

**Asian Yearbook  
of  
International Law**

**Volume 12  
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**ASIAN YEARBOOK OF INTERNATIONAL LAW**

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

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B.S. Chimni – Miyoshi Masahiro – Thio Li-ann

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# ASIAN YEARBOOK OF INTERNATIONAL LAW

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## INTRODUCTION BY THE GENERAL EDITORS

We are happy to present Volume 12 of the *Asian Yearbook of International Law*. The Asian approach to international law continues to make its presence felt in diverse international law fora: from trade to environment to human rights. Its distinctive approach as reflected in state practice is increasingly coming to be recognized. At the same time, it is worth noting, the Asian approach to international law has much in common with those of Africa and Latin America; together, these approaches constitute the Third World approach to international law.

This was at first articulated by Asian and African scholars, judges, and states from the middle of the previous century. The approach stressed the contribution of Third World states to the evolution and development of international law, the need to respect the fundamental principles of international law, such as the sovereignty of states and non-use of force, and the need for modern international law to take cognizance of the needs and interests of Third World peoples in order to transform these into universal international law.

In recent years, this early Third World scholarship in international law has been and is currently being critically assessed by a new generation of Third World scholars who explicitly go by the name of TWAIL (Third World Approaches to International Law). Similarly to its earlier incarnation, it does not represent a unified approach to international law; the best description is of Third World *approaches* to international law. Diverse ideological strands are a part of the new Third World approach: liberal, post-colonial, feminist, socialist, and so on. If there is a common unifying factor it is the critique of mainstream international law scholarship from the perspective of the interests of Asian, African, and Latin American peoples. While the north-south divide is a crucial element of this approach, it also takes into account the need for an inter-civilizational approach to international law.

TWAIL is the outcome of conversations held between scholars from the Third World in the mid-nineteen-nineties. It soon acquired a collective presence. The first TWAIL conference was organized at Harvard University in 1997; a second at York University, Canada, in 2001, and a third most recently at Albany, the US, in April, 2007. Scholars from Asia, Africa, and Latin America gathered at these conferences to consider a range of issues of international law, from the most theoretical to the most concrete.

These conferences, among their other aspects, reflected on the strengths and weaknesses of the first generation of Third World scholarship in international law. As regards weaknesses, there is a view emerging that colonialism is more central to the story of international law than had previously been recognized. Similarly, it is felt that the earlier generation of Third World scholarship failed to take into consideration “international law from below”.

The overall thrust is towards making international law more inclusive of and relevant to the concerns of Asian, African, and Latin American peoples. The development of TWAIL is of significance as the Asian approach to international law can evolve by learning from the experiences of the other regions that have had to confront Eurocentric and hegemonic international law (as can others from the Asian approach). We hope that in these contexts the *Asian Yearbook of International Law* can make an important contribution in the shaping of a new international law that will help to usher in a peaceful and just global order.

*The General Editors*

## ABBREVIATIONS

AIR	-	All India Reports
AToL	-	Asia Times on Line
BFMFPS	-	Bureau of Fisheries Management and Fishing Port Superintendence
CDM	-	Clean Development Mechanism
CERs	-	Certified Emission Reductions
CESCR	-	Committee on Economic, Social and Cultural Rights
CFACC	-	Chinese Fishery Administration Commanding Centre
CLA	-	Civil Liability Act [Iran]
CRC	-	Convention on the Rights of the Child
CVID	-	Complete, Verifiable and Irreversible Dismantling (of nuclear arms facilities)
DAO	-	District Administration Office [Nepal]
DNS	-	Domain Name System
DTAC	-	Double Taxation Avoidance Convention
EEZ	-	European Economic Zone
FEER	-	Far Eastern Economic Review
FIIIs	-	Foreign Institutional Investors
FTAAAs	-	Financial and Technical Assistance Agreements
GURTs	-	Genetic Use Restriction Technologies
HIV	-	Human Immunodeficiency Virus
HTCA	-	Human Traffic Combat Act [Iran]
IARCs	-	International Agricultural Research Centres
ICANN	-	Internet Corporation for Assigned Names and Numbers
ICCPR	-	International Covenant on Civil and Political Rights
ICERD	-	International Convention on Elimination of all Forms of Racial Discrimination
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
IHR	-	International Health Regulations
IHT	-	International Herald Tribune
IMDT	-	Illegal Migrants (Determination by Tribunals) Act [India]
IPRs	-	Intellectual Property Rights

JP	-	Jakarta Post
JPOI	-	Johannesburg Plan of Implementation
JT	-	Japan Times
<i>Kompas</i>	-	Jakarta daily newspaper
LCIA	-	London Court of International Arbitration
LDCs	-	Least-Developed Countries
<i>Mainichi Shimbun</i>	-	Tokyo daily newspaper
MLAT	-	Mutual Legal Assistance Treaty
NAMA	-	National Agri-Marketing Association
NDRC	-	National Development and Reform Commission [PRC]
OIC	-	Organization of the Islamic Conference
PEWFCL	-	Prohibition and Prompt Action for Eliminating the Worst Form of Child Labour Act [Iran]
POPs	-	Persistent Organic Pollutants
POTA	-	Prevention of Terrorism Act
SAR	-	Special Administrative Region
SMC	-	Shanghai Maritime Court
SRSG	-	Special Representative of the Secretary General [UN]
STCW	-	Standards of Training, Certification and Watchkeeping for Seafarers
TADA	-	Terrorist and Disruptive Activities (Prevention) Act
<i>Tempo</i>	-	Jakarta weekly newsmagazine
TFMR	-	Task Force on Monitoring and Reporting
TMC	-	Tianjin Maritime Court
TRIPS	-	Trade-Related aspects of Intellectual Property Rights
UCP	-	Uniform Customs and Practice
UDNDR	-	Uniform Domain Name Dispute Resolution policy
UNCITRAL	-	United Nations Commission on International Trade Law
UNCTAD	-	United Nations Conference on Trade and Development
UNDP	-	United Nations Development Program
UNFCC	-	United Nations Framework Convention on Climate Change
UPOV	-	International Union for the Protection of New Varieties of Plants
VACW	-	Violence Against Women and their Children Act
WHO	-	World Health Organization
WHOFCTC	-	WHO Framework Convention on Tobacco Control
WIPO	-	World Intellectual Property Organization
WSWS	-	World Socialist Website

## ARTICLES



# MARITIME TERRORISM AND SECURITY CHALLENGES IN THE STRAITS OF MALACCA AND SINGAPORE\*

Mary George\*\*

## 1. INTRODUCTION

Since the events of 11 September 2001 (9/11),<sup>1</sup> terrorism, and as far as this paper is concerned maritime terrorism,<sup>2</sup> has been added to the list of crimes that fall within the prescriptive and criminal enforcement jurisdiction of states, collectively referred to as criminal jurisdiction in this paper. Maritime terrorism may be committed on coastal land; on the coastal shelter belt; in the interface between land and sea; on offshore islands, reefs, or upon low-tide elevations; on lighthouses; on offshore

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\* The original version of this article was presented as a paper entitled "Maritime Security Challenges in the Straits of Malacca and Singapore" at the International Law Association, British Branch Spring Conference, hosted by University College London and the School of Oriental and African Studies in central London, "Tower of Babel, International Law in the 21<sup>st</sup> Century: Coherent or Compartmentalised?", 3-4 March 2006.

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<sup>1</sup> See Sterba, P. James (ed.), "For a brief history of terrorism", *Terrorism and International Justice* (New York: Oxford University Press, 2003) at 2, 1-27 where the author says, "The terrorism of 9/11 is something new and different". Sterba recognizes that states can commit terrorist acts as well, see Sterba, *ibid.* 206-228. On Brierly's critique of Vattel on the use of force and on freedom and human rights of the enemy, see Carty, Anthony, "Chapter 4: The terrors of freedom: the sovereignty of states and the freedom to fear" in Strawson, John (ed.), *Law after Ground Zero* (Portland, Oregon: The Glasshouse Press, 2002), at 44-56. See also Cook, L. Martin, "Ethical issues in counter-terrorism" in Okerstrom, Dennis (ed.), *Peace, War and Terrorism* (New York: Pearson/Longman, 2006), at 199-204, where the author discusses considerations of *jus ad bellum* and *jus in bello* and the moral status of an adversary. See also Charlesworth, Hilary, Valerie Epps and P. Michael Schraf, "International legal implication: Teach-in on terrorism\*: September 20, 2001", 8 *New Eng Int'l & Comp L Ann* (2002), at 81, where these Professors held discussions on the 9/11 events within a week of the tragedies.

<sup>2</sup> See Raymond, Catherine Zara, "The threat of maritime terrorism in the Malacca Straits" in 4/3 (February 9, 2006) *Terrorism Monitor, Global Terrorism Analysis*, see <http://jamestown.org/terrorism/news/article.php?articleid=236986>, accessed on 14/9/2006; Rommel, C. Banloi, "Maritime terrorism in South-East Asia: the Abu Sayyaf threat" (58) 4, *Naval War College Review* (2005) (on line).



installations; on the sea-bed, slope, or rise of the continental edge or margin; in the common heritage of mankind; on gas pipelines or cables; under the seabed; on structures under the seabed or in the airspace above the sea, or even in outer space above the airspace above the sea. In simple terms, terrorism at sea may take place in any maritime zone from internal waters to the outer edge of the exclusive economic zones, or outer edge of the continental shelves or on the high seas. Maritime terrorism has many manifestations, for example, ships have been deliberately hijacked, run aground or blown up by explosives, and passengers and crew have been threatened and killed. If a Strait state is to examine and control criminal activities at sea, it needs to be conferred with express criminal jurisdiction under the 1982 LOSC. The International Maritime Organization (the IMO) has adopted three international conventions for the suppression of maritime terrorism. These Conventions cover neither issues of state responsibility nor international judicial intervention, but focus on domestic criminal enforcement. The maritime conventions and protocols that address maritime terrorism are as follows:

1. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988;
2. Protocol for the Suppression of Unlawful Activities Against the Safety of Fixed Platforms Located on the Continental Shelf 1988, and
3. 2005 Amendments to the Convention for the Suppression of Unlawful Acts (SUA) Against the Safety of Maritime Navigation, 1988 and its Related Protocol.

The author argues that in order to enforce the provisions of the 2005 SUA Protocols certain amendments have to be made to Part III on Straits Used for International Navigation of the 1982 LOSC as it does not confer sufficient criminal jurisdiction upon Strait states. This demonstrable lack of imperative criminal enforcement jurisdiction in Part III is unlike its correlative for coastal states in Article 27 of Part II on the Territorial Sea and Contiguous Zone, where Article 34 (2) of Part III states that “the sovereignty or jurisdiction of the States bordering the Straits is exercised subject to this Part and to other rules of international law”. The reference to “other rules of international law” is, *inter alia*, a reference to the general principles of criminal jurisdiction, the most powerful of which are the territorial and protective principles: the ‘effects’ doctrine. Article 34(2) as currently worded is unsupported by enforcement powers in the rest of the provisions of Part III and lacks an imperative direction from states; it has, rather, a precatory tone in meeting the challenges of maritime terrorism and the nuclear radiation of the oceans. The precatory nature derives from an expression of desire as manifested in Article 34, above. Under these circumstances, Strait states face an unduly heavy burden in defending the regime of transit passage. Given that criminal enforcement jurisdiction as currently stated in Part III of the 1982 LOSC is insufficient to meet the challenges ahead, this paper offers an alternate solution to the defending of the freedom of the oceans for all.

The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.

- John Stuart Mill, *On Liberty*, 1859

The jurisprudential basis for attacking terrorism (the arguments of the utilitarian and the Kantian notwithstanding) is that terrorism is an exception to the general views on utilitarianism, freedom of speech and freedom of religion; it is a total violation of human rights and the dignity of persons. It deserves a special kind of treatment as it stems from a desire to use terror in the attempt, conspiracy or accomplishment of an act or omission which amounts to an offence. States need to study several areas, cited below, in the area of maritime terrorism and maritime security challenges. However, this paper does not aim to answer all of the following questions:

- (i) Is maritime terrorism any different from other crimes?
- (ii) What form of punishment should be meted out to these criminals?
- (iii) What sort of reform is envisaged for these criminals?
- (iv) Can the terrorist be separated from, say, the money-launderer?

In simple terms, where one individual or a group of individuals from one state or a group of states intends and knowingly plans and conspires to an attack using terror in any form on the citizens of the same state or a group of states in the furtherance of their unlawful objective, they have committed terrorism. It is direct abuse of the concept of liberty. A jurisprudence of the liberty of actions with no impediments is a veritable minefield. No one has the right to infringe the peaceful co-existence of a people or of a state. Liberty is that sphere of activity within which the law is content to leave one alone. This is lawful liberty. Liberty is good and some licence in a liberty for the regulation of civil society is acceptable when tempered by law, yet liberty without impediments when used by terrorists is tantamount to the instant genocide of the people and to the demolition of the state and its institutions. The peaceful co-existence of a people includes, among other factors, the recognition and enforcement of constitutionally guaranteed human rights that include the right to peaceful co-existence. When terrorists infringe this right of the peaceful co-existence of states and their populations, they commit an unlawful act. These unlawful acts are offences and have to be given a name, a definition, and a procedural content at international law in the form of a treaty for both legal and political action to be taken by the international community, a horizontally shared responsibility followed by a supporting element of national law. The right we have to live in peace and security is dependent upon the state's providing us with this blanket of security. Terrorists such as perpetrators of genocide have taken a liberty with no impediments to their terrorizing humankind, governments, and institutions alike for whatever reason. Their high degree of autonomy to determine and pursue their own ends has to be stopped where this infringes the right and liberty of the next citizen. Any form of state or official approval, connivance, indifference, impotence or acquiescence is wrong under the law of nature, anchored as it is in liberty.

With the dawn of the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, the regime of Straits used for international navigation needs

to be re-visited as the Convention considers it an offence to commit terrorism with nuclear materials.<sup>3</sup> This Convention recognizes the traditional principles of territorial,

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<sup>3</sup> The United Nations GA Resolution and Conventions on terrorism are as follows: The UNGA A/RES/49/60 at its fiftieth session adopted a Declaration entitled “Declaration on Measures to Eliminate International Terrorism” which called for closer co-operation among states to combat terrorism and crimes closely connected with terrorism. The latter comprise drug trafficking, unlawful arms trade, money laundering, and the smuggling of nuclear and other potentially deadly materials. This Declaration condemns all acts, methods and practices of terrorism as criminal and unjustifiable including those which jeopardize the friendly relations among states and peoples and which threaten the territorial integrity and security of states. Paragraph 3 provides that:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;

UNGA A/RES/51/210 adds an Annex to the above Declaration, namely, Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism. It states, among others, that terrorists should be tried within the state, or extradited. In the case of those who seek asylum, their terrorist activity should not be considered a political issue whereby the asylum seeker is pardoned for his criminal terrorist activity. States are urged in paragraph 3 to deal with terrorists in conformity with national and international law, including international standards of human rights, before granting refugee status. This status should not be used as a ruse to perpetrate further terrorist activities. Even those awaiting asylum applications may not avoid prosecution for their terrorist activities. States with experience in dealing with these issues are reminded of the importance of sharing their information regarding the terrorists, their movements, support and weaponry, investigation procedures, and the prosecution of terrorist acts.

For UN Anti-terrorism Conventions, see UN Publication: UNITED NATIONS Office on Drugs and Crime, *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols* (New York: United Nations, 2004) and the United Nations, *International Instruments related to the Prevention and Suppression of International Terrorism* (New York: United Nations, 2004). Some recent conventions to control terrorism are the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997 (UN Doc. A/RES/52/164, Annex), the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999 (UN Doc. A/RES/54/109, Annex), and the International Convention for the Suppression of Acts of Nuclear Terrorism, 2005.

Article 5 of the International Convention for the Suppression of Terrorist Bombings 1997 compels States Parties to adopt such measures as are necessary, including “domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature”. Article 1 of this Convention lays down definitions of “State or Government Facility”, “Infrastructure facility”, “Explosive or other lethal device”, “Military forces of a state”, “Place of public use” and “Public Transportation System”. Article 3 stresses that the Convention does not apply where the offence is committed within a single state, the alleged offender and the victims are nationals of that state, the alleged offender is found in the territory of that state, and no other state has a basis under the Convention to exercise jurisdiction. Besides territorial jurisdiction, quasi-territorial jurisdiction on board ships and aircraft, nationality, and passive personality juris-

quasi-territorial, nationality and passive personality jurisdiction as it applies to ships and aircraft. The unlawful and intentional possession, making and using of damaging radioactive material are punishable under Article 2 (1). The criminal liability in Article 2 (1) extends to any person who unlawfully and intentionally possesses radioactive material or makes or possesses a device with the intention to cause death or serious bodily injury or substantial damage to property or to the environment; or intentionally uses radioactive material or damages a nuclear facility in a manner which releases or risks the release of radioactive material with the intention of causing death or serious bodily injury or substantial damage to property or to the environment; or compels a natural or legal person, an international organization or a state to do or refrain from doing an act. Similarly, threats and demands also constitute offences. Attempts and accomplices are punishable as acts furthering criminal activity. However, where the geographical scope of the offence coincides with the nationality jurisdiction of both the perpetrator and the victim and no other state can exercise jurisdiction, that constitutes a case of territorial jurisdiction, where the Convention does not apply. The Convention urges states to enact laws that counter nuclear terrorism both within and beyond their territories.<sup>4</sup>

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dition, the Convention also recognizes jurisdiction based on domiciliary laws where the offence is committed by a stateless person who has his or her habitual residence in the territory of that State.

The 1999 International Convention For the Suppression of the Financing of Terrorism makes it an offence for a terrorist by any means, directly or indirectly, unlawfully and wilfully, to provide or collect funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, to carry out the acts within the scope of the Convention. Other offences include death, serious bodily injury to a civilian or the intimidation of a population, or the compulsion of a government or an international organization to do or abstain from doing an act.

<sup>4</sup> Some other international conventions on terrorism:

The UN conventions on terrorism deal with terrorism in the airspace, on land and at sea are as follows:

The Tokyo Convention on Offences Committed on Board Aircraft, 1963, *see UNTS*, vol. 704, No. 10106; The Convention for the Suppression of Unlawful Seizure of Aircraft 1970, *see UNTS*, vol. 860, No. 12325; The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971, *see UNTS*, vol. 974, No. 14118; The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations 1973, *see UNTS*, vol. 1035, No. 15410 (not discussed here); The International Convention Against the Taking of Hostages, 1979, *see UNTS*, vol. 1316, No. 21931 (not discussed here); The Convention on the Physical Protection of Nuclear Material 1979, *see UNTS*, vol. 1456, No. 24631 (not discussed here); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1971, *see ICAO Doc 9518*, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1988; and Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf 1988, *see UNTS*, vol. 1678, No. 29004.

Under these Conventions, criminal jurisdiction is based in traditional international law on the territorial principle; the quasi-territorial principle in so far as it relates to ships and aircraft registered in the particular state; the nationality principle; the passive personality principle, and the protective principle. Jurisdiction is linked to the location of crime. While states are given enforcement jurisdiction, they are encouraged to adopt prescriptive jurisdiction; through extra-territorial jurisdiction under their Penal Codes to conclude extradition treaties with states making terrorist offences

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extraditable, granting asylum where necessary; determining refugee status and the application of human rights and humanitarian rights of such refugees. The duty to prosecute and punish the terrorist is paramount. To do this a state needs both prescriptive and enforcement jurisdiction. The state is a holder of both a right and a duty. First, a state can obtain the necessary enforcement criminal jurisdiction only if it is a Contracting Party to the Convention. Ratification plays a major role as in other treaties and the Conventions are again dependent on a minimum number of ratifications for entry into force. These Conventions are also subject to the “forces” of reservation and denunciation, which will determine the success or failure of a Convention. Second, it is important to remember that only actions that instil terror fall under the definition of terrorism. Thus, for instance, if a terrorist pollutes the atmosphere of an aircraft cabin and causes the death of 400 passengers on that plane, there is no element of terror involved and the offence does not fall under terrorism. It is a loop-hole under the present definition. The term “territory” has to be understood under general international law; for maritime purposes, it has to be understood under the provisions of the 1982 LOSC. The determination of the territory is critical for the exercise of jurisdiction. Thirdly and finally, the traditional immunity accorded to military, customs and police services, which has perhaps worked very well so far, may just prove to be the Achilles heel of the entire operations.

For instance, to give effect to the quasi-territorial jurisdiction of a state under the Tokyo Convention on Offences Committed on Board Aircraft 1963, the state has to be a Contracting Party to the Tokyo Convention and the aircraft to be one of a Contracting State. The recognized offence is provided in Articles 1 and 2 which deal with offences against penal law; acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board. The Convention applies in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any state.

Article 2 provides that without prejudice to the provisions of Article 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.

It is only the state of registration of the aircraft that is competent to exercise jurisdiction. This includes criminal jurisdiction exercised in accordance with national law. There are some recognized exceptions encapsulated within Article 4 that permit a Contracting State which is not an aircraft registered state to exercise (1) protective jurisdiction where the offence has an effect on the territory of that state; (2) the nationality principle where the offence has been committed by or against a national or permanent resident of such state; (3) the principle of quasi-territorial jurisdiction where the offence consists of a breach of any rule or regulation relating to the flight or manoeuvre of aircraft in force in such state, and (4) subject-matter jurisdiction where the exercise of jurisdiction is necessary to ensure the observance of any obligation of such state under a multilateral international agreement. The aircraft commander is under pressure to determine whether, subjectively or objectively, he has reasonable grounds to believe that someone on his aircraft is about to commit an offence aboard. Twelve instruments of ratification are required to bring it into force.

Some of the weaknesses of the Tokyo Convention remain unchanged in The Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971. To begin with, the Preamble of The Hague Convention in no uncertain terms provides that “for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders.” The Act recognizes that the act in question is an offence under Article 1 whereby any person who on board an aircraft in flight unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or is an accomplice

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of a person who performs or attempts to perform any such act commits an offence.

The material scope of the Act extends to aircraft in flight as mentioned in Article 3. Every Contracting State undertakes to make the offence punishable by severe penalties (Article 2). When a person has been taken into custody, the concerned Contracting State has a duty to inform on the state of the registration of the aircraft, the state of the nationality of the detained person and any other State interested in the detention of such person of such custody (Article 4). States are bound to give the greatest measure of assistance in these criminal matters (Article 10). This Article also provides that the law of the state requested shall apply in all such cases. Extradition is recognized in these matters in Article 8 and the Council of the ICAO is to be informed of all such information (Article 11). The Convention requires a mere ten ratifications to enter into force.

The Montreal Convention of 1971 applies to offences against aircraft, too, and considered that there was an urgent need to provide appropriate measures for the punishment of offenders. It introduced the *mens rea* of intention into the definition of the offence against civil aviation. In Article 1 it states that any person commits an offence if he unlawfully and intentionally:

- a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft;
- b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight;
- c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight;
- d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
- e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

Attempts are punished as much as accomplices. The material scope of the Convention covers aircraft in flight and aircraft in service as stated in Article 2. The idea of imposing severe penalties is again retained in Article 3. Contracting States who are about to try the offender are required to take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state (Article 7). The jurisdiction of a Contracting State is widened under this Convention for it extends to territorial jurisdiction, quasi-territorial jurisdiction, and domiciliary jurisdiction which covers both permanent residence and principal place of business requirements (Article 5). Articles 5 and 8 are inter-connected, as Article 8 states that for purposes of extradition between the Contracting States, each offence is to be treated as if the occurrence had been committed in all of the territories of the states required to establish jurisdiction under Article 5. This Convention is dependent on ten ratifications for it to enter into force.

The 1971 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation also considers in its Preamble that for the purpose of deterring such acts, the offenders must be punished. As this Protocol extends its coverage to the airport, the definition of the offence is given in Article II as stated below:

Article II:

Any person commits an offence if he unlawfully and intentionally, using any device, substance or weapon:

- a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or
- b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport.

States are required to regulate, de-regulate and re-regulate crimes occasionally within their states. Today crimes of maritime terrorism are added to this list. Terrorists are not punished under the laws of armed conflict, Geneva Conventions I to IV. Terrorism is a criminal offence for which states that once bore no responsibility for terrorists in their territories should now bear state responsibility, the rationale being that criminal acts undermine collective national security.

## 2. CONVENTIONS ON COUNTER-MARITIME TERRORISM

Piracy and armed robbery were the main human threats at sea for a long time.<sup>5</sup> Pirates were not considered as terrorists but as stateless persons on the high seas who marauded certain passing ships for private gain and were subject to the rules of international law.<sup>6</sup> Armed robbers were subject to municipal laws. A new offence was added to this list: the offence of maritime terrorism. The genesis of maritime terrorism in recent times can be traced to the nineteen-eighties, when there was a great deal of concern when ships were hijacked, run aground or blown up, passengers and crew killed or kidnapped and cargo lost. In November 1985, the Fourteenth Assembly of the IMO considered a proposal by the US that measures regulating the prevention of such unlawful conduct should be adopted. In this context, the IMO General Assembly in Resolution A. 584(14) noted:

[W]ith great concern the danger to passengers and crew resulting from the increasing number of incidents involving piracy, armed robbery and other unlawful acts against or on board ships, including small craft, both at anchor and underway.

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Various provisions such as Article 1(4) (Tokyo), Article 3(2) (Hague), and Article 4(1) (Montreal), all state that the Conventions do not apply to aircraft used in military, customs or police services.

<sup>5</sup> There is a great deal of literature on the subject of piracy, the *Achille Lauro* case, and maritime terrorism as follows: see Halberstam, Malvina, "Terrorism on the high seas: the *Achille Lauro*, piracy and the IMO Convention on Maritime Safety" 82 *AJIL* (1998), at 269–310; Barrios, Erik, "Casting a wider net: Addressing the maritime piracy problem in South-East Asia" 28 *Boston College International and Comparative Law Review* (2005), at 149–166 where he raises an interesting argument that there is another definition of piracy before UNCLOS that States in South-East Asia may apply and that maritime terrorism falls within the latter. At para. 157 of this work, this author writes: "Towards a more historically accurate piracy framework". Another author, Goodman, laments that no one is using international law to suppress piracy in Goodman, Timothy H., "Leaving the corsair's name to other times: How to enforce the law of the sea piracy in the 21<sup>st</sup> century through regional international agreements", 31 *Case W Res Int'l L* (1999), at 139–168; for gaps in the current law on piracy see Bornick, Brooke A., "Bounty hunters and pirates: Filling in the gaps of the 1982 UN Convention on the Law of the Sea", 17 *Fla J Int'l L* (2005), at 259 – 275.

<sup>6</sup> See Dubner, Barry Hart, "Human rights and environmental disaster – two problems that defy the 'norms' of the international law of the sea piracy" 23 *Syracuse J Int'l L & Com* (1997), at 1 where Dubner argues that piracy and terrorist attacks have similarities, but their goals are different. For instance, a terrorist or pirate attack leading to oil or chemical spills could result in disastrous consequences moving up the entire food chain.

Thus the offences of piracy, armed robbery and maritime terrorism became intertwined to some extent with their criminal elements. The locus for maritime terrorism is very wide, while piracy is still an offence on the high seas and armed robbery a municipal crime. In December 1985, the UNGA called upon IMO “to study the problem of terrorism abroad or against ships with a view to making recommendations on appropriate measures”. The Maritime Safety Committee of the IMO issued a circular MSC/Circ. 443 on Measures to Prevent Unlawful Acts Against Passengers and Crews on Board Ships; it required governments, port authorities, administrators, ship-owners, ship masters and crews to take appropriate measures to prevent these unlawful acts.

By November 1986, taking the grave concerns of the international community into consideration, the Governments of Egypt, Austria and Italy proposed that the IMO prepare a convention on the topic of unlawful acts against the safety of maritime navigation to provide for a comprehensive suppression of unlawful acts committed against the safety of maritime navigation which endangers innocent human lives, jeopardizes the safety of persons and property, and seriously affects the operation of maritime services.

## **2.1. 1988 SUA and Protocol**

About two years later, in March 1988, the Rome Conference adopted the 1988 Convention for the Suppression of Unlawful acts Against the Safety of Maritime Navigation (1988 SUA). The provisions of the 1988 SUA were then applied to the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf. This Protocol was adopted on 10 March 1988 and it entered into force on 1 March 1992.<sup>7</sup>

The 1988 SUA and the Fixed Platforms Protocol were adopted in response to the 1985 hijacking of the Italian flag cruise ship, the *Achille Lauro*, and the murder of an American passenger. The main objective of the Convention was to ensure that appropriate action was taken against persons committing unlawful acts against ships. These included the seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship which were likely to destroy or damage it. The terms of the Convention obliged Contracting Governments either to extradite or to prosecute the alleged offenders. It was a combination of several provisions developed in the past in dealing with aerial hijackings. The Convention required states to penalize the seizure of a ship; damage to a ship or its cargo likely to endanger its safe navigation; the introduction of a device or substance likely to endanger the ship, endanger its safe navigation by serious damage to its navigational facilities, or by communicating false information and injuring or killing any person in connection with the commission of the offences under the general conventions against terrorism. Attempts and participation are also punished. These conventions

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<sup>7</sup> See Witten, Samuel M., “The International Convention for the Suppression of Terrorist Bombings”, 92 *AJIL* (1998), at 774-781.



and protocols are applicable to non-Strait states and land-locked states under the subjective territorial principle, personality or passive personality or protective principles of general international law.

The 1988 SUA differs from the offence of piracy and armed robbery in that the rationale of the 1988 SUA Convention was to ensure the safety of navigation and to punish those responsible for abusing the safety of navigation. The Preamble expressed deep concern at the world-wide escalation of acts of terrorism in all of its forms which endangered or took innocent human lives, jeopardized fundamental freedoms and seriously impaired the dignity of human beings. The material scope of the Convention covered ships, a term defined in Article 1 as a “vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft”. This Convention did not apply to a warship, or to a ship owned or operated by a State when used as a naval auxiliary or for customs or police purposes. An abuse of navigation occurred where a ship, its passengers or cargo were endangered. Thus, where any person under Article 3 unlawfully and intentionally seized or controlled a ship by force, or threat, or intimidation; or performed an act of violence against a person on board a ship if that act was likely to *endanger the safe navigation* of that ship; or destroyed or damaged a ship or its cargo such that it was likely to endanger the safe navigation of that ship; or placed or caused to be placed on a ship a device or substance likely to destroy that ship, or caused damage to that ship or its cargo which endangered or was likely to endanger the safe navigation of that ship; or destroyed or seriously damaged maritime navigational facilities or seriously interfered with their operation, if any such act was likely to endanger the safe navigation of a ship; or communicated information which he knew to be false, thereby endangering the safe navigation of a ship; or injured or killed any person in connection with the commission or the attempted commission of any of the above offences: that person is said to have committed an offence.

Paragraph 2 of Article 3 punishes an attempt and an abetment of the above offence. Accomplices of persons who commit these offences are also punished. Any person who threatens, with or without a condition, aimed at compelling a physical or juridical person to do or refrain from doing any act also commits an offence if that threat is likely to endanger the safe navigation of the ship in question.

The geographical scope of the Convention, spelled out in Article 4 (1), covers ships navigating or scheduled to navigate in waters beyond the outer limit of the *territorial sea* of a single state or the lateral limits of its *territorial sea* with adjacent states. This shows that the Convention is not applicable to ships in the middle of the territorial sea of a state. “The lateral limits of its territorial sea” refers to the outer boundary of the territorial sea with the contiguous zone boundary. However, Paragraph 2 claims the territorial jurisdiction of a State Party when the offender or alleged offender is found in that State’s territory. This small problem of interpretation could be set aside as matters are further clarified in Article 6 where each State Party is mandated to legislate upon territorial jurisdiction in its territorial sea, extra-territorial or quasi-territorial jurisdiction for ships flying its flag, personal jurisdiction over its nationals and other stateless persons who habitually reside in that state, and passive personality jurisdiction where the national of that state is a victim of an offence.

Attempts are equally punishable. Acquisition and rescission of such jurisdiction must be notified to the Secretary General of the IMO. The Convention recognizes the municipal criminal jurisdiction of a State Party to the Convention.

States Parties have to ensure that their criminal procedure codes, the laws of evidence and extradition laws have suitable provisions in this regard. States Parties are under an obligation to prevent preparations in their respective territories. The Secretary General of the IMO has to be informed of all legal and extradition proceedings.

Neither the 1988 SUA and Protocol referred to Straits used for international navigation.

## **2.2. 2005 SUA Protocols**

The 1988 SUA Convention and Protocol were amended during a Diplomatic Conference on the Revision of the SUA Treaties held from 10 to 14 October 2005. The 2005 Protocol to the SUA Convention was adopted on 11 October 2005. They are conveniently referred to as the 2005 SUA Protocols.<sup>8</sup> The amended Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation will enter into force ninety days after the date on which twelve States have signed it without reservation as to ratification, acceptance or approval, or have deposited such an instrument with the Secretary General. The amended Convention will enter into force only after the 2005 Protocol has entered into force. These two treaties have significant non-proliferation, counter-terrorism and ship-boarding provisions. They are meant to plug the loopholes in the fight against terrorism as follows:

The SUA Protocol provides the first international treaty framework for combating and prosecuting individuals who use a ship as a weapon or means of committing a terrorist attack, or transport by ship terrorists or cargo intended for use in connection with weapons of mass destruction programs.

The SUA Protocol also establishes a mechanism to facilitate the boarding in international waters of vessels suspected of engaging in these activities.

- The new *non-proliferation offences* strengthen the international legal basis to impede and prosecute the trafficking of WMD, their delivery systems and related materials on the high seas in commercial ships by requiring states parties to

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<sup>8</sup> See *UNTS*, Vol. 1678, No. 29004. See “United States Supports New Protocols Directed Against Use of Ships in Terrorism and Proliferation of Weapons of Mass Destruction” in 100/1 *AJIL* (2006), at 224-227. See also “Contemporary practice of the United States relating to international law: international oceans, environment, health and aviation law” edited by John R. Crook, where he outlined President George W. Bush’s New US Maritime Security Strategy intended to “prevent the maritime domain from being used by terrorists, criminals, and hostile states to commit acts of terrorism and criminal or other unlawful or hostile acts against the United States, its ... allies, and friends.” *Ibid.* 222.

criminalize such transport. These transport offences are subject to specific knowledge and intent requirements that ensure the protection of legitimate trade and innocent seafarers. The non-proliferation offences are consistent with existing international non-proliferation treaties, and the SUA Protocol explicitly provides that the rights, obligations and responsibilities of states under international law – including the Nuclear Non-proliferation Treaty (NPT), the Chemical Weapons Convention (CWC), and the Biological Weapons Convention (BWC) – are not affected.

- The new *counter-terrorism offences* criminalize the use of a ship or a fixed platform to intimidate a population or compel a Government or international organization, including when: (1) explosive, radioactive material or a biological, chemical or nuclear weapon is used against, on or discharged from a ship or fixed platform; (2) certain hazardous or noxious substances are discharged from a ship or fixed platform; or (3) any other use is made of a ship in a manner that may lead to or causes death, serious injury or damage. The SUA Protocol also criminalizes the transport of fugitives who have committed an offence under the 12 UN (counter-) terrorism conventions and protocols.
- The *ship boarding provisions* establish a comprehensive set of procedures and protections designed to facilitate the boarding of a vessel suspected of being involved in a SUA offence. Consistent with existing international law and practice, SUA boardings can be conducted only with the express consent of the flag state. In addition to eliminating the need to create time-consuming *ad hoc* boarding arrangements when facing the immediacy of on-going criminal activity, the ship boarding provisions provide robust safeguards that ensure the protection of innocent seafarers.<sup>9</sup>

### 2.2.1. *Broader range of non-proliferation and counterterrorism offences to be included in national laws*

New Article 2 *bis* broadens the range of offences included in the Protocol. It is recognized that the likely targets are the populations of states, governments, and international organizations. Where a person unlawfully and intentionally intimidates a population, or compels a Government or an international organization to do or to abstain from doing any act, uses against or on a fixed platform or discharges from a fixed platform any explosive, radioactive material, or BCN weapon in a manner that it causes or is likely to cause death or serious injury or damage; or discharges from a fixed platform, oil, liquefied natural gas, or any other hazardous or noxious substance in such quantity or concentration that it causes or is likely to cause death or serious injury or damage; or threatens, with or without a condition: this person commits an offence. (Irreparable loss to the marine environment has been excluded.)

New Article 2 *ter* covers the unlawful and intentional injuring or killing of any person in connection with the commission of any of the offences; in attempting to

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<sup>9</sup> See 100/1 *AJIL* (2006), at 225.

commit an offence; in participating as an accomplice, and in organizing or directing others to commit an offence.

The 2005 Protocol adds a new Article 3 *bis* to Article 3 of the 1988 SUA Convention. The latter referred to the seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship likely to destroy or damage it.

The new Article 3 *bis* states that a person commits an offence within the meaning of the Convention if that person unlawfully and intentionally:

1. Intimidates a population, or compels a government or an international organization to do or abstain from any act:
  - Uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN (biological, chemical or nuclear) weapon in a manner that causes or is likely to cause death or serious injury or damage;
  - Discharges from a ship oil, liquefied natural gas, or any other hazardous or noxious substance in such quantity or concentration that it causes or is likely to cause death or serious injury or damage;
  - Uses a ship in a manner that causes death or serious injury or damage;
2. Transports on board a ship any explosive or radioactive material, knowing that it is intended to be used to cause, or is a threat to cause death or serious injury or damage for the purpose of intimidating a population, or compelling a Government or an international organization to do or abstain from doing any act;
3. Transports on board a ship any BCN weapon, knowing it to be a BCN weapon;
4. Transports any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; and
5. Transports on board a ship any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

Transportation of nuclear material within the terms of the Treaty on Non-Proliferation of Nuclear Weapons is permissible.

Where a person unlawfully and intentionally transports a person who has breached the SUA Convention or any one of the nine treaties mentioned in the Annex on board a ship, this person commits an offence; this is also so where a person unlawfully and intentionally injures or kills any person in connection with the commission of any of the offences in the Convention. The phrase “in connection with” probably refers to the furtherance of the crime in question with the accompanying relevant states of mind such as common intention, common objective, unlawful conspiracy, and other bases for criminal liability. Other offences include attempts, abetments, participation as an accomplice, organization and directions to others to commit an offence, or to contribute to the commissioning of an offence. Corporate and other

legal entities are also made liable for the commission of an offence within the scope of the amendments.

### 2.2.2. *Use of force and boarding provisions*

A new Article 8 *bis* in the 2005 Protocol deals with the co-operation and procedures to be followed if a State Party desires to board a ship flying the flag of a State Party when the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offence under the Convention. The use of force is prohibited except under the following circumstances: when required to protect the safety of officials and persons on board or where the officials are obstructed in the execution of authorised actions. Article 8 *bis* provides for certain safeguards such as not endangering the safety of life at sea, ensuring that human dignity is preserved and human rights law observed, taking due account of the safety and security of the ship and its cargo, ensuring that measures taken are environmentally sound, and taking reasonable steps to ensure that ships are neither unduly detained or delayed.

### 2.2.3. *Extradition, criminal procedure and evidence*

A new Article 11 *bis* states that none of the offences should be considered for the purposes of extradition as a political offence. New Article 11 *ter* recognizes certain exemptions to extradition and thus states that the obligation to extradite or afford mutual legal assistance need not apply if the request for extradition is believed to have been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

A new Article 12 *bis* covers the conditions under which a person who is being detained or is serving a sentence in the territory of one State Party, may be transferred to another State Party for the purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences.

## 3. THE INADEQUACIES OF PART III OF THE 1982 LOSC

Part III of the 1982 LOSC has several inadequacies as regards combating maritime terrorism and for criminal enforcement jurisdiction in dealing with nuclear radiation and associated terrorist challenges of the oceans. The material, geographic and personal scope of the offence of maritime terrorism needs to be re-assessed in the context of the 1982 LOSC. For instance, there is a difference between the geographic scope of, respectively, maritime terrorist offences, and piracy. Terrorist conventions are adopted at the international level yet have no universal jurisdiction. Piracy differs in that it attracts universal jurisdiction where the offence is committed for a private

end. The personal content again is markedly different. For an offence such as piracy, the pirates are regarded as *hostis humanis generis*, are denied nationality and are subject to universal jurisdiction. Since terrorists are not denied nationality and are not regarded as *hostis humanis generis*, they could be regarded as being of a “higher rank” than pirates. This should not be the case; it is submitted that the laws of piracy, extrapolated from the 1982 LOSC, could be *mutatis mutandis* applied to the offence of maritime terrorism on the high seas. Terrorism on the high seas deserves a different definition while at least the same status as piracy on the high seas. If the criminality is bench-marked against the use of ‘terror’, then under such an approach, piracy and armed robbery would also be considered terrorist activities. Warships and aircraft should exercise over maritime terrorists such universal jurisdiction as that exercised over pirates under the 1982 LOSC. Armed robbery, which does not fall within the definition of the 1982 LOSC, would fall, too, under the definition of a terrorist activity and consequently would need to be regulated by national Penal Codes and extra-territorial offences legislation. All attempts, abetments and conspiracies directed against the subjects or objects of international law, that is, against States, ships and their cargoes and crew, are punishable. The resources of the seas and oceans within a national jurisdiction are State property and as such ought to be subject to the doctrine of public trust. Where resources are shared between States, then concurrent jurisdiction and joint surveillance over maritime terrorist activities should be adopted. In adopting a policy against maritime terrorism, it would be necessary to re-examine the legal validity of maritime and air-defence identification zones that extend right up to the high seas boundary, an otherwise prohibited activity under the rules of general international law and the law of the sea. Over the high seas, regional states may agree upon a treaty, a practice in which some states engage in the context of fisheries, the provisions of which could address the exercise of criminal enforcement jurisdiction by the concerned states. As a global constitution for the oceans, it is a failure on the part of the Convention that it does not deal with these issues.

The 2005 SUA Protocols require criminal enforcement jurisdiction on the part of Strait States as the range of offences have been broadened, the use of force recognized and extradition, criminal procedure and evidence introduced. To achieve these frightening goals under a sense of impending gloom, certain amendments need to be made to the 1982 LOSC.

### **3.1. Amendments to the 1982 LOSC**

The 1982 LOSC needs to be amended in several respects to enable states to enforce the provisions of the 2005 SUA Protocols. These amendments are abbreviated as (A) in the following Articles of the 1982 LOSC. Besides the amendments, Strait states and flag states need to conclude a Compromissory Statement to Part III of the 1982 LOSC to confer express criminal enforcement jurisdiction on Strait states that would even in denial respect the transit rights of ships. There are nine amendments to be discussed, the first of which is addressed at Article 100 (A) which should read as “Duty to co-operate in the prevention, reduction, control and elimination of

terrorism – All States shall co-operate to the fullest extent possible in the prevention, reduction, control and elimination of terrorism on the high seas or in any place *within* or outside the jurisdiction of any State”. The second amendment is directed at Article 101 (A): definition of maritime terrorism – The definition of maritime terrorism is based on the 1988 SUA and its 2005 Protocol insofar as it is a comprehensive definition in comparison to the other international conventions on terrorism and at Article 101 (A2): definition of nuclear terrorism – The definition of nuclear terrorism is *per* the International Convention for the Suppression of Acts of Nuclear Terrorism. The third amendment is with regard to Article 102 (A): Terrorism by a warship, government ship or government aircraft – The acts of terror as defined in Article 101(A) committed by a warship, government ship or government aircraft are also acts of terrorism. The fourth amendment deals with Article 102 (A2): Terrorism by a warship, government ship or government aircraft whose crew has mutinied – The acts of terrorism, as defined in Article 101(A) committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts of terrorism committed by a private ship or aircraft and with Article 103 (A): Definition of a terrorist ship or aircraft – This definition is also to be based on the international conventions on maritime and nuclear terrorism. The fifth amendment is related to Article 104 (A2): Retention or loss of the nationality of a terrorist ship or aircraft – A ship or aircraft *retains or loses* its nationality once it has become a terrorist ship or aircraft. The fifth amendment focuses on Article 105 (A): Seizure of a terrorist ship or aircraft, universal jurisdiction – On the high seas, or in any place outside the jurisdiction of any State, every State may seize a terrorist ship or aircraft, or a ship or aircraft taken by terrorism and under the control of terrorists, and arrest the persons on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft and persons, subject to the rights of third parties acting in good faith.

The sixth amendment is directed at Article 106(A): Liability for seizure without adequate grounds – Where the seizure of a ship or aircraft on suspicion of maritime terrorism has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure. The seventh amendment relates to Article 107 (A): Ships and aircraft which are entitled to seize on account of maritime terrorism – A seizure on account of maritime terrorism may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. The eighth amendment deals with Article 108 (A2): Criminal Jurisdiction of States in the suppression of maritime terrorism – Where the offence of maritime terrorism has taken place under the 1988 SUA Convention and its 2005 Protocol, and in the case of nuclear terrorism under the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, the State with territorial, quasi-territorial, nationality, and passive personality criminal jurisdiction in the matter shall take the necessary action as stipulated under these conventions as ratified by the States Parties. Finally, Strait states would

need guidelines for the use of force besides the traditional argument of “no choice of means and no moment for deliberation.”

### **3.2. Compromissory Statement**

Part III of the 1982 LOSC deals with the regime of transit passage in Straits used for international navigation. The drafting history of this Part as stated in UNCLOS III records that this was a regime fought for by developed states; it is a priceless regime. The nature of transit passage requires ships to pass through the Straits without impediments from Strait states. In the Straits, the flag state has four duties:

1. to proceed without delay through or over the Strait;
2. to refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of Strait states;
3. to refrain from non-transit activities; and
4. to comply with other relevant provisions of Part III.

Of these four duties, the only topic that comes somewhat close to the topic of terrorism is the reference to the “use of force” by the flag state against the Strait state. There is a difference here between the 2005 Protocols on Terrorism and Part III of the 1982 LOSC. Under the 2005 Protocols the Strait state is empowered to use force against terrorists. Under the 1982 LOSC, the flag state is required to refrain from the use of force against the Strait state. The only provisions on the threat or use of force against the sovereignty, territorial integrity or political independence of a state are found in Articles 19(2)(a), 39(1)(b) and 301. Besides this reference to the “use of force” no further mention is made of it. Under the 1982 LOSC, Strait states do not have the necessary criminal enforcement jurisdiction over flag states. The 1982 LOSC was concluded before the international conventions on terrorism were drafted. The involvement, active or passive, of warships, aircraft, or government vessels of any non-commercial type, that engage in maritime terrorism lies beyond the scope of the SUA Convention or Protocol. The provisions of Articles 29 to 32 of the 1982 LOSC focus on warships.

The material scope of the unlawful acts under the 1988 and 2005 SUA Protocols are far beyond the scope of Part III of the 1982 LOSC. As the mainframe constitution of the oceans, Part III must endorse the criminal jurisdiction of the Strait state in matters of maritime terrorism. New Article 8 *bis* of 2005 emphasizes co-operation between states, yet does not provide for universal jurisdiction. Even some measure of the use of force is permissible under Article 8 *bis* for the safety of officials and persons on board. However, under Part III of the 1982 LOSC, such use of force by both the flag state and the Strait state will jeopardize transit passage.

Maritime criminal jurisdiction must be exercised subject to Part III of the 1982 LOSC and to general principles of public international law. There has to be a balancing act, an act of accommodation, an adjustment between the right of transit passage,



the duty of due diligence of Strait states, and the overriding need to control terrorist activities and to control the irradiation of the seas. An exercise of domestic maritime criminal jurisdiction could interfere with the right of transit passage of ships under Part III of the 1982 LOSC. Thus, “this Part” has to be reconciled with “other rules of international law”. Such a reconciliation has not been made in Part III of the 1982 LOSC, whereas it has in its counter-part in Part II as stated above. These arguments are centred on the fact that the exercise of maritime criminal jurisdiction by Strait states under Part III of the 1982 LOSC is not adequately provided for under the Convention; secondly, that maritime criminal jurisdiction referred to in Article 34(2) is not supported by the rest of Part III; and finally, Strait states and user states need to arrive at a “Compromissory Statement on the Exercise of Maritime Criminal Jurisdiction by Strait states and User States in the Regulation of Transit Passage in the Straits of Malacca and Singapore.”

When counter-maritime terrorism conventions are implemented by Strait states, the regime of transit passage will be suspended. To balance the right of transit passage and criminal enforcement jurisdiction, a set of seven other considerations need to be addressed, as follows:

- (1) the adoption of a Statement of Guarantee that will uphold the Freedom of Navigation, the Safety of Navigation, and the Duty of all user and Strait states to safeguard the marine environment of the Straits in this nuclear age;
- (2) the conduct of marine scientific research in the Straits given the range of new and deadly pollutants;
- (3) the examination of the exercise of pre-emptive criminal jurisdiction and criminal enforcement jurisdiction of Strait states, and the standard and basis of liability of the offence of terrorism;
- (4) the examination of the feasibility of adopting universal jurisdiction for cases of maritime terrorism on the high seas;
- (5) the re-examination of the role of warships and government ships in terrorism given their traditional immunity;
- (6) the adoption and establishment of Air Defence Identification Zones on the EEZ/ high seas boundaries of Strait states; and finally
- (7) the security implications at the ASEAN level.

#### 4. THE OBLIGATIONS OF STRAIT STATES UNDER THE 1982 LOSC

Given the exceptionally broad range of offences and extraordinary provision on the use of force among other new developments, the varied obligations of the Strait state to uphold safe navigation is unduly burdensome, as they relate to the due diligence duty to uphold and maintain a safe and orderly Straits without suspending or hampering the right of transit passage of ships. This is translated in Article 42(1) as a requirement to uphold the safety of navigation and the regulation of maritime traffic; to prevent, reduce and control marine pollution; to adopt regulations relating to fishing vessels; the prevention of fishing, including the stowage of fishing gear, and to legislate in matters of customs, fiscal, immigration or sanitary laws. Where

loss or damage is caused to a Strait state by a warship, or any vessel, ship or aircraft entitled to sovereign immunity, the flag state bears international responsibility for that loss or damage. This is stated in Article 42(5). This in effect means that the ship or aircraft can inflict an injury on the Strait state for which the flag state bears international responsibility. This provision makes little sense, standing alone, and in the context of maritime terrorism. However, since no amendments have been made, it remains an obligation of the Strait state to uphold navigation even in the face of such a threat.

#### **4.1. *Mens rea and actus reus of terrorism***

It is a general principle of criminal law that the *actus reus* of an offence must coincide with the *mens rea*, expressed in the maxim *actus non facit reum nisi mens sit rea*. How should the *actus reus* and *mens rea* of terrorism be viewed and weighed? Acts of terrorism could be considered the equivalent of an offence against the state such as treason, and made an absolute liability offence, where even private thoughts can give rise to a criminal action. Mere *actus reus* of a slight degree of danger should be sufficient to attract punishment. Similarly, *mens rea* would also be punished. As the offence of maritime terrorism is unlawful in its very nature and condemned by the international community, the regime of strict liability cannot apply: strict liability usually applies in cases where the conduct sought to be regulated is either generally lawful and the offence is less serious, as in the case of a traffic offence; more serious, as in the case of operational or accidental oil pollution by vessels, or where the offence is less serious and consequently punishable, too.<sup>10</sup> What would prove difficult for the Strait state would be the rehabilitation of the terrorist, that is, upon pain of punishment, what kind of person should the terrorist become? How should the terrorist handle future actions? What should the new influences be? Would the terrorist weary the state by his importunity? The terrorist in pursuit of his goal may commit various types of crimes such as crimes against the state, property crimes, crimes against morality, against the public order and other regulatory crimes. The Strait state would be obliged to rehabilitate the terrorist.

##### *4.1.1. Radioactive pollution and injunctions*

Radioactive pollution should also be considered a maritime crime as it will lead to the unsustainable development of the marine environment, and a violation of the rights and interests of state parties and stakeholders. Above all, such pollution is a direct infringement of the rights of the coastal populations that depend on the sea

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<sup>10</sup> This discussion has been influenced by the following works: Ratnapala, Suri and Moens GA, *Jurisprudence of Liberty* (Sydney: Butterworths, 1996), at 6-13; Simon, Thomas W., *Law and Philosophy* (Boston: McGraw Hill, 2001) for discussion on Berlin, Isaiah, "Two Concepts of Liberty" (1969), 219; Hospers, John, "What Libertarianism Is" (1974), 217; Bergmann, Frithjof, "On Being Free" (1977), 225.

for their livelihood. This sort of pollution requires a reconsideration of the powers of ITLOS to grant provisional measures that are more in the nature of a *quia timet* or mandatory injunction to prevent radioactive environmental degradation.

In the light of the above discussion, the exercise of maritime criminal jurisdiction has to be balanced by the respect by Strait states for several international rules, namely, firstly, to ensure that there is no safe haven for terrorists; secondly, that jurisdiction is based on the registration of aircraft or ships or on territoriality; thirdly, that jurisdiction is based upon the nationality of the alleged offender; fourthly, that jurisdiction is based upon the protection of other specified interests and, finally, that jurisdiction is required to be maintained for extradition or prosecution once an alleged offender is present. Strait states are under an obligation to conduct an inquiry, to report findings, and to advise of intent to exercise jurisdiction. Where Strait states do not prosecute the alleged offender, there is an obligation to submit for extradition. Similarly, the elements of knowledge and intent, and the bases of participation in crimes, need to be defined by states parties, for example, where Strait states intend to assist each other in criminal matters. Other matters that need to be looked into by Strait states that intend to establish jurisdiction under the extradition treaties are the nature and type of extraditable offences, extradition clauses, and exceptions to be made on grounds of political offence and discriminatory purposes. In a civilized society today the perpetrators of genocide are awarded their basic human rights; so too is the case with the terrorist. The first-generation human rights of the terrorist to communicate and to fair treatment cannot be ignored. Strait states also need to consider whether the offenders are worthy of being deemed refugees, where the status and a common understanding of the implications of such a move need to be underscored by the states. In one sense, such overly great care is taken in the name of human rights that it seems almost an abuse of a right.

Strait states have to incorporate and transform the international rules on counter-terrorism into municipal law enactments, such as merchant shipping regulations, penal codes, criminal procedure codes, laws of evidence, and extradition treaties where grounds of political asylum and grounds of refugee status are sharply defined. The Strait state may now have a duty to provide piloted armed riding crews on behalf of the state, exercise the rights of hot pursuit, and adopt an integrated approach to maritime governance where the state can introduce new Strait state maritime terrorist control and enforcement jurisdiction. In the exercise of maritime criminal jurisdiction, the state may also be required to ensure container tracking and apply advanced technology to ensure the safety of the cargo being transported. Such an activity may also fall under the civil jurisdiction of states.

Besides, regarding the drafting of municipal laws on counter-maritime terrorism, Strait states need to sort these by degree of civil and criminal wrongs and political issues: abuse of shipping and navigational standards, maritime terrorism, armed robbery and piracy, radioactive marine environmental pollution, and the economic and biological waste of living and non-living resources. Strait states also need to evaluate the destruction of living resources such as marine parks, aquaculture and animal husbandry at sea, and of non-living resources such as offshore oil and gas installations and the abuse of fishing rights. The loss of intellectual property rights

in marine scientific research needs to be quantified in socio-economic terms and assessed under the biodiversity list test. Strait states need to come to terms with the current law that a terrorist who abuses the human rights of other citizens of the world will if convicted be guaranteed his human rights in the conduct of a fair trial, with adequate legal representation, and in detention.

#### 4.1.2. *Pre-emptive criminal jurisdiction*

There is no provision in Part III as a whole that confers pre-emptive criminal protective jurisdiction to the Strait state to prevent loss or damage. Even the provision on regional co-operation in Article 43, which has been criticized as being a hortatory call, fails to cover the duty to adopt protective criminal jurisdiction in terrorist situations when upholding a safe Strait. Does this mean that, should such terrorist acts occur in the Strait, the Strait states will be exempt from state liability or, on the contrary, be held liable to the international community for irresponsible conduct? The customary international law provision is found in the *Corfu Channel Case*,<sup>11</sup> which states that no State must knowingly allow injuries to be inflicted upon flag ships in its territorial sea. What is the alternative where the above-mentioned Compromissory Statement is not adopted, the 1982 LOSC not revised, and where the injunctive powers of the ICJ/ ITLOS are limited? The alternative, it is submitted, is that as the *Corfu Channel* standard is non-beneficial to Strait states, this could result in a breach of and thus endangerment of international peace and security.

## 5. IMPLICATIONS FOR STRAIT STATES

When the provisions of the SUA Convention and Protocol on maritime terrorism are extrapolated and applied to Part III of the 1982 LOSC, the following consequences, both positive and negative, arise. These prompt amendments to the 1982 LOSC.

### 5.1. **Definition of a ship/warship**

The definition of a ship proffered in the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation has to be adopted by the 1982 LOSC as there is, currently, no definition of a ship under the Convention, even though a warship has been defined in Article 29. The 1988 Convention's definition states that a ship is a "vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft".

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<sup>11</sup> *ICJ Reports 1949*, at 4.

The weakness of the 1988 Convention is that it excludes warships. The 1982 LOSC recognizes the role played by a warship in the offence of piracy, yet the 1988 Convention applies neither to a warship, nor to a ship owned or operated by a State in a terrorist activity.

## 5.2. Due diligence measures

The due diligence measures that Strait states need to implement are found in Article 3 of the 1988 Convention. Due diligence means, *inter alia*, the ability to command sufficient means of acquiring knowledge of unlawfulness and of intention, seizure of ships, definitions relating to terms such as “control”, “force”, “threat”, “intimidation”, “violence”, “endanger safe navigation”, “destruction”, “damage”, and “BCN weapon or device or substance”, to name but a few.

This Convention states that any person who unlawfully and intentionally seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or performs an act of violence against a person on board a ship, if that act is likely to endanger the safe navigation of that ship; or destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or causes damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or injures or kills any person, in connection with the commission or the attempted commission of any of the offences mentioned above: that person is guilty of an offence under the Convention.

Attempts and abetments are also considered as offences. In the same vein, conditional or unconditional threats aimed at compelling a physical or juridical person to do or refrain from doing any act, where that threat is *likely to endanger the safe navigation of the ship in question*, amount to an offence. Accomplices, too, are considered as offenders.

## 5.3. Beyond scope

Part III of the 1982 LOSC does not address the issue of maritime terrorism or nuclear terrorism as provided for in the International Convention for the Suppression of Acts of Nuclear Terrorism. Ships navigating within and outside Straits used for international navigation are beyond the scope of the 1988 Convention. Article 4 (1) of the 1988 Convention covers ships navigating or scheduled to navigate in waters beyond the outer limit of the territorial sea of a single state or the lateral limits of its territorial sea with adjacent states. Paragraph 2 claims territorial jurisdiction of a State Party when the offender or alleged offender is found in that state’s territory.

Article 6 requires states to legislate upon territorial jurisdiction in its territorial sea, extra-territorial /quasi-territorial jurisdiction, personal jurisdiction over nationals and other stateless persons who habitually reside in that state, and passive personality jurisdiction where the national of that state is a victim of an offence. Offshore oil and gas installations in the northern end of the Straits of Malacca and Singapore may be beyond the scope of the 1988 Protocol for the Suppression of Unlawful Activities Against the Safety of Fixed Platforms Located on the Continental Shelf. As this Protocol is an extension of the 1988 SUA Convention to offshore oil and gas fixed platforms there is a possibility that it does not cover the oil and gas platforms in the northern end of the Straits of Malacca and Singapore, as Part III of the 1982 LOSC does not deal with this matter. Should the Strait states bordering the Straits of Malacca and Singapore ratify the 1988 SUA Convention and Protocol or should they instead ratify the 2005 SUA Protocols?

#### 5.4. The 2005 SUA Protocols

Straits used for international navigation come under the regime of the 2005 Protocol to the SUA Convention. The 1982 LOSC may require a revision in the nature and meaning of transit passage, and the nature and types of actions that Strait states may undertake to ensure the safety and freedom of navigation from maritime terrorism and nuclear terrorism. This in turn would have implications for the temporary suspension of transit passage. For instance, new Article 2 *bis* broadens the range of offences included in the Protocol such as the intimidation of a population, or compelling a Government, or an international organization to do or to abstain from doing any act as unlawful. Similarly, the use of any explosive, any radioactive material or a BCN weapon against or on a fixed platform or discharged from a fixed platform that cause death or serious injury or damage also constitutes an offence. When an oil, gas or other chemical platform is attacked and death or serious injury or damage is caused, this too amounts to an offence.

New Article 3 *bis* of the 2005 Protocol does not limit its application to the area of the territorial sea. Therefore, it could apply to terrorist actions within the regime of Straits used for international navigation. A perpetrator or offender under the Protocol is a person who unlawfully and intentionally intimidates a population, or compels a government or an international organization to do or abstain from any act and uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage. There are several other examples of *actus reus* mentioned in the Protocol, as discussed *supra*.

The transportation of any person who has breached the SUA Convention or any of the nine treaties mentioned in the Annex; the transportation of any explosive or radioactive material, or any BCN weapon, or any equipment, material or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon and transport by a ship for the above purposes, are all considered as offences.

Article 43 of the 1982 LOSC has to undergo a revision in this context and make a mandatory call for regional and sub-regional co-operation. Similarly, the position on use of force has to be endorsed in the 1982 LOSC. In this context, the 1982 LOSC also lacks provisions incorporating Article 8 *bis* of the 2005 Protocol which strives to uphold the freedom of navigation, respect for international human rights laws and the safety of life at sea, and marine environment law. It states that where a state, upon certain reasonable grounds of suspicion that an offender or potential offender is on board a ship, requests another State Party to board such a ship, then the flag state has to co-operate in this matter. If such co-operation is not forthcoming, then the State Party has to communicate such intent to the Secretary General of the IMO if the flag state does not respond within four hours. The use of force is permitted under very limited conditions.

The general basis of action to combat maritime and nuclear terrorism has to be endorsed in Part III, 1982 LOSC, and cognizance of this fact must be taken so that corresponding amendments may perhaps be introduced into the 1982 LOSC.

Finally, it is submitted that Strait states may need to study the gaps, inconsistencies and overlaps in their bilateral and multilateral treaties, and their current laws then to reconsider the following offences, their elements, and the relevant institutions as the offences may arise separately or concurrently, as enumerated below:

1. Piracy as traditionally understood under public international law, over which warships of states could exercise universal jurisdiction which today could also be termed as a form of piracy with terrorism;
2. Armed robbery which is subject to municipal law;
3. All attempts, abetment and conspiracies in the commission or omission of the above offences;
4. The *mens rea* of intention that could be difficult to prove in municipal courts;
5. The basis of liability which may be sole, joint or several;
6. The nature of extra-territorial enforcement jurisdiction of the relevant agencies involved in the suppression of terrorism, and
7. The attacks, attempts, abetments or conspiracies directed against subjects and objects of international law and under the 1982 LOSC and against all resources and properties of states in the seas.

## 6. CONCLUSION

This paper has examined maritime terrorism and maritime security challenges facing Strait states bordering the Straits of Malacca and of Singapore. The emphasis was on maritime conventions on counter-terrorism, namely, the 1988 and the 2005 SUA Conventions and Protocols. Under the 2005 Amended SUA Convention and Protocol, the term “terrorism” has been broadly defined as all acts that terrorize people or the State. Embedded in this definition lies the inducement of fear or terror that violates the territorial integrity or sovereignty, or sovereign rights, or jurisdiction, or political independence of the subjects and objects of international law. Equally embedded in this definition are all acts of commission or omission that are terrifying

in nature and/or content whether they be completed offences or attempts. Abetments and conspiracies are also to be punished. This means that terrorism at various stages, whether committed on land or at sea or in the interface between land and sea; or on offshore islands, or reefs or low tide elevations; or on light-houses or on offshore installations; or on the seabed; or on the continental slope may be punished. It also covers gas pipelines or cables placed on the continental shelf. Unfortunately, it does not include terrorism on the continental rise. It does not cover the seabed of the common heritage of mankind, or in the airspace above the high seas. As mentioned at the outset, terrorism at sea may take place in any maritime zone from internal waters to the outer edge of the exclusive economic zone, or the outer edge of the continental shelves or on the high seas. The point to be remembered is that no criminal enforcement jurisdiction has been vested in Strait states by the 1982 LOSC. Terrorism on the high seas deserves a different definition yet, *mutatis mutandis*, the same jurisdictional status as piracy on the high seas. To give effect to the concept of terrorism in these maritime zones, corresponding basic framework provisions need to be included in the 1982 LOSC, given that the Convention was concluded before the 1988 SUA was introduced. As a concept, the term “terrorism” should cover not only acts that induce fear or terror in the minds of a person or against the body of a person or which violate the integrity or stability of an international organization or other legal entity or which violate the territorial integrity or sovereignty or sovereign rights, or political independence of the subjects and objects of international law, but also cover acts that use terrorism to acquire property or gain or perpetuate an idea or philosophy.

### 6.1. Psyche

The motive, personal opinion or reason behind the terrorist attack should serve only towards achieving an understanding of the psyche of the terrorist. The basis of liability has to be established, for terror may be inflicted for a variety of reasons such as religious differences, political or ideological or institutional purposes or for reform of any body, charitable or non-charitable, or for public or private purposes or for private ends. The standard and basis of liability for terrorism has to be determined at municipal law. Purpose or motive, although irrelevant under the Conventions, will need to be proved when the *mens rea* of intention is proven before the local courts. At the municipal level, perhaps, and not at the international level, it matters whether terror was inflicted for religious, or political, or ideological or institutional purposes or for the reform of any body, charitable or non-charitable, or for public or private purposes or for political agenda or for private ends.

The offence of terrorism has the potential to be considered the equivalent of an offence against the state such as treason, and made an absolute liability offence. In such a case mere *mens rea* would be sufficient, where even private thoughts can give rise to a criminal action. Terrorism should not be based on strict liability because terrorism is an unlawful act. In a strict liability regime as in the 1969 CLC or 1992 CLC Conventions for vessel-sourced oil pollution, the regime of strict liability is



adopted as a *quid pro quo* measure between a victim of oil pollution who will find it hard to prove liability against an oil industry, on the one hand, and the liability of the industry, on the other, which would be capped where it would otherwise face unlimited damages.

With the dawn of nuclear terrorism, several old offences now receive fresh consideration. While the motives for the offences are different, the fact that terror is induced in the mind of the victim makes these old offences terrorist in nature, too. The proof of *mens rea* could be difficult unless the terrorist admits voluntarily to his state of mind, in a manner that may be adopted by the court. The basis of liability, sole or joint and several, is a detail that municipal law-makers have to manage. Similarly, they have to undertake revision of their respective Penal Codes, taking into account the extra-territorial nature of the offence, the provisions of the criminal procedure code and the laws of evidence. Issues concerning the punishment of offenders, the treatment of offenders and the trials of offenders; the international human rights of terrorists and pirates; their *habeas corpus* rights; legitimate expectation rights; the right to counsel, and other administrative law rights would all have to be reviewed at the municipal law level. It would also require Strait states to reconsider ratification of those treaties that have not yet been ratified.

As an exception to the general rule on the retrospective applicability of criminal laws, terrorist criminal law may be applied retrospectively for the reason that laws should be made to apply over activities that pierce the heart of collective security. The following definitions of “terrorism” and “terrorist” are submitted in this paper:

Terrorism means all acts of commission or omission against any person, natural, legal or juridical, that are terrifying in nature and/or content, whether they are actual, constructive, or imputable, committed in any space under sovereign domain or in *res communis* or in the common heritage of mankind or in the common province of mankind, whether successful or unsuccessful or complete or incomplete.

Anyone who participates in such an activity ought to be considered a terrorist. The motive, personal opinion or reason of the terrorist may serve as a guide to understanding the action or omission of the terrorist and, most importantly, the mind of the terrorist.

Given all of these developments, the 1982 LOSC has to state the broad framework of criminal enforcement jurisdiction of the Strait state in Straits used for international navigation. Similarly, the right of private security companies to provide armed riding crews for protection, the right of hot pursuit, and the adoption of an integrated approach to maritime governance are areas that need to be considered, and perhaps, necessary amendments may have to be made to the 1982 LOSC and then to municipal legislation. Other detailed considerations for Strait states would be the exercise of civil jurisdiction on board flag states that consist of container tracking, and the adoption of new technology for cargo safety. The exercise of criminal (and, for that matter, even civil jurisdiction) has to be expressly stated in the context of Straits used for international navigation. It may be timely that a new trust fund at the UN level for counter-terrorism expenses and counter-terrorism forces are set up to enable

Strait states to uphold the safety of the Straits and to guarantee the right of transit passage as they strive to bring the problem of maritime terrorism under their control.<sup>12</sup> As men, women and also minors may be involved in the offence of maritime terrorism, the use of the relevant pronoun should be borne in mind.

The universal condemnation of terrorism by the global community expressed in the UNGA resolutions and treaties and the adoption of the *lex specialis* maritime treaties for the suppression of terrorism may serve to prove that the terrorism has been condemned and outlawed; *a fortiori* condemnation of maritime terrorism has attained the status of *jus cogens* or at the very least represent the *opinio juris generalis juris* of states and thus amount to an obligation *erga omnes* at international law. It is true that a minimal number of ratifications are required to bring these into force; the diplomatic conference concluding the SUA Protocols were well attended by the member states of the IMO. If this argument is accepted, then it makes for a compelling case that a Compromissory Statement be adopted. Achieving the status of *jus cogens* or *opinio juris generalis juris* does not override the need for an alternative solution, as propounded in this paper.

At the sub-regional level, it would be necessary for Malaysia, Indonesia and Singapore to adopt, as a subset of the respective national oceans policy, the harmonization of laws and policies relating to maritime terrorism and maritime security challenges in the Straits of Malacca and Singapore.<sup>13</sup> We need a Compromissory

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<sup>12</sup> Bacon, Francis and Brian Vickers, *The Major Works including New Atlantis and the Essays, Oxford World Classics*, (Oxford: Oxford University Press, 2002), at 377 said: "A just fear of imminent danger, though there be no blow given, is a lawful cause of war". The security concerns within ASEAN range from international to municipal. The issues concerning security measures revolve around strategic alliances between developed and developing states, our position in non-aligned movement, military to military ties within ASEAN, and internal security and stability within States. There are many other issues that we in ASEAN need to explore such as enhanced diplomacy where peace is sometimes referred to as the period in between wars. We also need to examine and consolidate our positions on the ratification of UN Conventions and other maritime treaties by Malaysia, Singapore and Indonesia and other ASEAN members. These international treaties will have to be incorporated or transformed into municipal law and the regional stance on co-operation and data centres adopted and established. In addition, the role of the coastguard, marine police, warships, and the budget for defence needs reconsideration.

<sup>13</sup> For summary of Indonesian legislation related to Anti-Terrorism, see United Nations Legislative Series, National Laws and Regulations on the Prevention and Suppression of International Terrorism, Part II (A-L), (New York: United Nations, 2005), at 292-293 and for the laws of Malaysia and Singapore on Anti-Terrorism see United Nations Legislative Series, National laws and Regulations on the Prevention and Suppression of International Terrorism, Part II (M-Z), (New York: United Nations, 2005), at 2-4 and 270- 272 respectively. See also Sittnick, Tammy M., "State responsibility and maritime terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to take additional steps to secure the Strait" 14 *Pac Rim L & Pol'y* (2005), at 743 where the author makes an argument that Malaysia and Indonesia have failed to take further steps to improve security and that Indonesia and Malaysia have breached their duty under international law to prevent terrorism as they are required to patrol and permit cross-border patrols. See also Dahlvang, Niclas, "Thieves, robbers and terrorists: piracy in the 21<sup>st</sup> century", 4 *Regent J Int'l L* (2006), at 17 where the author accuses

Statement that is adopted by Strait states and user states reconciling enforcement criminal jurisdiction and transit passage rights under the 1982 LOSC. The alternative to the Compromissory Statement could be globally unacceptable: the suspension of transit passage without permission. In order to carry out criminal enforcement jurisdiction for the control of terrorism, the time has come for stretching the financial resources of the nations to further protect the resources of the seas as states re-align themselves under the principle of protective jurisdiction in a nuclear age. As Aristotle once said: “A common danger unites even the bitterest of enemies” or if we may extrapolate from Benjamin Franklin, who said on the signing of the US Declaration of Independence: “We must all hang together, or assuredly, we shall all hang separately.”<sup>14</sup>

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Indonesia of demonstrating a lack of commitment to fighting terrorism even after the Bali Bombings of October 2002.

<sup>14</sup> Aristotle, Greek Philosopher (384 BC – 322 BC) at <http://www.giga-usa.com/gigaweb/1/quotes2/quautaristotlex001.htm>, visited site on 28 November 2006; Franklin, Benjamin, US statesman and writer, (1706–1790), Remark 4 July 1776 at the signing of the Declaration of Independence, quoted in Ben Franklin Laughing, Zall PM (1980), *The Columbia World of Quotations* (New York: Columbia University Press, 1996), Entry No. 23009, replying to John Hancock’s remark that the revolutionaries should be unanimous in their actions. See also <http://www.bartleby.com/100/245.21.html>, visited site on 28 November 2006 for Bartlett, John, *Familiar Quotations*, 10<sup>th</sup> Ed, 1919, Entry no: 3949. For all aspects of ASEAN and National Security Strategy, see Paper by Tun Abdul Razak, Mohd Najib, Minister for Defence (as he then was), *Towards a Comprehensive National Security Strategy*, delivered on 26 September 2000, Hotel Nikko, Kuala Lumpur.

# UN SECURITY COUNCIL REFORM AND GLOBAL SECURITY

Katak B. Malla\*

## 1. INTRODUCTION

This article raises a question concerning the ongoing UN Security Council reform and global security, which is: Can global security be realized by increasing the number of permanent members of the Security Council from the present five to fifteen or more? The present author argues that changing the number of the permanent members in the Security Council does not help to ensure global security. It is claimed that the Security Council *per se* was created as a neo-colonial superstructure after World War II, and in this structure it is apparent that the UN member States have surrendered their position to the Security Council, conferring power and privilege on the permanent member States.<sup>1</sup> Under the aegis of the principle of equal yet differentiated responsibility, the economically and militarily weak member States of the UN have become subordinate to powerful States; as a result, weaker States are in a colonized situation whereby they are unable either to determine what constitutes threats to peace and security on their own terms and conditions, or their genuine concerns are not taken into full consideration by the more powerful States in determining global security and social justice. Since the Security Council is empowered to determine threats endangering international peace and security, and to respond to such threats including through the military use of force, the position of the permanent members of the Council has not only become that of both judge and jury; they are, furthermore, acting as both legislator and administrator. There is also no international legal arrangement for the judicial review of the actions of the Council. In such a situation, it is obvious that the individual interests of the powerful member(s) prevail over the general international community interest in the decision-making of

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<sup>1</sup> It is well known that the United States and (the former Soviet Union) Russia would not have accepted the creation of the United Nations without the veto privilege.

the Security Council. Consequently, the Security Council has not only failed in reaching consensus to carry out the primary responsibility conferred upon them, but has also lost its legitimacy to represent the international community of nations. The principle here is that any national or international legal authority can surrender its legitimacy when it fails to fulfil commitments and/or the mandated responsibility.

The present author recognizes that since the vested economic and military interests of powerful State(s) may constitute constraints to common global security, these issues are relevant to discussion in international law; it is further suggested that as long as the existing international economic and military disparity remains, global security through the existing or an enlarged Security Council may not be realized. As there is a serious concern expressed in the UN reform agenda about the *interest of the world's peoples*,<sup>2</sup> it is recommended that the whole idea of global security be perceived and implemented in consistency with threats involving international socio-economic, political, and environmental issues, rather than national security threats as perceived by individual States.

As an alternative to the official UN reform agenda, a *Super General Assembly* should be established, consisting of the democratic member States of the existing UN General Assembly. The proposed Super General Assembly could be an appropriate body of the UN to generate international law and order, especially by separating the current dual functioning of the Security Council as both legislator and administrator into discrete entities. In addition, instead of allowing the Security Council to act as judge and jury, the role and functions of the International Court of Justice (ICJ) need to be strengthened through the universal recognition of the compulsory jurisdiction of the Court. The present author recognizes that the overall arrangement of the UN is a legitimate international endeavour. However, there is no doubt that the UN needs to be enhanced as a third-generational international institution.

Readers will find the main question posed at the beginning of this article discussed along with suggestions in the following order: initially, a short description of the

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<sup>2</sup> The UN Secretary General proposed a reform strategy to the General Assembly on 25 March 2005, giving equal weight to development, security, and human rights. He urged Member States to establish a Peace-Building Commission to help countries make the transition from war to lasting peace, including a Democracy Fund to provide funding and technical assistance to countries seeking to establish or strengthen their democracy. The Secretary General has also recommended a system of Councils, covering (a) international peace and security, (b) economic and social issues, and (c) human rights. Among these, the first two of these Councils already exist and the third, as suggested by the Secretary General, is the creation of the Human Rights Council, which he suggests should be smaller than the present Commission; the new Council should be "elected directly by a two-thirds majority of the General Assembly." As regards the Secretariat itself, the Secretary General has acknowledged that it must be made more flexible, transparent and accountable in serving the priorities of Member States, and the interests of the world's peoples. Following the Secretary General's report, the UN General Assembly released, on 5 August 2005, a third draft outcome document for the forthcoming World Summit, aiming to strengthen the UN, recognizing the freedoms from want and fear as well as the freedom to live in dignity. See Press Release SG/SM/9770, GA/10335, ORG/1438, based on the text of the UN Secretary General's statement to the General Assembly, in New York on 21 March 2005.

“Official Reform Agenda” of the UN will be given, followed by a discussion on the existing UN “Security Council Regime”. There is also a thorough discussion of vital issues entitled “Security on Whose Terms?”. The article further provides an alternative proposal to the official UN reform agenda, entitled “A Third-Generational International Institution”, which is elaborated under the following subheadings: “A Third-Generational Super General Assembly (3G Assembly)”; “A Third-Generational International Court (3G Court)”; and “Implementation of International Law”. The article concludes with suggestions.

## 2. OFFICIAL REFORM AGENDAS

Marking the UN’s sixtieth anniversary in September 2005, more than 150 heads of State and government signed a deal to re-shape the world body in order to meet the challenges of the twenty-first century. This was done in consideration of a reform strategy proposed by the UN Secretary General in the General Assembly.<sup>3</sup> A few, yet important, outcomes of the summit meeting are as follows: 1) The Protocol of the summit meeting obliges intervention in cases of genocide, acknowledging that there is an international responsibility to protect people from genocide, war crimes and ethnic cleansing; 2) Terrorism is condemned “in all its forms and manifestations, committed by whomever, wherever and for whatever purposes”. However, the meeting failed to settle on a definition of terrorism. 3) The goals to combat global poverty are reaffirmed. The final document of the summit meeting decided to establish a new *Peace-Building Commission* to help countries make the transition from war to peace and to set up a new powerful *Human Rights Council*,<sup>4</sup> replacing the Human Rights Commission. Modalities, powers and functions of the proposed institutions are the matter of negotiations among States.

In his reform strategy, the UN Secretary General has urged Member States to make the Security Council more nearly representative of the international community as a whole, based on the geo-political realities of the present time. He has suggested that the Security Council should make clear “in a resolution, the principles by which it intends to be guided when deciding whether or not to authorize the use of force”. Apart from the proposal to increase the number of permanent members in the Security Council, the UN’s reform proposals include changes in the Council’s procedures and working methods, such as regular rules of procedure, a greater number of public meetings, and other steps to render the Council more transparent and accountable. These issues require no changes in the UN Charter and can be implemented by a

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<sup>3</sup> *Ibid.*

<sup>4</sup> The UN General Assembly has voted overwhelmingly to create the Human Rights Council (170 members of the 191 of the General Assembly voted, and only three abstained). Israel, the Marshall Islands and Palau joined the US in voting against the motion. The (47-member) UN Human Rights Council will replace the (53-member) UN Human Rights Commission. The new council will comprise members who are elected by secret ballot by an absolute majority of the General Assembly.

decision of the Council itself. However, an amendment to the Charter is required in order to increase the number of permanent members on the Security Council.

## 2.1. Comments on the official agenda

The above-mentioned changes and proposed changes in the reform strategy of the UN Secretary General are important yet, in my opinion, do not go far enough in order to ensure global security threatened by political, economic, resource- and environment-related conflicts at local, national and international levels. In the absence of substantial and overall changes in the UN system, particularly the need for the existing international system of rule of power to be replaced by the rule of law, the serious problems of the world cannot be resolved. These problems are threatening global security and resulting in social injustice, including an increase in poverty, a decline in human dignity, and human rights violations inflicted not only by the world's dictatorial regimes but also by democracies.<sup>5</sup>

From the few successes and the many failures of the UN activities one can draw the conclusion that "social justice" is a precondition for durable "peace" and that a lack of management of the international legal order is leading to "global injustice", a source of major conflicts and thus destabilizing global security.<sup>6</sup> The political problem of the present world is that there exists a worldwide domination by a handful of States, in terms of military, economic, and technological strength. The economic problem, combined with political and legal problems, is that there is over-exploitation of the world's resources – the accumulation of wealth by a few, resulting in the deprivation of basic living conditions of others, and unsustainable development – which in turn threatens common security in terms of resources and environment.

Therefore, there is a need for the UN reforms to focus on the core issues such as the establishment and management of an international rule of law, as opposed to the existing order of power through domination; proper observation of the rules, as opposed to the selective respect of rules; and compulsory peaceful settlement of international disputes by adjudication or arbitration, as opposed to optional judicial settlement. In addition, the UN reforms need to focus on the fundamental question: how the very idea of security is conceived as well as implemented. Unlike a monolithic discourse of normative national security, global security needs to be implemented in consistency with resource, environment and climate securities.

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<sup>5</sup> While the Iraqi dictator, Saddam Hussein, was ousted by the intervention of the United States and its allies, it is nevertheless dictatorial for anyone to wage war against anyone without the collective decision of the UN Security Council. Even if dictators may indeed be toppled by force, there are still many dictators in the world.

<sup>6</sup> For example, the end of *apartheid* in South Africa provided a sense of justice not only to the people of South Africa but also to the world community, just as the end of slavery and decolonization provided a sense of justice to the world. Foreign occupations or dominations still remain a source of conflicts in the world.

### 3. SECURITY COUNCIL REGIME

The international institutional order, established by the UN in 1945, recognizes sovereign equality of States based on the respect of international law, but this international order has also established a hierarchy of five permanent members of the Security Council. More often than not, the interests of these States influence the international order. The five permanent members of the Security Council, i.e., the United States, the United Kingdom, China, France, and Russia, have a special yet undemocratic position in the decision-making process. The Security Council, consisting of fifteen members (five permanent and ten non-permanent elected by the UN General Assembly for two years), is responsible for the maintenance of international peace and security. The Security Council is supposed to represent the international community and fulfil its obligations on behalf of the community, as stated in Article 24 of the Charter:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Article 24 has conferred the powers of the Security Council; however, its legitimacy to act on behalf of the international community is an unresolved issue of international law. An unsuccessful attempt was made to overcome issues concerning the lack of representation and legitimacy of the Security Council by amending Article 23, which enlarged the membership from eleven to fifteen. This amendment does not seem to have helped either to establish legitimacy or to create appropriate representation of the community of nations in the Council since there is an ongoing discussion about enlarging the Council. It is conformed by suggestions made by the UN Secretary General Kofi Annan to make the Security Council “more representative of the international community as a whole, based on the geo-political realities of the present time”.

According to Article 41 the Security Council may decide what measures involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. All Members of the United Nations are obliged, in Article 43(1), to observe the Security Council decisions in order to maintain international peace and security.

#### **3.1. Judge and jury as well as legislator and administrator**

When it comes to the question of the determination of threat and security according to Article 39 of the Charter, the Security Council is authorized to determine the existence of any threat to peace, breach of peace, or act of aggression. The Council is held responsible for making recommendations or deciding what measures to take in order to restore international peace and security. This means that the Council has



the power to act as a jury in determining threats, and also the responsibility to act as a judge in taking action.

In addition to this dual role, there is another legal absurdity that, on the basis of Chapter VII of the Charter, the Council is acting not only as legislator and administrator, but also as a court, determining the financial liability of the adversary party, i.e., in the case of Iraq's intervention in Kuwait the Council determined the financial liability of Iraq.<sup>7</sup> This exercise seems clearly to be against the general principle of law: not to be judge of one's own actions, as well as to distinguishing the different roles of jury and judge.

### 3.2. Global dictatorship or tyranny of vetoes

There is yet another legal problem arising out of the principle of equal but differentiated responsibility: the decision making in the Security Council is clearly dictatorial, resulting in international lawlessness,<sup>8</sup> if not the tyranny of Orwell's *Animal Farm*.<sup>9</sup> Despite the fact that Article 27 of the Charter was amended, providing that "decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members (formerly seven) and on all other matters by an affirmative vote of nine members (formerly seven), including the concurring votes of the five permanent members", it must be noted that the five permanent members are empowered to void any Security Council resolution, irrespective of the supporting majority. This is known as veto power, exercised when any permanent member enters a "negative" vote; an abstention vote allows the measure to pass. The veto power has virtually undermined the strength and authority of the UN Security Council.

Among the permanent members of the Security Council, the US is the most powerful at the moment, and either dominates the decision-making process in the Council, or simply ignores the defined rules of the Charter.<sup>10</sup> In the present international order where vested national interests are vital, it is understandable that the US is able to use or misuse the UN. The US also dictates the reform agenda, the UN being financially dependent upon the United States.

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<sup>7</sup> Harper, K., "Does the United Nations Security Council have competence to act as court and legislature?", *27 New York University Journal of International Law and Politics* (1994), at 1-2-157.

<sup>8</sup> Sands, P., *Lawless World Making and Breaking Global Rules*, (London: Penguin Books Ltd., 2005).

<sup>9</sup> George Orwell's *Animal Farm* is an allegory of betrayal, power and corruption. When the downtrodden animals of Manor Farm overthrow their master Mr. Jones and take over the farm themselves, they imagine it is the beginning of a life of freedom and plenty. But as the cunning, ruthless elite among them starts to take control, the other animals find themselves hopelessly ensnared as one form of tyranny is gradually replaced by another. Orwell, G., *Animal Farm* (London: Penguin Books Ltd., reprint, 2003).

<sup>10</sup> The United States is often criticized for using its veto power at the Security Council in favour of Israel.

### 3.3. Where is the Security Council heading after Iraq?

The invasion of Iraq, and its regime change, by the US and the UK without authorization from the Security Council illustrates how powerful States act or are likely to act in order to defend their interests. The role of the other permanent members of the Council, since 1991, in the case of Iraq indicates how they will be acting or reacting in similar scenarios in the future, yet there remain a few questions unanswered: What would have happened if France had been the invader of Iraq without the consent of the Security Council?; What could have been the reaction of the US against France in such a case?; Would the UK and the other pro-invasion States have supported the French invasion on Iraq had the US been in opposition to France? Will the norm and practice established by the US and the UK in the case of Iraq allow Russia or China to take unilateral action at their will? Answers to these questions are important when shaping a reformed Council prepared to take collective security actions. Where we go from Iraq is a challenge to the collective security.<sup>11</sup>

### 3.4. Does the international community of civilized nations exist?

In a society of civilized nations, which is often claimed to exist, one has to ask why only rich and powerful States should be eligible to become permanent members of the Security Council.

As opposed to the mandate of Article 24 of the Charter, the permanent members of the Security Council have clearly used their positions as a neo-colonial super-structure, exercising military powers rather than establishing democratic norms. Being the inventors and proliferators of nuclear weapons, the permanent members of the Council are responsible for creating a nuclear balance of terror. In addition, they are the largest producers and traders of conventional weapons, fuelling armed conflicts in many regions of the world – itself indeed a threat to global security. Militarily, technologically and economically, the permanent members of the Council are themselves the world's competing powers and are concerned about their respective spheres of influence in order to control resources and other people's lives. They are also industrial powers responsible for the emission of greenhouse gases, leading to a global climate change resulting in global environmental insecurity. The States aiming to become permanent members of the Council, e.g., Japan, Germany, Brazil, India, and perhaps South Africa (and the European Union), are also industrial States contributing a major share to global environmental harm. None of the economically poor and militarily weaker States are seeking permanent membership of the Council. Some poor States are being labelled as "failed States" and are therefore the target of control and domination, if not intervention, by powerful States.

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<sup>11</sup> Jacobsson, M., "The use of force and the case of Iraq", in Amneus, D. and K. Svanberg-Torpman (eds.), *Peace and Security Current Challenges in International Law* (Lund, Sweden: Studentlitteratur, 2004), at 373-407.

Over the past sixty years, with the enormous power and wealth of the permanent members of the Security Council, they could and should have resolved many of the world's problems, especially by promoting an international legal order. Instead, the Security Council itself has become a source of rather than a solution to the problems, mainly because of the lack of consensus deriving from their vested interests. Given their dominant positions in the Security Council, none seems in favour of a more democratic UN, which would entail their relinquishing their power of veto. As the Security Council reform process in itself seems complex, one might wonder what legitimacy the Security Council would have if the reform did not take place as is aimed for, and if an expansion of the permanent members failed.

Criticisms of legitimacy seem strongest where the Security Council purports to speak for the global community in making declarations and imposing sanctions on States. However, some critics of legitimacy look rightly beyond the Security Council's decision-making process and beyond whether the Security Council is merely acting in accordance with its legal competence. Thomas Franck suggests that it is important to see whether or not the Security Council acts in accordance with general principles of fairness.<sup>12</sup> He argues that there must be determinacy, consistency and coherence in a rule-based system. In addition, a deeply common-sense question is: How can a few powerful States represent the whole international community of weak and under-developed States whose interests are incompatible with the interest of the permanent members? This is a challenging legal and political question to be answered appropriately for the establishment of the twenty-first century international legal order to take place.

#### 4. SECURITY ON WHOSE TERMS?

The present international security order, which has its roots in the 1648 Treaty of Westphalia, recognizes the sovereign equality of States as the basis of international law. This *de facto* legal order has been operating with no central authority enforcing it directly, but has been indirectly imposed based on a balance of power. According to the balance of power theorists, whether it is the issue of resource sharing or peace and security, the international order is maintained not through international law or organizations, but by virtue of *détente*, by which the ambitions of one power are moderated by the countervailing power of its counterparts.<sup>13</sup>

The author suggests that the balance of power mentality, even in its present form, is essentially neo-colonial, under which States struggle for control over territory in order to control the resources within that territory. Instead of the balance of power,

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<sup>12</sup> Franck, T, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990); Franck, T, "Legitimacy and the democratic entitlement", in Fox, Gregory H. and Brad R. Roth, *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000).

<sup>13</sup> Kissinger, for example, is one of the staunchest supporters of the balance of power theory. See Kissinger, H., *A World Restored: The Politics of Conservatism in a Revolutionary Era* (London: Gollancz, 1974).

it is asserted that peace and security can best be guaranteed by international law and organizations through the establishment of a meaningful international institutional order built upon consent and respect for such laws. The author believes, in line with the institutionalists and critical security studies' view, one must cultivate a more questioning attitude towards the whole framework. This questioning must cover not only why States quarrel over resources, but also the ways in which peace and security are implemented and conceptualized.<sup>14</sup> In contrast to the fixed knowable world of the realists,<sup>15</sup> and in line with the post-Modernist interpretation of reality, the author would subscribe to the principle of coexistence. In philosophical terms, it emphasizes the creative instincts of States or individuals seeking to share the earth's resources, rather than seeking primarily to satisfy one's own wants. An integrated approach to international law and institutions, it is being suggested, should be used to define global security, the rule of law and social justice. The main facts supporting these arguments are as follows.

#### 4.1. Colonial tendencies of powerful States

The first fact is based upon the legacy of States' struggles for power to control over territory and its resources, an integral part of the history of nation-States. The history of colonial control over the world's natural resources is clear: "from 1815 to 1914 European direct colonial domination, especially by Britain and France expanded from about 35 per cent of the earth's surface to about 85 per cent of it".<sup>16</sup> Writing in the nineteenth century in support of colonization, Westlake argued that the "regions of the earth designated as *uncivilized* ought to be annexed or occupied by *advanced powers*."<sup>17</sup> The struggle for control over territory in order to control the resources remained the historical legacy of colonial times. In the present world, this is illustrated through China's occupation of Tibet, India's annexation of Sikkim, Israel's occupation of Palestine, and the recent US-UK occupation of Iraq. The

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<sup>14</sup> In general, there seem to be three schools of thought on security: 1) the traditionalists (also known as the normative), who wish to maintain a largely military focus; 2) those moving beyond the traditionalists, who wish to broaden the range of issues on the security agenda; 3) the proponents of critical security studies, who wish to cultivate a more questioning attitude to the whole framework in which security is not only conceptualized, but how it is initiated. Among these three schools of thought there may be both overlapping and contradictory ideas. However, there is a growing awareness among experts for the necessity to rethink the concept of security. See Buzan, B, "Re-thinking security after the Cold War", 32 *NJIS* (1997), at 5-28.

<sup>15</sup> The political science approaches are as follows. While the Realists see a fixed and knowable world, the post-Modernists see the possibility of endless interpretations of the world around them... there are no constraints, no fixed meaning, no secure grounds, no profound secrets, no financial structure or limits of history... there is only interpretation... History itself is grasped as a series of interpretations imposed upon interpretations – none primary, all arbitrary (see Baylis, J., *Globalization of World Politics* (Oxford: Oxford University Press, 1998), at 193-211, 205).

<sup>16</sup> See more in Edward Said's *Orientalism* (London: Penguin Books Ltd., reprint, 2003), at 41.

<sup>17</sup> Westlake, J., *The Principles of International Law* (Cambridge: Cambridge University Press, 1894).

consequence of this legacy is that direct control by the *advanced powers* over the less-advanced States has been transformed into a broad social and economic influence.

This transformation can be seen in the establishment of the UN Security Council, which has assumed the responsibility of representing the whole international community in terms of maintaining peace and security. The five permanent members adopted this role. The UN Charter dealt with the colonial issues through the Trusteeship Council, recognizing the right of self-determination. At the same time, the Security Council seemed to serve the same functions and perpetuate the essence of the colonial superstructure. As a result, even as the Trusteeship Council was actively promoting the decolonization of Africa and Asia, the power of the *advanced powers* was transformed into a more sophisticated means of social control.<sup>18</sup> These spheres of influence of the permanent members of the Security Council were vividly illustrated by the Cold War and its continuation of resource competition and control over the newly independent developing States.

At the Bandung Conference in 1955, the newly independent States held a conference defining the *principles of peaceful coexistence* among States and of remaining non-aligned in the Cold War. Almost all of these decolonized States (especially in Asia) had achieved self-determination, but economic and political independence from the former Western empires was incomplete. Yet again, they were forced to confront a configuration of powers that demanded acquiescence, in the new bipolar Cold War form, from either the United States or the Soviet Union. By the early 1990s the United States had emerged as the unipolar power in terms of political and economic influence, backed up by military might. However, from the perspective of the decolonized States, the interests of the other four permanent members of the Security Council still dominate their resource management decisions.

## 4.2. Unequal powers and treaties

The second fact supporting my arguments is that power differentiations among States determine the terms of treaties. The UN Charter itself illustrates this recognition of the privileges of power assumed by the permanent members of the Security Council. This is dramatically highlighted by the 1970 Nuclear Non-Proliferation Treaty (NPT). Instead of prescribing the complete elimination nuclear weapons, the NPT recognized the privilege of the “Nuclear Club“, that is, for those States that already had nuclear capabilities to possess weapons of mass destruction. The fact that the NPT denied the access of only some States to these weapons shows the power differentiation that permeates most, if not all, aspects of international issues. Clearly, if the non-proliferation of weapons of mass destruction were the true aim of the treaty, it would first have focused on the elimination of all existing weapons and simul-

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<sup>18</sup> The Trusteeship Council administered the UN’s trust territories. The Council suspended its activities in 1994 when the last of the trust territories, Palau, in the south Pacific, became independent. The Council, made up of the five permanent Security Council members, have agreed to meet as required.

taneously restricted all other states from acquiring such weapons. If there were to be a truth-in-labelling law applied to the NPT, it should have been entitled the Nuclear Non-Proliferation (to States the Nuclear Club Does Not Trust) Treaty. As well, the hesitancy of the ICJ to make an outright pronouncement on the legality or illegality of the threat or use of nuclear weapons<sup>19</sup> suggests that the judges are inclined to abide by the *status quo* and the wishes of the Nuclear Club.

### 4.3. Neo-colonial trade and economic order

The third fact supporting my arguments is that the present-day multinational (or transnational) corporations are the new faces of the old colonial instruments of economic control, serving the same functions as did the Dutch, French, Portuguese and British East India companies until the nineteenth century. Those who perceive these new faces differently have only to examine in whose interests treaties establishing international trade and financial institutions were negotiated: those of rich or poor States. The new trade and economic order and the multinational corporations are, according to critics of neo-liberal economics, the *new rulers of the world*,<sup>20</sup> nourished by the rich and *advanced powers* and backed by their economic and trade institutions, i.e., the World Bank, the IMF, and the WTO. This means that a powerful State can easily wield *undue influence* over its weaker counterpart. In this unequal partnership between the rich/advanced and poor/less advanced, it is obvious that the *advanced powers* reap most of the benefits. Furthermore, there is the degradation of the environment from the extraction of resources and its adverse impact on the local populations, mostly by displacement.<sup>21</sup> As was the case in colonial times, there may be an insignificant percentage of the local population benefiting from these multinational companies' activities. Overall, however, the present global economic order, in which States seem essentially no longer to have actual borders, labour and income are subject mostly to global managers' governance. In this inevitable process of economic privatization, there is direct intervention in the affairs of developing countries by *advanced powers*, through structural adjustment programmes and the like. In such a situation, the prospect of economic self-determination is, for the developing States, grim.

Every step towards economic development, especially industrial development, has consequences that include social and economic injustice, and environmental

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<sup>19</sup> Advisory Opinion of the ICJ concerning the *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, General list No. 95. "Had the ICJ focused on the applicability of general principles of international law, it may have reached a conclusion more consonant with common sense and natural law: namely, the illegalities of the threat or use of nuclear weapons". See Mahmoudi, S., "International Court of Justice and nuclear weapons", 66 *Nordic Journal of International Law* (1997), at 77-100.

<sup>20</sup> Pilger, J., *The New Rulers of the World* (London/New York: Verso, 2003).

<sup>21</sup> Roy, A., *The Greater Common Good*, see <<http://www.narmada.org/gec/gec.html>> (accessed 10 December 1999).

degradation. This holds true irrespective of distinctions between developing countries past or present, e.g., nineteenth-century Britain as compared with twentieth-century India. For more than 150 years, economic development models have rotated around two paradigms: free market capitalism, and centrally planned socialism. Both are predicated on extracting the maximum use from natural resources and expanding the frontiers of science to facilitate consumption.<sup>22</sup> In the process of the deification of economic development, priority is given to the exploitation of shared natural resources over their protection, prime examples being the lack of political will among many States to implement the 1997 Kyoto Protocol of the 1992 Climate Change Convention. Parallel to this are the phenomena of economic development aid, which serves as an instrument to maintain the *status quo* in favour of the *advanced powers*.<sup>23</sup> Similarly, fora for adjusting the rules of economic co-operation and international trade are often used as a cover to secure advantages for States or blocs of States, while restricting the trade of other States *via* threats of retaliatory tariffs barriers; one of many examples is that the arms trade is not included in the negotiation under the auspices of the WTO,<sup>24</sup> and another is the failure of negotiations concerning agricultural subsidies in the developed world and the impact of this failure on developing States.<sup>25</sup>

#### 4.4. Recognition of sub-state entities

The fourth fact is the need for recognition of sub-state rights, specifically, the community rights of people with regard to their resources and the environment in which they live. The sub-state groups are the human communities that mediate between an individual and States. Over the course of the past thirty years, community rights have been recognized by international law in the areas of both human rights and environmental protection. It is noteworthy that the UN Johannesburg Summit (building on earlier works of the Stockholm 1972 and Rio de Janeiro 1992 Summits), for all its limitations, revealed an ongoing concern; its detailed declarations on matters dealing with the *environment, famine*, the gap between advanced and developing

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<sup>22</sup> See, for example, McIntosh, M., *et al* (eds.), *Corporate Citizenship* (London: Financial Times, Pitman Publishing, 1998), at 96.

<sup>23</sup> Hans J. Morgenthau, in his book *Politics Among Nations: The Struggle for Power and Peace* (New York: Alfred A. Knopf, Fifth Edition, Revised, 1978) explains the way in which powerful States are concerned to keep the *status quo* intact against any change threatening their establishment; how one government supports another with bribes in the name of aid [to maintain the *status quo*], but beyond that he is doubtful that activities such as economic aid have a useful purpose though such beneficiaries belong to the hopeless group of “bum and beggar nations”. See Nobel, J., “Morgenthau’s struggle with power: The theory of power politics and Cold War”, 12 *RIS* (1995), at 61-85.

<sup>24</sup> Arms trade constitutes the major share of the world trade, yet it does not fall within the purview of the WTO.

<sup>25</sup> WTO Ministerial talks at Cancun, December 2003.

countries, *health* and *human rights*, suggest the emergence of a collective theme of community rights.<sup>26</sup>

Unlike nation-States, sub-state community relationships with nature have been, and still remain, generally cooperative. This factor emphasizes the themes of community rights, e.g., the water rights of indigenous populations, and the rights of minorities, women, and children. At this point it is absolutely necessary to make a distinction between the interests of the communities of people (whom the state claims to represent) and the policy of States (which more often than not contradicts these said interests), i.e., the *community interests* and *national interests*.<sup>27</sup> Treaties concluded by States are ostensibly negotiated based on the interests of their respective constituents. However, the politics of the earth's resource use allocation frequently becomes enmeshed with other contentious issues, aggravating tension between neighbouring countries. The struggle for power and competition for resources between States over various issues<sup>28</sup> leads to the issue of the earth's resources being framed as one of *competing national interests*.<sup>29</sup> The fact that there is a growing trend towards wider participation in the policy-making process of international watercourse use and environmental protection<sup>30</sup> points to the existing gap (albeit narrowing) between the so-called *national interest* and *community interests* and, at the very least, that there are fundamental failings in a particular state's democratic system.

#### 4.5. Global security based on equity and social justice

Finally, it is suggested that global security must be viewed and implemented in constituency with equity and social justice. This needs to be seen in connection with issues that dominate the security agenda of the international community (i.e., rights of access to food and safe water, freedom, democracy, the rule of law and human rights, the protection of the environment, and necessity for economic development, as well as security and protection against terrorism), including States, sub-States communities and individuals. In guiding *a way to the world peace*, it is rightly asserted that:

There can be no *social justice* without reducing the *cost of arms*; no *disarmament* without a *peaceful* method of *settling* irreconcilable *disputes* among States; no *court* without *binding authority* to resolve such disputes until States agree to give it necessary power;

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<sup>26</sup> The UN Summit held in Johannesburg in 2002. See <http://www.johannesburgsummit.org/>.

<sup>27</sup> Zinn, H.A., *A People's History of the United States* (New York: Perennial Classics HarperCollins Publishers, 2001).

<sup>28</sup> See, for example, Morgenthau, n. 23.

<sup>29</sup> In Egypt, for example, watercourse-related data are classified as a national security issue. See Goldenman, G., "Adapting to climate change: a study of international rivers and their legal arrangement", 17 *Ecology Law Quarterly* (1990), at 741-802.

<sup>30</sup> Ebbesson, J., "The notion of public participation in international environmental law" 8 *Yearbook of International Environmental Law* (1997), at 51-97.



no need for an international army if there is no international court; no *consent to judicial determinations* until there are *common norms of international behaviour*; no agreements on norms until nations with different values develop *mutual confidence* and a will to *compromise* in order to enhance the *security and the well being of all peoples*. Progress must be made in all areas if effective international law enforcement is to become a reality.<sup>31</sup> (*Emphasis added*)

This is a key approach to international law and international legal order, in that it aims at the well-being of all peoples by securing an order of social justice. This, in essence, illustrates the interconnection between cause and effect, with emphasis on the root reasons rather than on the consequences. For instance, a state striving for security through military power will acquire stockpiles of arms, which may trigger an arms race among rival powers. The end result is that the original goal of security has been undermined in the process. Thus, of all the problems of the present world, the prevalence of military power positions<sup>32</sup> dictating treaty terms is the main hindrance to fair international resource sharing. Because of this, treaty negotiations between riparian States and the terms of treaties between those States are often not based on their actual needs.<sup>33</sup> This omission points to the need for a fundamental questioning of the military/arms-based security of States. Indirectly, this issue was addressed by the 1972 UN Declaration on Human Environment. Whether the signatories to (and those who drafted) the Declaration's Principle 21 were aware of it or not, the legality of the international sale of arms can be challenged. Principle 21 provides for States the sovereign right to exploit natural resources within their territory. At the same time, it prohibits States from causing damage to the human environment of other States. By implication, the use of natural resources by a given state to produce arms (and the sale of those arms to other States), ultimately results in damage to the human environment, regardless of the stated purpose of such arms, for instance, for national defence. In addition, funds spent on arms are clearly subtracted from those spent on fulfilling basic human needs. According to one analyst, the combined military budgets, for example, of all of the South Asian countries in one year are equivalent to the sum needed to provide basic living costs for the entire world's population.<sup>34</sup> In this context of misuse of resources, the key to global security is the rethinking of military science (i.e., the challenging of the use of science for destructive purposes) and the need for conversion of military industries to civilian use.<sup>35</sup>

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<sup>31</sup> Freencz, B., *Enforcing International Law A Way to World Peace, A Documentary History and Analysis* (New York: Oceana, 1983), at 493.

<sup>32</sup> Principle 21 seems to be aimed at complete disarmament; see Principle 21 in *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972*, UN Doc. A/CONF.48/14.

<sup>33</sup> See, for example, treaties between the United States and Mexico, between Egypt and Sudan, between China and the lower Mekong basin States, or between India and Bangladesh.

<sup>34</sup> Stark, A., "Från bombfronten-ingetnytt", *Svenska Dagbladet*, 3 June 1998, at 16.

<sup>35</sup> Barnby, F., *New Statesman and Society*, 31 January 1992, at 14-16.

The call for *mutual confidence* and a *will to compromise* can be interpreted as relevant to a form of shared resource management that is based on social justice. In particular, *mutual confidence* stems from the perception of common norms governing the behaviour of States.<sup>36</sup> This ideally leads to the negotiation of treaties based on actual needs. Under these conditions, the *will to compromise* among States would emerge, and the foundation for the rule of law can be established. Within this foundation, there can be equality before the law and equal protection of the law in the true sense.

## 5. A THIRD-GENERATIONAL INTERNATIONAL INSTITUTION

A third-generational global democratic institution is essential in order to establish a system of international justice, democratic peace and global common security. The League of Nations, established after World War I, was a first-generational international organization which allowed its Member States to use war to settle international disputes in certain circumstances.<sup>37</sup> However, in no case did the League impose sanctions on those States instigating war.<sup>38</sup> During the time of the League international conflicts were mostly over the territory of States. These were the classic or first-generational conflicts. The failure of the League is often linked to its failure in preventing the outbreak of World War II. Nonetheless, regarding the judicial settlement of dispute, the establishment of the Permanent Court of International Justice (PCIJ), presently known as the ICJ, is one of the important achievements of the League. This is the most civilized method of establishing peace and securing justice. However, the compulsory jurisdiction of the court has not yet been established.

The UN, established after World War II, represents a second-generational international organization, facing not only second-generational conflicts, e.g., conflicts of ideologies, sphere of influence, and control of raw materials, but also third-generational conflicts creating global insecurity, i.e., global warming, increasing poverty, the depletion of environmental resources, and international terrorism. Various forms of injustice are breeding disorder, which is in turn creating violence at local, national, and international levels, finally leading to global insecurity. The existing methods of international dispute settlement are for the most part “*ad hoc* and

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<sup>36</sup> For example, one of the common norms of international behaviours may be to treat others as you would have them treat you, as opposed to ‘you must do what I say, not what I do’.

<sup>37</sup> Article 12 of the Covenant of the League of Nations, including amendments in force, published by the Secretariat of the League of Nations, at 7.

<sup>38</sup> Poeggel, W., and E. Oeser, “Methods of diplomatic settlement” in Bedjaoui, Mohammed (ed.), *International Law: Achievement and Prospects* (Paris: UNESCO, 1991), at 534.

opportunistic with little adherence to the rules or procedures provided in the Charter, or even in the rules of procedure.”<sup>39</sup>

Dissimilarly to the Covenant of the League, the UN Charter prohibits the use of force, recognizing territorial sovereignty and integrity, and the political independence of States. Intervention in the affairs of States is prohibited. However, according to the UN Charter, the use of force can be justified in the cases of self-defence and the collective use of force by and through the decision of the Security Council. The main reason for the Security Council to fail to fulfil its responsibility from the very start is that it suffered from the *Big Brother syndrome*.<sup>40</sup> Subsequently, it was handicapped by the power politics between the two super-powers, i.e., the two Big Brothers: the United States and the Soviet Union. After the fall of the Soviet Union, the Security Council became interventionist, acting as a supra-national authority and exercising power as an international executive, legislative, and judicial authority.

Under the UN Charter, the legality of the supra-national behaviour of the Security Council is highly controversial.<sup>41</sup> A series of sanctions and wars against Iraq has also been highly controversial, raising doubt about the character and purpose of conflict resolution by the UN. The need for an effective global institution is perceived by all Member States, in preventing and resolving third-generation conflicts. The bitter reality regarding the UN reform, as explained by the former UN Secretary General Boutros Boutros Ghali, is that Member States do not know what they really want from the UN: “as a forum just to talk about international problems or an institution to solve the problems of the world”.<sup>42</sup>

### 5.1. A 3G General Assembly

The UN General Assembly is the best-represented body that could be developed as an international consensus-building body, responding to global challenges, and it could be empowered as a multilateral (binding) treaty-making body. The Assembly could also be a centre for conflict prevention and post-crisis settlement, given the present trend of often referring conflicting issues among States to the General Assembly. It should, however, be noted that not all of the Member States of the General

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<sup>39</sup> Eagleton, C., *International Government* (New York: Ronald Press Company, 1957), at 519. Eagleton was one of the members of the draft committee of the UN Charter. Although his book was published in 1957, his arguments are still valid since there are no changes in *ad-hocism* and non-adherence to law in international dispute settlement.

<sup>40</sup> Big Brother is Watching You (war is peace, freedom is slavery, ignorance is strength, two and two make five, god is power). See Orwell, G., *Nineteen Eighty-Four* (London: Penguin Books, Martin Secker and Warburg Ltd., 1989).

<sup>41</sup> Harper, K., “Does the United Nations Security Council have the competence to act as a court and legislature?” *27 New York University Journal of International Law and Politics* (1994), at 103-157.

<sup>42</sup> Boutros Boutros Ghali talking with the former British Foreign Secretary Douglas Hurd, in a BBC television programme called “Search For Peace”, prepared by Douglas Hurd (1997).

Assembly have democracy. It is, therefore, proposed here that a Super General Assembly (3G General Assembly) should be established out of the existing General Assembly; each State's membership and voting strength would be based on democratic credentials.<sup>43</sup> Based on the minimum criteria, such as multiparty democracy, a free press, an independent judiciary, and the rule of law, the ICJ could help to define democracy when and if needed. No State would have the power of veto in the General Assembly of democratic States, and its resolutions would be binding rather than merely advisory, provided that those resolutions are approved by a two-thirds majority of the Member States. This arrangement could be expected to be helpful for the democratization of internal politics of the Member States; also, to enhance the principle of sovereign equality and international legitimacy. One can argue against and oppose the above proposed status of the Assembly as an international parliament, yet the fact remains that the Security Council is already behaving as such: however, without a mandate. Therefore, it would appear more logical to authorize the Assembly to perform the legislative function, and the Security Council, the executive function.

### 5.1.1. Models of 3G General Assembly

A model for third-generation organizations proposed by some experts suggests the creation of several separate authorities in different functional areas along the lines of the International Sea-bed Authority, designed to regulate deep sea-bed mining.<sup>44</sup> Another model can be the Antarctica Treaty Regime. For example, Articles X and IV of this latter treaty impose obligations on third States. According to Article X, each of the contracting parties undertakes to exert appropriate efforts, consistent with the UN Charter, such that no one party engages in any activity in Antarctica contrary to the principles or purposes of the present treaty.<sup>45</sup> Yet another model can be the further development of the United Nations Environmental Program (UNEP), borrowing from the International Labour Organization (ILO) model, to provide the legislative outcomes for international agencies. The ILO networks provide labour dispute settlements between employers and employees (including governments), which is an instructive model of direct involvement of non-governmental organizations in setting standards.<sup>46</sup>

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<sup>43</sup> Here the term "Member States having democracy" means those States which have at least a multiparty democracy, a free press, an independent judiciary, and the rule of law: in other words, no military or other dictatorships such as absolute monarchies.

<sup>44</sup> The United Nations Convention on the Law of the Sea, 10 December 1982, UNDoc.A/CONF.62/112, reprinted in 21 *ILM* (1982), at 1261.

<sup>45</sup> See, 402 *UNTS* 71; The treaty entered into force on 23 June 1961.

<sup>46</sup> Palmer, G., "New ways to make international environmental law", 86 *AJIL* (1992), at 259-283. His model is as follows: 1) A General Conference comprising all members is to be convened annually and more often if the Governing Council so decides. The conference shall consist of four representatives from each member; two shall be government delegates and the two others shall represent business and environmental organizations, respectively; 2) The Governing Council is to consist of forty people: twenty representing government, ten representing business, and ten representing environmental organizations; 3) The ability of the conference to set international environmental

It is important to note that the independence, legitimacy and impartiality of a third-generational global organization will be questioned – just as the role and position of the Security Council is often questioned regarding conflict resolutions. This question mainly arises in connection with the respective financial contributions of certain countries, and in particular the dependency of the UN on the US. Article 19 of the Charter provides that:

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

In a reformed Article 19 it could be stated that a financial obligation of the members of the third-generation international institution must be recognized. A logical option in this regard is that Member States should contribute a proportion of their annual defence budget for the management cost of the third-generation international organization. The rule of economic liability towards such an organization needs to be based on a wise assumption, i.e., the higher the financial contribution to a third-generation international organization, the better the national and global security. Such a contribution would help to promote common security, thereby building a more sophisticated form of international security. This could be the thrust of the common security concept. However, it raises a fundamental question as to how to build a global order.

A need for a standing military force would be anticipated within a third-generational international organization, as it is realistic to assume the lawful use of force

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regulations by a two-thirds majority of the vote cast by delegates present. The regulations would become binding without further action. There would also be provision for recommendation to be made to members; 4) A Director-General and staff of the International Environmental Office, to have explicit international responsibilities for educating people about global environmental problems and what they can do to help; 5) The office to have defined functions for gathering information and monitoring compliance, including verification of compliance with the regulations; 6) A thorough preparatory process, in which there is ample notice, thorough scientific and technical preparation, and consultation before regulations are made; 7) Formal provision for authoritative and widely representative scientific advice and papers to be available to the organization; 8) Detailed requirements for nations to report annually on action taken to implement agreed regulations. The environment and business representatives would be required to report separately from governments; 9) Provision for any member to be able to submit complaints regarding non-observance in respect of any other member to the International Environment Office; 10) Discretion of the Council to refer such complaints to a Commission of Inquiry for a full report. The Commission shall consist of three appropriate experts of recognized impartiality and be chaired by a lawyer. The Commission is to make findings of fact and rule on the steps to be taken to deal with the complaint and the time by which the steps must be taken. Refusal by governments to accept these findings are to be referred to the full conference; 11) Authority for the council to recommend measures to the conference to secure compliance when it is lacking.

in certain circumstances. Thus, instead of trying to assemble a multinational rapid response contingent under the existing system, a quite lengthy and complex process, some experts have proposed that the UN needs a standing force to intervene in trouble-spots around the world. One proposed solution is to put together a contingent of professional soldiers.<sup>47</sup> The democratic General Assembly could suggest to the Security Council where and how the force could be deployed. However, such a proposal raises challenges that many governments are reluctant to confront.

In addition to the task to define global threats and appropriate responses, a 3G General Assembly needs to concentrate on both the prevention of conflict and alternative conflict resolution.

### 5.1.2. *Conflicts prevention*

Regarding the prevention of international conflicts, the UN Charter offers guidance on how to use an early-warning information system to prevent the development of disputes. The preventive measures provided in the UN Charter are as follows.

The primary responsibility for prompt and effective action in the maintenance of international peace and security as well as consistent vigilance of conflict situations rests with the Security Council.<sup>48</sup> The UN Secretary General has the responsibility for bringing any matters of international conflict to the attention of the Security Council.<sup>49</sup> The General Assembly may also discuss any questions relating to the maintenance of international peace and security.<sup>50</sup> The General Assembly may call the attention of the Security Council to situations likely to endanger international peace and security,<sup>51</sup> and the Security Council may take provisional measures for dispute prevention.<sup>52</sup> Similarly, the ICJ may indicate interim measures.<sup>53</sup> All of these measures provided under the Charter may be used even for the so-called 'global watch'.<sup>54</sup> So far, none of the above-mentioned measures seems to have been used in a timely or adequate manner.

Although the set of preventive measures is a farsighted arrangement of the UN Charter, neither of its organs seems to be accountable for their execution, nor have the Member States given a clear mandate or funds for the implementation of such

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<sup>47</sup> Brian Farrel, a military historian, and Christopher Lingle, an economist, wrote "Gurkhas could do the job" in *International Herald Tribune*, stating that the UN needs a minimum of 5,000 standing force, and the most suitable troop could be the Gurkhas, particularly since with the return of Hongkong to China in 1997, they will no longer be required in the British army. *The Kathmandu Post* (20 October 1994) republished the article, resulting into an interesting discussion, see <<http://library.wustl.edu/~listmgr/tnd/0067.html>>(accessed 28 February 2006).

<sup>48</sup> Article 34 of the UN Charter.

<sup>49</sup> Article 99 of the UN Charter.

<sup>50</sup> Article 11(2) of the UN Charter.

<sup>51</sup> Article 11(3) of the UN Charter.

<sup>52</sup> Article 40 of the UN Charter.

<sup>53</sup> Article 41 of the ICJ Statute.

<sup>54</sup> Ramcharan, B., *The International Law and Practice of Early-Warning and Preventive Diplomacy: The Emerging Global Watch* (Dordrecht/Boston: Nijhoff, 1991), at 22.

measures. It has often been pointed out that the UN does not possess the necessary means, mandates and mission capacity to prevent the outbreak of hostility leading to devastating conflicts. Therefore, there is a need for a conflict prevention strategy, by which early warning systems could be improved through more effective, internationally co-ordinated efforts, while taking into account the economic and social root causes of the conflict. In order to avoid or prevent any conflict, it is necessary to understand the source of the conflict and design a process to deal with this source. For example, conflicts generated by data disagreement should be dealt with as soon as they arise. Conflicts of interest involve value differences or relationship issues; therefore, the psychological needs of the parties should to be addressed. In this situation, there is a dual function for the peace makers or peace keepers: one is to identify the cause of the conflict, and the other is to use appropriate alternative measures to prevent it.<sup>55</sup>

### 5.1.3. *Alternative Conflict resolution*

“Negotiate the interests rather than the positions.” This is the concept of the Alternative Conflict Resolution (ACR). Attention to the traditional methods of diplomatic negotiation is given to the bargaining powers of the parties rather than to the actual needs of their respective populations. A study illustrates several benefits of using a combination of dispute resolution and decision analytical techniques to structure negotiations of environmental disputes. The interests of disputing parties are expressed in terms of a utility model, in which specific objectives with measurable criteria are used to evaluate how well alternative actions satisfy the goals.<sup>56</sup>

The ACR techniques are intended to facilitate consensus decision-making by disputing parties, thereby avoiding legal or administrative proceedings to resolve disputes. Some characteristics of this group of techniques include: 1) focusing on the underlying interests of the disputing parties, rather than on their bargaining positions; 2) using creative thinking to dovetail dissimilar interests, preferences, capabilities, risk tolerances, and to change disputes from being zero-sum games to situations with the potential for joint gains; 3) appealing to jointly-accepted objective standards for appropriating gains, and 4) requiring consensus among parties for decision, rather than majority rule.<sup>57</sup> The concept of public involvement in dispute resolution is another form of ACR, and may be used to prevent disputes, resolve

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<sup>55</sup> Priscoli, J., “Public involvement; conflict management and dispute resolution in water resources and environmental decision making”, 3-2/3 *Water Nepal* (1993), at 43-58.

<sup>56</sup> Maguire, L., “Resolving environmental disputes: a framework incorporating decision analysis and dispute resolution techniques”, 42 *Journal of Environmental Management* (1994), at 31-47.

<sup>57</sup> These techniques are based on a socio-psychological approach rather than a purely judicial approach. An independent mediator is often used to direct the process of dispute resolution. The ACR techniques have been applied to policy disputes involving waste facility siting, national forest planning, and regulation of pesticides, among many others. All of the ACR techniques promote creative thinking and compromise, but they lack a formal structure for identifying critical sources of disagreement in complex disputes; here, decision analysis could provide a structure.

them at earlier stage, or settle them prior to formal litigation. ACR involves six important concepts of public involvement, namely: 1) to build credibility; 2) to identify public concern value; 3) to develop consensus; 4) to keep parties informed; 5) to produce decisions, and 6) to enhance democratic practice. Within ACR, policy makers and the public have different roles from their traditional roles.<sup>58</sup> Conflicts are classified along non-traditional lines.<sup>59</sup>

In order to find a solution to the above-mentioned cause of conflict, the following steps could be taken. Firstly, one must understand the source of the conflict then design appropriate public involvement and conflict management processes. Secondly, negotiation with an open mind and without any predetermined solution needs to take place. Thirdly, one must isolate extremes, such as the use of force or litigation. Fourthly, negotiation should be conducted around interests rather than around positions. Fifthly, durable settlement depends on at least three dimensions: procedural, psychological, and substantive satisfaction. Finally, it is necessary to employ techniques which help parties to talk directly with one another. It must be realized that negotiation of interest is not an easy task. Some conflicts need adjudication and others may require the use of force. The objective of ACR should not be to isolate adjudication, but to find settlement at an earlier stage.

#### 5.1.4. *Creative thinking*

ACR requires creative thinking. It is impossible for all parties to think alike, but to act collectively in combating conflict and ensuring global security is possible. All problems may not be solved at once, yet a start would be made if States could agree on a common code of behaviours. This means that the perception of States may not be changed, while their role may be regulated. One of the major weaknesses in international conflict resolutions is the absence of consensual support for a transnational code of behaviour, such as that of 'do unto others as you would wish them to do unto you'. The prevention and settlement of third-generation conflicts mentioned above relates to third-generation rights and remedies — the collective human right to a human environment of sustainable development, which implies the right to life.

At present, there are many serious threats to common security created by competing power interests of States. The terror of the arms race and trade among States is still a vital issue to be resolved. In addition to this, there is at present a threat to environmental security, which cannot be achieved within the prevailing power interests of States. At the same time, a lasting settlement to any resource-related conflict cannot

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<sup>58</sup> In doing so, all policy makers are considered not as one entity, but include elected, administrative officials of various types. The public is defined as the both formally organized and informally organized, and directly and indirectly affected public.

<sup>59</sup> It is generally understood that many of the international conflicts are based primarily not on fact, but on values. The types of conflict are: 1) conflicts of data; 2) interest conflicts, or 3) conflicts of value differences. In most resource disputes, the primary cause of the conflict is rarely data. It is more likely to be caused by differing values, interests or, possibly, relationship issues.



be found without environmental security. Thus, it is absolutely necessary to adopt the common security approach, and to take a step towards international dispute prevention rather than conflict resolution. There may be several options and a number of ways in which to ensure global security. First and foremost is the conversion of military industries to civilian purposes;<sup>60</sup> second is the building of trust and confidence among States; third is the exchange of views and dialogue rather than confrontations and, last but not least, there is the priority of the common interests of humanity, rather than each State's pitting its national interests against others'.

## 5.2. A 3G Court

The contemporary world is (dis)organized in such a way that, from a legal point of view, States are independent of each other and have no actual authority over each other. Each State maintains its own courts and prescribes its own laws, often in isolation from other States. Unless bilaterally or multilaterally bound to each other by treaty to settle disputes or enforce judgments, States, especially powerful ones, often behave as if they are free selectively to recognize and enforce international judgments. States, in order to attain their political ends, place conditions, based on satisfaction of national interest, when acquiescing to international regulations.

The existing means and techniques of dispute settlement and conflict resolution can be viewed as two ends of a continuum, at one end being adjudication, i.e., arbitration and international courts, and at the other end being the possibility of the Security Council to use force as a means of securing international peace on the terms and conditions of the most powerful permanent member of the Council. In the field between the two ends of the continuum fall different kinds of non-judicial dispute settlement options like diplomatic negotiations or good offices.

Regarding the means of adjudication, the ICJ is an international institution with the necessary competence for the settlement of disputes<sup>61</sup> including disputes related to natural resources shared or solely owned by states, but the Court is able to entertain a case only when the parties to the case have given their consent.<sup>62</sup>

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<sup>60</sup> Bamby, F., *New Statesman and Society*, 31 January 1992, at 14-16.

<sup>61</sup> Jennings, R. Y., "The United Nations at fifty: The International Court of Justice after fifty years", 89 *AJIL* (1998), at 493-505.

<sup>62</sup> GA Res.51/229, Annex (21 May 1997), UNGADoc.A51/869. According to Article 33(5) Subparagraph (i) to (vi) of the 1997 UN Convention on the Law of Non-Navigational Uses of International Watercourses, a compulsory fact-finding Commission may be requested under paragraph 1(b), which provides that unless the parties have agreed otherwise, the fact-finding shall be conducted by a fact-finding Commission established in accordance with paragraph 1, subparagraph (b) of this article. See <http://www.un.org/law/cod/watere.htm>.

According to Article 36 (2) of the Statute of the International Court of Justice, the States which are Parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the legal interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would

A growing demand for a separate independent international environmental court led in 1993 to the establishment of the Environmental Chamber by the ICJ.<sup>63</sup> This chamber resolved *Nauru v. Australia*, settling on the payment of compensation by Australia, the UK and New Zealand; and the Chamber has also decided the *Hungary v. Slovakia case*.<sup>64</sup> In addition, the International Criminal Court has been established. The problem is that the Court has still not been recognized by the US.<sup>65</sup>

These examples exhibit that international judicial entities are capable of resolving third-generation disputes, provided that cases are referred to the court. However, it must be noted that the compulsory jurisdiction of the ICJ has not been universally recognized.

### 5.2.1. *Implementation of international law*

As there is no international public prosecutor to bring charges against States for the breach of law, the dispute settlement through the ICJ depends upon the balance of power and interests of States. In this scenario, the actors or subjects of international law often become divided, and vested interests prevail over human concerns and considerations of justice. An effective reaction of the international community to a conflict threatening international peace may be available only when the interests of the major powers, i.e., the five Permanent Members of the Security Council, are at stake.

In a conflict situation where the economic interests of the major powers compete, reactions are often divided. As a result, the UN in general, and the Security Council in particular, either ends up acting as an interventionist or remains inactive when it comes to conflict resolution. Lack of action is, in effect, an action, which appeases although this may not be intentional. Within this power scenario, there are obvious risks of a powerful State exercising pressure on a weaker one and thereby bypassing the law.

### 5.2.2. *Forced implementation: more problems than solutions*

The use of force is often said to be the last resort of the enforcement of international law. In this context, international law is currently facing a challenge. States involved in the invasion of Iraq seem to have taken the view that dictators, especially those involved in nuclear proliferation and/or supporting international terrorism, can be overthrown by the use of force. Despite the fact that no weapons of mass destruction were found and no link between the Iraqi regime and international terrorism has been established, the invading States are still suggesting that the dicta-

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constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.

<sup>63</sup> Jennings, *loc. cit.*, n. 61, at 493-505.

<sup>64</sup> *Gabcikovo-Nagymaros Project Case*, 1997, *ICJ Rep.1997*, at 1-72.

<sup>65</sup> Lack of recognition of this court by the most powerful members of the international community, the United States, illustrates the problems in establishing a third-generational organization.

torial regime can be overthrown. There are also many States opposing such a view, taking a more legalistic approach to the enforcement of international law by preferring criminal prosecution against terrorists instead of the military use of force. The problem of the use of force for the enforcement of international law is that the military force can be used against a powerless, non-permanent member of the Security Council. There is no possibility that force could be used against a militarily powerful State. This is where the problem lies with the balance of power theory of international politics and the existing legal rules of the use of force. As to the non-compliance with the law by powerful States, the international public opinion may have very little impact, serving sanctions in response to the violation of international law.

When States behave in an uncivilized manner, leading to the violation of international law, what measures can be taken for the implementation? Is criminalization of international wrongdoing an option? Even if it be so, one has to be sure whether or not a deterrent theory of law and punishment works. These are vital issues of jurisprudence; actual implementation of international law depends upon the civilized behaviour of the State leaderships.

### 5.2.3. *Voluntary compliance of international law*

Voluntary compliance with international law is a civilized manner of its application to achieve *legal justice*, and global public opinion is a decent sanction of the law, influencing States' behaviour. The international legal system is built upon the principles of *consent* and *reciprocity*. International lawmaking through treaty or customary practice is based on the voluntary consent of States and adjudication is based upon the principle of reciprocity. By voluntary agreement, States may choose any avenue of international dispute settlement available under international law, including diplomatic (negotiation, inquiry, mediation, conciliation, good offices, Article 33 of the UN Charter) and adjudication, as well as arbitration. States may also enforce international judgements voluntarily. When and if necessary, States themselves impose sanctions upon each other, as there is no supranational authority to enforce international law. Enforcement of international law through the Security Council is also based on the consent rule. There are various kinds of sanctions available under international law, including so-called smart sanctions. However, the important question is: who uses sanctions against whom? It is vital to have a clear legal understanding about when and how to use sanctions.

As actors of international law, States usually comply with international rules through self-interest. Compliance with a vast number of international rules, covering socio-economic, technical and cultural activities among States, illustrates the observation of international law. The interdependency of States as well as the ongoing interaction between various sub-States' communities are facts of global life, and suggests that there is observation of international law. There are, however, problems in the enforcement of international law concerning cross-boundary activities, including the enforcement of environmental regulations.

In the cyber age of fast communications, it must be realized that the world's public opinion is increasingly becoming an instrument that serves as sanction of law.

When there is a violation or lack of compliance with the law, States face criticism from the international community through the mass media, requiring a proper reply and justifications. More often than not, States attempt to justify their actions, arguing that they are indeed upholding the law. The lack of legal justification is condemned not only by affected parties but also by the world public opinion. States do not want to face such condemnation, which means that the international public opinion serves as a sanction for a breach of the implementation of international law.

Some governments comply with the world public opinion, and others defy it and therefore become constraints for the enforcement of the law. This means that implementation of the law also depends upon the political ideology of the country's leadership of the time. It is generally assumed that a democratically elected leader would listen to the world public opinion more closely than would a dictator.

At a time when the UN system is under consideration for change, the creation of a Super General Assembly of democratic States can be a futuristic solution to the problems facing international law, empowering the Assembly and guiding appropriate sanctions for the enforcement of international law on a case-by-case basis. This would help not only to enhance the system of legal justice, but also to establish social justice.

## 6. CONCLUDING REMARKS AND SUGGESTIONS

The Security Council has become a non-functional organ of the UN partly because of an absurd legal arrangement of it both as a legislature and a court, and partly because of a tendency towards unilateral intervention taken by a few powerful permanent members of the Council, such as intervention by the US and the UK over Iraq. Because of this particular intervention the legitimacy of the Council has been severely undermined. Since the credibility of the determination of global threats and appropriate responses to threats by the permanent members of the Council is questionable, global security cannot be realized by the enlargement of the Security Council. Instead of enlargement, a Super General Assembly needs to be created and empowered, and the ICJ needs to be strengthened. The separation of powers between the proposed Super General Assembly, the Security Council and the ICJ is vital for the establishment of the rule of law. This means that the transformation of the UN into a third-generational international institution is becoming increasingly important with the emerging notion of trans-boundary States, sharing sovereignty across State boundaries.

It is not that State boundaries are disappearing and national security has become irrelevant, but that important changes are taking place, such as an increase in global social movements and a growth in the recognition of a global common interest of social justice. All of these factors are transforming the classic national interests into one global interest. This development is taking place among global common masses, rather than on an inter-governmental level. Therefore, it is essential to strengthen a bottom-up approach to security in consistency with all kinds of threats (nuclear weapons and terrorism, genocide, famine, poverty, civil wars, and global climate

insecurity created by unsustainable development), and not just with regard to selected threats defined by the powerful States. Global security should not only be left to be defined on the terms and conditions of the powerful permanent members of the Security Council; enforcement actions should not be left to their will. Given the background of problems as presented above, the following suggestions need to be taken into consideration although they may be controversial.

Instead of reforming the UN Security Council, which is unlikely to be reformed, it is appropriate to establish a Super General Assembly of democratic States with the power only to generate an international legal order. The member States of the General Assembly should be obliged to provide a compulsory progressive economic contribution to the UN at a fixed proportion of their yearly defence budget. The voting power and methods of the proposed Super General Assembly can be resolved through negotiation.

The role of the ICJ should be strengthened, especially through recognition of the compulsory jurisdiction and a unilateral right of States and sub-state entities to bring cases to the ICJ. The establishment of regional branches of the ICJ should be considered.

Extend the jurisdiction of the ICJ to entertain public interest litigations. Particularly in cases where there is a denial of justice or where a State judicial system fails to ensure basic human rights, the sub-State communities should be entitled the right to judicial remedy by and through the ICJ.

Enforce the ICJ's decisions, when and if needed, through the use of sanctions and force, with a majority decision of the proposed Super General Assembly, for which the existing Security Council will be obliged to fulfil its primary responsibility through the use of force. This will be a test of the will of the permanent members of the Council as well as demonstrating on whose terms security is perceived and for what purpose force is used.

# THE UNITED NATIONS SECURITY COUNCIL AND THE INTERNATIONAL COURT OF JUSTICE: CO-OPERATION, CO-EXISTENCE, AND CO-INVOLVEMENT

Jaemin Lee\*

The Security Council is more than a political power tool. It is an organ with important responsibilities derived from the Charter. The authority of the Council will not be diminished, but enhanced, if it accepts that its decisions are not above the law. There is no contradiction between the rule of law and international peace and security.<sup>1</sup>

## 1. INTRODUCTION

Through diplomatic fluctuations, expansion of the United Nations Security Council (“Security Council”) is finally being discussed at the various entities of the United Nations as a part of the general effort to reform the world body.<sup>2</sup> In this process, the issue which attracts the keen attention from member states, as is well known, concerns whether to expand the number of permanent members from the current 15 to 24, and, if so, whom to include.<sup>3</sup> It appears that Japan, Germany, India, and Brazil are the most likely candidates for the new Security Council. It is regrettable, however, that this important effort fails to reform the United Nations in general; the Security Council in particular fails to focus on a more fundamental issue that would significantly affect the future of the United Nations and the Security Council: how to create a mechanism to apply international law to the actions of the Security Council in order

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This paper shared the Sata Prize with that of Naazima Kamardeen, which appears in this volume.

<sup>1</sup> Martenczuk, Bernd, “The Security Council, the International Court and judicial review: what lessons from Lockerbie?”, 10 *EJIL* (1999), at 547.

<sup>2</sup> BBC, “Annan urges sweeping U.N. reforms”, *BBC News World Edition* (21 March 2005).

<sup>3</sup> Chambers, Madeline, “Talks on U.N. Security Council expansion to continue”, *Reuters* (25 July 2005).

to enhance “rule of law” within the operation of the Security Council. This crucial issue seems to be missing in the current debates at the United Nations

As the role of the Security Council has dramatically expanded after the demise of the Cold War confrontations,<sup>4</sup> so has international concern for and criticism of the role of the Security Council. Many countries, especially those in the Third World, view the Security Council as an apparatus that implements the strategies and plans of a few permanent member countries in order to uphold their national interests, especially in the case of the United States, rather than to maintain international peace and security. The criticism of the Security Council basically boils down to the claim that the most important entity of the United Nations fails to pay adequate attention to the basic norms of international law; it attempts to address international issues only from the political perspective. The proposition that the United Nations and the Security Council are subject to the norms of international law as provided in the Charter of the United Nations (“Charter”) is not refuted. What is not clear, however, concerns who or which agency has the authority to check and determine whether a particular action of the Security Council is consistent with international law. This “uncertainty” has caused a great deal of confusion and controversy whenever there is a legally dubious action adopted by the Security Council. This paper attempts to address this issue.

This paper concludes that all duly-constituted international courts preserve the inherent authority judicially to review the consistency of an action of the Security Council with the applicable norm of international law. Needless to say, the most important and influential judicial body among various international courts is the International Court of Justice (“ICJ”). Henceforth, judicial review of Security Council actions by the ICJ is the most important topic in addressing this particular issue; the current paper focuses mainly on the judicial review authority of the ICJ. Although various domestic courts of member states may judicially review relevant actions of

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<sup>4</sup> Watson, Geoffrey R., “Constitutionalism, judicial review, and the World Court”, 34 *Harv. Int'l L. J.* (1993), at 1; Most of the sanctions by the Security Council based on its enforcement action under Chapter VII of the U.N. Charter have taken place since the 1990s, since the Security Council was revitalized by the demise of the Cold War. The first state against which the Security Council applied sanctions was Rhodesia in 1965; the next was South Africa in 1977, and all others (including Iraq, Yugoslavia, Somalia, and Libya) were sanctioned in the 1990s after the Cold War. See Kirgis, Frederic L., *International Organizations in Their Legal Setting*, (St. Paul, Minn., West Publishing Co., 1993), at 620. One commentator described the advent of the newly charged Security Council in 1990s as follows. “With a metaphor that, like most metaphors, is not altogether accurate, the UN Security Council could be described as a whale which, for reasons known and unknown, lay quietly somewhere on the high seas for most of its life. Some ten years ago, the whale awoke and turned over once or twice, sending waves to distant shores which, in turn, set in motion the ships and boats and canoes of legal science. They are still nervously cruising while the whale, as it turned out, did not really leave its place.” Fassbender, Bardo, “Quis judicabit?: The Security Council, its powers and its legal control”, 11 *EJIL* (2000), retrieved from the EJIL website at <http://www.ejil.org/journal/vol11/no1/br1.html>, at 1.

the Security Council in accordance with domestic statutes or constitutions – some of such reviews may constitute violations of international law if such review is not consistent with the member states' obligation under relevant international treaties including the Charter – the focus here is only on the issue of judicial review by the ICJ of the actions of the Security Council. Similarly, other international tribunals may also exercise judicial review in the course of their evaluation of a particular case. Yet again, however, this is not the focus of the discussion of this paper.

This paper first discusses the fundamental limitations on the Security Council operation as imposed by the Charter. The paper then enquires into relevant ICJ precedents and Charter provisions to analyze the relationship between the Security Council and the ICJ, and to confirm that the ICJ is indeed allowed judicially to review an action (most notably, the binding resolutions and decisions) of the Security Council. This paper also notes the unique characteristics of the function carried out by the Security Council, and fundamental differences between the municipal judicial system and international judicial system. As such, this paper concludes that a judicial review by the ICJ should be a harmonious, indirect one, which duly takes into account these unique aspects of a judicial review mechanism under the current structure of the United Nations. It then suggests a framework to assist the ICJ in carrying out its judicial review of the Security Council actions in more effective and reasonable manner.

## 2. THE SECURITY COUNCIL IS NOT ABOVE INTERNATIONAL LAW: LIMIT OF THE SECURITY COUNCIL'S ACTIONS

Is the Security Council immune from basic norms of international law? Should the Security Council be free from the restriction of international law because the Council carries out such an important function under the Charter? The answer to these two questions is simple and clear: No. The following discussion proves this.

### 2.1. The *Ultra vires* doctrine

Under international law, every international organization, unlike a state, has a limited international personality with an inherent restriction attached.<sup>5</sup> In other words, international organizations are authorized to operate only to the extent stipulated by a constitutional instrument explicitly, which is a distinctive trait of international organizations as contrasted with those of states. If an organization attempts to carry out an act beyond the authorized boundary in the constitutional document, then it

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<sup>5</sup> See Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, 7<sup>th</sup> Revised edn. (London: Routledge, 1997), at 93.



would constitute an *ultra vires* activity, which is null and void *ab initio*.<sup>6</sup> As a matter of fact, this is an inevitable, logical conclusion because the power of an international organization comes only from the mandates from each member state participating in the international organization; thus, as a corollary, an organization cannot exercise an authority that has not been delegated in the first place. Meanwhile, no state may delegate power that the state does not possess originally. In other words, only the power that lies within the proper boundary of each state can be reassigned to an international organization, and the organization constituted as such, in turn, has international personality only within the delegated boundary. An international organization is created by the “collective accumulation” of individual authorities of individual members; therefore, the power or authority of an international organization could on occasion be greater than that of a member state. Nonetheless, the fundamental principle still remains the same: the organization does not in the first place possess the authority which each member does not possess, because it cannot and has not been delegated.

The United Nations is an international organization established by a treaty: the Charter. Its power as an organization thus stems only from the Charter precisely as delegated by each member state. As regards the Security Council, however important a role it may play, it remains simply a sub-organization of the United Nations and, as a sub-organization, its authority cannot exceed that of the umbrella authority. Therefore, the Security Council is also subject to the same limitations applicable to the United Nations. The Security Council is also bound by the Charter.<sup>7</sup> Thus, it is logically self-evident that there is from the outset a limitation upon the actions of the Security Council.<sup>8</sup>

As such, there is no logical reason not to apply the theory of *ultra vires* in the context of the Security Council operation. It should therefore be remembered, as a principle from which to start, that whenever the Security Council exercises its power, this is valid only when performed within the boundaries of the Charter provisions. Similarly, another inevitable result is that the Security Council does not possess the power which individual states do not originally own. In other words, unlike tempting arguments to the contrary, there is indeed a limitation on the actions of the Security Council under the Charter; consequently, any resolution adopted in violation of the Charter should be considered null and void as an *ultra vires* action, at least theoretically speaking.

It is true, as opponents of this theory strenuously argue, that even if such an adoption be null and void, there is no entity in the current international society that

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<sup>6</sup> See *Certain Expenses of the United Nations*, ICJ Rep.1962, at 167-68 (“Neither purposes nor powers conferred on the U.N. to effectuate the purposes are unlimited.” The *Ultra vires* doctrine could apply “when the organization takes action which does not warrant the assertion that it was appropriate for the fulfillment of one of the purposes.”).

<sup>7</sup> Martenczuk, *loc. cit.*, note 1, at 534.

<sup>8</sup> David, Marcella, “Passport to justice: Internationalizing the political question doctrine for application in the World Court”, 40 *Harv. Int'l L. J.* (1999) at 81, 113; see Sabahi, Babback, *loc. cit.*, n. 57, at 12.

can officially pronounce such nullification of the actions of the Security Council or sanction the Security Council for that matter.<sup>9</sup> However, when a social norm is deemed a law, the lack (or weakness) of an enforcement mechanism or of declaratory entities does not necessarily stimulate a conclusion that the norm is not law at all. Its coercive nature is indeed an important factor of law, yet is not always dispositive. As such, the fact that no entity in the international community can issue an enforceable judgment *vis-à-vis* the Security Council does not lead to the conclusion that the body is immune from the international law in general and the *ultra vires* doctrine in particular.

## 2.2. Charter provisions

This principle of “limited authority” is also contained in the Charter provisions. According to the Charter, one of the purposes and principles of the United Nations is to settle international disputes, and to maintain international peace and security “*in accordance with international law*” (emphasis added).<sup>10</sup> Articles 1 and 2 of the Charter also make it clear that all actions of the United Nations must be in conformity with various international law principles. Therefore, actions of a United Nations body – including the Security Council – must be in conformity with international law. Actions of the United Nations bodies violating international legal norms thus automatically constitute *ultra vires* activities, as far as the United Nations as an international organization is concerned, as well as constituting a violation of applicable substantive international law. Again, theoretically speaking, such international law-violating *ultra vires* activities of the United Nations bodies, including the Security Council, are to be viewed as null and void *ab initio*, as explained above.<sup>11</sup>

Despite this obvious fact, there are commentators who believe that the Security Council is authorized to carry out its duty without constraint from other international law principles, mainly based on Article 103 of the Charter, which provides that “the obligation under the Charter overrides other obligations from other agreements.”<sup>12</sup>

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<sup>9</sup> Judge Schwebel mentioned in his dissenting opinion that “the Court is particularly without power to overrule or undercut decisions of the Security Council determining whether there is a threat to the peace and what measures shall be taken to deal with the threat.” See Judge Schwebel’s Dissenting Opinion in the Judgment on Preliminary Objections in the *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom, Libyan Arab Jamahiriya v. United States of America, 27 February 1998) (hereinafter, the *Pan Am 103* case), found at [www.icj.org](http://www.icj.org).

<sup>10</sup> See Article 1 of the Charter.

<sup>11</sup> Fassbender, *loc. cit.*, n. 4, at 4 (“The decisions of the Security Council are presumed to be legal. If this presumption is rebutted, an illegal decision is void,” citing Michael Fraas’ statement.).

<sup>12</sup> See Judge Schwebel’s dissenting opinion in the Judgment on Preliminary Objections, *loc. cit.*, n. 9. (“Security Council resolutions supervene any rights of Libya under the Montreal Convention, and thus render reliance upon it without object and moot.”).

They then attempt to combine Article 103 with Article 25 which, in turn, provides the Security Council with the power to issue a “binding” decision. The outcome of this combination makes every Security Council resolution superior to obligations arising from any other treaty or agreement, they argue.<sup>13</sup> Stated differently, the Security Council is entitled to issue a resolution that is in conflict with an existing international treaty, and that resolution ‘trumps’ the contradictory treaty. A simple reading of Articles 103 and 25 does seem to lead to such a conclusion.

The more proper analysis, however, requires a more in-depth examination of the issue as opposed merely to a technical reading of these provisions in the Charter. Even if Article 103 of the Charter recognizes the superiority of the Charter obligation over other “treaty” obligations, that provision, just as any other provision in the Charter, should always be interpreted in harmony with the basic purposes and principles of the Charter as defined in Articles 1 and 2. The spirit of Article 103 certainly is not that “the Security Council can carry out its action even through violation of international law” thus invalidating the basic principles of the Charter as provided in Articles 1 and 2.

More significantly than any other factor, the initial hurdle to be cleared in recognizing the superiority of a Security Council action in the context of a combination scheme of Articles 25-103 is that the action at issue (the resolution) must be a valid one under the Charter, both procedurally and substantively. In other words, barring any procedural defect,<sup>14</sup> only the actions of the Security Council that have been performed in conformity with the basic principles of international law (*i.e.*, *in accordance with international law*, to borrow the wording from the Charter) are given binding authority under Article 25, and only then are such resolutions eligible for the superiority consideration under Article 103.

In this regard, there is an important issue to note. Given the fact that Article 103 is introduced to “override” other treaties that impose contradictory obligations on member states, the term “international law” should be interpreted to mean the set of international law except the treaty to be superseded by a particular Security Council action (a resolution). If the term “international law” also includes the international law as created by the contradictory treaty, the Security Council would never issue a resolution that contravenes any other international treaty. Certainly, that is not the purpose of the Charter, either. The Security Council’s resolution should be in conformity with the various principles of international law, except with those specific provisions of a treaty to be overridden by the resolution.

Thus, a proper way of interpreting those provisions would be that Article 103 is operable as a rule of hierarchy *only when* there is a conflict between a “valid” treaty, on the one hand, and a “valid” Security Council resolution, on the other. It is simply untenable to interpret Article 103 in a way that gives the Security Council the virtually limitless authority to ignore a valid existing treaty even if such an action undermines the basic principles of the Charter. The ordinary meaning of Articles

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<sup>13</sup> See *ibid.*

<sup>14</sup> For example, resolutions which have been adopted without concurrent affirmative votes from the five Permanent Members would fall into this category. See Article 27 of the Charter.

25 and 103 may, technically, lead to such a conclusion, yet when ordinary meaning clearly goes against the fundamental principles and underlying purposes of the Charter, it simply cannot stand.

Article 103 does not mean that the Security Council may execute whatever it wants regardless of international treaties and agreements;<sup>15</sup> it was not designed to provide the Security Council with a royal immunity. Rather, it should be read to mean that only those Security Council actions that have been adopted through valid procedures in furtherance of the Charter objectives may be given such status. Article 103 should not be invoked as a ground to nullify valid existing international treaties simply because this would hinder the achievement of a particular goal of the Security Council.

Other aspects of Article 103 further support this conclusion. The obligation under Article 103 is described as the obligation of “states,” not as the obligation of any United Nations organ. It could therefore be argued that United Nations bodies such as the Security Council are not necessarily bound by the Article;<sup>16</sup> this in turn means that, unlike the case with member states, the Article does not require the Security Council and other United Nations bodies to afford the superior status of the Charter over a treaty. This would support the proposition that the Security Council cannot hide behind Article 103 in justifying its violation of existing international law.

At the same time, Article 103 mentions only “treaty.” Thus, it could be argued that it does not grant superiority over customary international law. When the Charter mentions international law in Article 1, it does not expressly or implicitly set aside a customary portion (or any other portion, for that matter) of it.<sup>17</sup> Therefore, all branches of international law are applicable to the member states and to United Nations organs. Accordingly, states and the United Nations as an international organization are still bound by customary law (that is, important principles of international law, such as the equality of sovereign rights) if there exists one applicable to the specific situation posed, irrespective of Article 103.<sup>18</sup> All of these points

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<sup>15</sup> See Judge Schwebel’s dissenting opinion in the Judgment on Preliminary Objections, n. 9. (“The terms and drafting history of the Charter demonstrate that the Security Council is subject to the rule of law, and at the same time is empowered to derogate from international law if the maintenance of international peace requires.”).

<sup>16</sup> Gardam, Judith G., “Legal restraints on Security Council military action”, 17 *Mich. J. Int’l L.* (1996), at 285, 304.

<sup>17</sup> For example, the Articles of Agreement of the World Bank have implicitly made clear that some provisions are applicable despite existing contradictory customary international law. For example, the World Bank can order a variety of measures that may interfere with the national sovereignty of a recipient state as a *quid pro quo* of a loan.

<sup>18</sup> Professor Franck says that if Libya had accepted a compulsory jurisdiction under Article 36 (2) of the Charter, and had brought a claim against Great Britain which accepted the compulsory jurisdiction, unlike the United States, then it could have resorted to general principles of international law, such as customary law, to demonstrate the violation of its sovereign rights, without having to limit its claim to the interpretation of the Montreal Convention. If that were the case, he signals, Libya would have stronger case here. Franck, Thomas, “The ‘Powers of Appreciation’: Who is the ultimate guardian of U.N. legality?”, 86 *AJIL* (1992), at 519, 522.

collectively stand for the proposition that Articles 103 and 25 combined do not provide the Security Council with the full immunity to violate international law.

### 2.3. Positions of the ICJ

Actual practice of the ICJ will shed more light on this issue. The ICJ has indeed since 1945 exercised judicial review over the actions of the United Nations bodies. As these were done in an indirect, roundabout manner, it may be called a *de facto* judicial review.

The first example came in the *Conditions of Admission* case in 1948 when the General Assembly requested an advisory opinion regarding the validity of imposing additional admission conditions not stipulated in Article 4 of the Charter.<sup>19</sup> Rejecting the consideration of other elements than those provided in Article 4, the ICJ has recognized that there are legal limits to the powers of the respective United Nations organs.<sup>20</sup> The ICJ reasoned that “the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.”<sup>21</sup> To ascertain whether an organ has the freedom of choice over its decisions, reference must be made to the terms of its constitution.<sup>22</sup> This broad language applies not only to the United Nations admission issue, but also to virtually any other act by a political organ that arguably runs counter to express conditions imposed by relevant constituent instruments. Viewed from that perspective, the Security Council, although a highly political organ, is still subject to the provisions of the Charter, and its actions are valid only when they are done pursuant to the Charter.<sup>23</sup>

In 1962, the ICJ issued another advisory opinion pursuant to the General Assembly’s request concerning the burden sharing of the peace-keeping operations in the Congo and Middle East.<sup>24</sup> The question was whether those peace-keeping-related expenses were the “expenses of the Organizations” as provided in Article 17 (2) of the Charter.<sup>25</sup> In ruling that the expenses are indeed covered by Article 17 (2), the ICJ provided a meaningful indication recognizing the judicial review authority of the ICJ.<sup>26</sup> Ignoring the General Assembly’s blatant attempt to avoid the ICJ’s review

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<sup>19</sup> See *Conditions of Admission of a State to Membership in the United Nations*, Advisory Opinion (1948) *ICJ Rep. 1948*, at 57.

<sup>20</sup> See *ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Certain Expenses of the United Nations*, Advisory Opinion (1962), *ICJ Rep. 1962*, at 151.

<sup>25</sup> See *ibid.*

<sup>26</sup> *Ibid.*

in its request for advisory opinion,<sup>27</sup> the ICJ held that “it must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion,” despite the fact that the General Assembly’s intention was clearly otherwise.<sup>28</sup> In addition, the ICJ further reasoned that “when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires*.”<sup>29</sup> In other words, such a non-*ultra vires* presumption may be overcome when a disputed action is not “appropriate for the fulfilment of one of the stated purposes of the United Nations,” ultimately making the action *ultra vires*. One of the stated purposes of the United Nations is to preserve and enhance international law. If a Security Council action undermines relevant international law, such an action is not to preserve and enhance international law, hence is not appropriate to the fulfilment of one of the stated purposes of the United Nations. The Security Council action would therefore be an *ultra vires* activity, and the ICJ would refuse to accord it legal validity, according to the rationale in the *Certain Expenses* case.

This position was also maintained in the *Namibia* case in 1971.<sup>30</sup> South Africa had been governing southwest Africa (now known as Namibia) under the trusteeship authorization since the era of the League of Nations. South Africa had applied its infamous apartheid policy in that region despite international criticism, which prompted the General Assembly and the Security Council to adopt respective resolutions to terminate the trusteeship.<sup>31</sup> South Africa then challenged the resolutions as *ultra vires* action, and the Security Council referred the matter to the ICJ for an advisory opinion. In that case, the ICJ did review the validity of the resolutions and concluded that they were constituted within the boundary of the Charter provisions.<sup>32</sup>

Since it was the Security Council itself that asked for advisory opinions in these cases, one may well argue that the Security Council, not the ICJ, has an inherent right to engage in a so-called “practical” judicial review of its own actions, using the ICJ as a judicial advisor. To some extent, such an argument may sound plausible, but it fails to provide an accurate characterization of the situations involved. This is because the Security Council has here merely the power to *request* the ICJ to provide an opinion: not to make a decision itself. The *review* is done by the ICJ,

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<sup>27</sup> France proposed to formulate the request for an advisory opinion in a more direct way, which was rejected by the General Assembly. That is, the rejected French amendment asked for a two-step decision whether the General Assembly and the Council had acted *ultra vires* in authorizing the expenditure, and then asked for an opinion whether such expenditure lay within the “expenses of the Organization.”

<sup>28</sup> See the *Certain Expenses* case, n. 24, at 167-68.

<sup>29</sup> See *ibid*.

<sup>30</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276*, Advisory Opinion (1971), *ICJ Rep.* 1971, at 16.

<sup>31</sup> See Gross, L., “The South West Africa case: What happened ?”, 45 *Foreign Affairs* (1966), at 36, reprinted in Kirgis, *op. cit.*, n. 4, at 485-89; See also U.N. *GAOR*, U.N. Doc. GA/ RES/ 2145 (27 October 1966) and U.N. *SCOR*, U.N. Doc. SC/RES/ 276 (30 January 1970).

<sup>32</sup> See the *Namibia* case, n. 30, at 16.

and it is the ICJ's judicial review as such. If there exists a fundamental reason prohibiting the Security Council from judicially reviewing a Security Council action, a request from the Security Council should not and could not cure the defect: the ICJ is performing a step it should not take. On the contrary: the fact that the Charter explicitly allows the ICJ to provide advisory opinions at the request of the Security Council indicates that at least the Charter does not impose a fundamental hindrance to the ICJ's judicial review. Furthermore, this decision also indicates that as long as a case is legitimately brought before the ICJ, the United Nations judicial organ can legitimately review an action by the Security Council which is implicated in the case. In this instance, the case was appropriately brought before the ICJ through the request for an advisory opinion by the Security Council.

In furtherance of that logic, the ICJ made another significant stride in the *Pan Am 103* case. There, the ICJ hinted that, if necessary, it could judicially review a Security Council resolution which violates the Charter or treaty obligations.<sup>33</sup> This is the first contentious case in which the ICJ signalled that it has the power judicially to review a Security Council action. Given the importance of the case, a brief explanation of the background to the case seems helpful.

Pan Am flight 103 flying from Frankfurt to New York *via* London was blown out of the sky over Lockerbie in Scotland on 21 December 1998, killing all 216 people on board, most of them American soldiers returning home for Christmas, and eleven on the ground.<sup>34</sup> Thanks to a three-year-long investigation by American and British terrorist specialists, sufficient evidence was collected to show that the Libyan Intelligence Service was apparently behind the explosion.<sup>35</sup> Consequently, the United States and the United Kingdom demanded the extradition of the two Libyan agents involved for trial in the US or the UK.<sup>36</sup> The request was, however, denied by the Libyan government on the grounds that the request violated relevant international law.<sup>37</sup> The two countries then turned to the Security Council, of which both are permanent members, asking for its action since the dispute constituted a threat to international peace and security.<sup>38</sup>

The Security Council then, under its Chapter VII authority, adopted a series of resolutions: Resolutions 731 (21 January 1992),<sup>39</sup> 748 (31 March 1992),<sup>40</sup> and 883 (11 November 1993),<sup>41</sup> ordering Libya to turn over the requested agents to the US or the UK governments, and imposing severe economic sanctions when Tripoli refused

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<sup>33</sup> See the Judgment on Preliminary Objection of the *Pan Am 103* case, n. 9.

<sup>34</sup> See generally, Martenczuk, *loc.cit.*, n. 1, at 520-22.

<sup>35</sup> See *ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> U.N. SCOR, 3033d mtg., U.N. Doc. S/RES/731 (1992).

<sup>40</sup> U.N. SCOR, 3036d mtg., U.N. Doc. S/RES/748 (1992).

<sup>41</sup> U.N. SCOR, 3312<sup>th</sup> mtg., U.N. Doc. S/RES/883 (1993).

to obey.<sup>42</sup> In the meantime, the Libyan government resorted to the ICJ for the settlement of the case,<sup>43</sup> citing the jurisdictional provision of the 1971 *Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (“*Montreal Convention*”) that arguably confers jurisdiction of the dispute on the ICJ.<sup>44</sup> The Convention clearly provides that terrorist attacks against a civilian aircraft, such as the Lockerbie incident, fall under the jurisdiction of the ICJ,<sup>45</sup> and all three countries were indeed parties to the Convention.<sup>46</sup> In addition, there were other provisions that arguably support the position held by Libya.<sup>47</sup> The gist of Libya’s claim was to enjoin the US and the UK from pressing their claims for the extradition of two Libyan nationals through the enforcement of the Security Council action, arguing that it has the legal right not to extradite them under the *Montreal Convention*<sup>48</sup> and as well under customary law.<sup>49</sup>

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<sup>42</sup> The extradition demand is extraordinary in and of itself because under customary international law, a state has no obligation to extradite its own nationals in the absence of treaty obligations to that effect. Here, the only treaty obligation for these three states concerned is the *Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (23 September 1971) (hereinafter the “*Montreal Convention*”) which aims at punishing acts of terrorism against a civilian aircraft. See Articles 1, 7, 8 of the *Montreal Convention*.

<sup>43</sup> Libya filed two separate, but virtually identical, applications against the United States and the United Kingdom respectively on 3 March 1992. See n. 9; see also History of the Proceeding contained in *Press Communiqué 2000/27* (13 September 2000), retrieved from the ICJ website at [www.icj.org](http://www.icj.org).

<sup>44</sup> Article 14 (1) of the *Montreal Convention* provides that “[a]ny dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of request for arbitration, any one of those Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.”

<sup>45</sup> See Articles 1 and 14 (1) of the *Montreal Convention*.

<sup>46</sup> The United States and the United Kingdom also acknowledge that Libya has the right and can claim it under the *Montreal Convention*. However, they argue that the right is superseded by the Security Council resolutions. See the Judgment on Preliminary Objections of the *Pan Am 103* case, n. 9, at paras. 37-38.

<sup>47</sup> The provisions invoked by Libya in its applications are Articles 1, 5 (2), 5 (3), 7, 8 (2), 11 (1), and 14 (1) of the *Montreal Convention*.

<sup>48</sup> Libya’s argument runs that: Article 7 of the Convention declares the principle of “*aut dedere aut judicare*,” which gives the custodial state of terrorist suspects the choice between extradition to other requesting states with jurisdiction, or indicting them itself. Furthermore, even if an extradition obligation arises (say, by not prosecuting the criminals), Libya’s obligation under the Convention is subject to its domestic law under Article 8 (2) of the Convention that provides “Extradition is made subject to the laws of the State from which extradition is requested.” Libyan law, furthermore, as do those of many other states, proscribes the extradition of its own nationals. Accordingly, Libya arrested the two named suspects and asked, in preparation for the prosecution of the crime, the American and British authorities to turn over to them the relevant information, as is provided in the *Montreal Convention*.



On the other hand, based upon the vast evidence accumulated by the joint American-British investigation team linking the bombing to the Libyan Intelligence Service,<sup>50</sup> the US and the UK concluded that the bombing was perpetrated by two agents of the Libyan Intelligence Service in retaliation for the 1986 US air raid over Tripoli and Benghazi.<sup>51</sup> Despite such cold facts, it is also true that Libya has accumulated significant support in the international community and among international scholars for its assertion that the Security Council's backing of the American and British demands is inconsistent with applicable international law and therefore infringes on its sovereign rights.<sup>52</sup> To outsiders, there was obviously an unambiguous appearance of a biased decision by the Security Council.<sup>53</sup>

The principal argument of the US and the UK is that even if Libya has the proper right to refuse the extradition of its nationals under the Montreal Convention, the treaty-based right has been negated by the Security Council resolutions under Article 103 of the Charter.<sup>54</sup> They further argue that Article 25 requires Libya as a member state of the United Nations to "accept and carry out the decisions of the Security Council in accordance with the present Charter,"

Libya first asked for provisional measures, mentioning irreparable harm imminent from the pending Security Council resolutions; these were rejected by the ICJ.<sup>55</sup> In the merit phase, however, while rejecting the long, persistent argument of the

<sup>49</sup> Even if there is a sign of a changing trend, traditionally, civil law states do not usually extradite their own nationals. This principle is usually included in their national law and extradition treaties. Gilbert, Geoff, *Aspects of Extradition Law* (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1991), at 95-100.

<sup>50</sup> There was irrefutably concrete evidence to ascertain Libya's involvement in the bombing. For example, the bomb's Toshiba timing device was one of twenty delivered to a Libyan official. Zubel, Eric, "The Lockerbie controversy: Tension between the International Court of Justice and the Security Council", 5 *Ann. Surv. Int'l & Comp. L.* (1999) at 261.

<sup>51</sup> See "France-United Kingdom-United States: Statements calling on Libya to cooperate in investigations of aerial incidents at Lockerbie and Niger, Announcement by the Lord Advocate of Scotland on November 14, 1991", 31 *ILM* (1992) at 718.

<sup>52</sup> See e.g., David, *loc. cit.*, n. 8, at 88; Franck, *loc. cit.* n. 18, at 520; Teson, Ferrando, "Collective Humanitarian Intervention", 17 *Mich. J. Int'l L.* (1996), at 323; Gowlland-Debbas, Vera, "The Relationship between the International Court of Justice and the Security Council in light of the Lockerbie Case", 88 *AJIL* (1994), at 643.

<sup>53</sup> This case shows the arguably strong appearance of the impartiality of Security Council's resolutions: two permanent members are parties to the dispute and one (France) has a strong interest in the outcome. David, *ibid.*, at 117-18. France has a strong interest in the outcome of the case, because the French government also indicted six Libyan Intelligence Agents in its domestic courts *in absentia* for the bombing of UTA flight 772 over Niger that killed 171 people.

<sup>54</sup> See the remarks of David Andrews (representing the US) at the Oral Hearing held on 14 October 1997 at the Peace Palace, The Hague, *Verbatim Record of the Hearing*, para. 1.22; John Crook's argument for more details contained in the same document, both retrieved from the ICJ website retrieved at [www.icj.org](http://www.icj.org).

<sup>55</sup> *Order Denying Provisional Measures, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United States), *ICJ Rep.* 1992, at 114.

Washington and London governments that the ICJ had no jurisdiction over a matter in which the Security Council was exercising its power under the Charter,<sup>56</sup> the ICJ decided in favour of Libya in 1998 by recognizing its jurisdiction over the case.<sup>57</sup>

Although the ICJ managed to find technical loopholes allowing it to avoid a head-on collision with the Security Council<sup>58</sup> and the case was subsequently settled among the three states in 2003 as a result of the diplomatic negotiations and ensuing thaw among the parties, the *Pan Am 103* case presented a striking institutional challenge to the current United Nations constitutional system.<sup>59</sup> Despite heated controversy,<sup>60</sup> this case offered clear indication that the ICJ does possess the authority to review judicially a particular action of the Security Council and in the future the ICJ may exercise its judicial power over the same issue as that being addressed by the Security Council.

In the *Israeli Wall Case* in 2004, the ICJ provided the same logic in its discussion of the jurisdiction of the ICJ and the political nature of the Security Council. In the case, the ICJ held that it could not accept the view that it had no jurisdiction over the Israeli-Palestinian dispute over Israel's construction of a separation wall because

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<sup>56</sup> Some have argued that the ICJ's failure to avoid a direct conflict with the Security Council is reckless and misguided, as it might seriously prejudice the effectiveness of the Council which will, in turn, lead to the eventual disintegration of the UN. See David, *loc. cit.*, n 8, at 91.

<sup>57</sup> This is the Judgment on the Preliminary Objections filed by the US and UK, *loc. cit.*, note 9. For a brief history of the case: after its application for provisional measures was rejected, Libya filed Memorials on 19 June 1992; the US/UK filed Counter-Memorials on 31 March 1999; Libya filed its Replies on 29 June 2000, and Rejoinders from the US/UK were due on 3 August 2001. The case then remained as pending for about three years until it was finally dismissed, as the three parties settled it through diplomatic negotiations in 2003. See History of the Proceedings, *loc. cit.*, n. 43, at 2; see also the *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v. U.K.), *ICJ Rep. 2003*, ordering the case to be removed from the docket of the Court. One commentator opined that this withdrawal forced the Court "to lose the opportunity to hear the merits of and pronounce itself upon one of the most controversial issues that it had encountered since its inception." Sabahi, Babback, "The ICJ's authority to invalidate the Security Council's decisions under Chapter VII: Legal romanticism or the Rule of Law", 17 *N.Y. Int'l L. Rev.* (Summer 2004), at 1.

<sup>58</sup> The ICJ tactfully avoided the question of the validity of the Security Council's resolution by simply noting that Libya's application to the ICJ pre-dated the adoption of the Council resolution. See the Judgment on Preliminary Objections, *loc. cit.*, n. 9, at para. 38. However, Judge Sir Robert Jennings in his dissenting opinion wondered whether the ICJ had sufficiently weighed the gravity of dealings with a question involving binding and peace-keeping decisions of the Security Council in so technical, not to say legalistic, a fashion. See his dissenting opinion in the Judgment on Preliminary Objections. One commentator also characterized the Preliminary Objection ruling of the ICJ as "extremely cautious." See Martenczuk, *loc. cit.*, n. 1, at 525.

<sup>59</sup> David, *loc. cit.*, n. 8, at 82; Andrews, *loc. cit.*, n. 54, at para.1.3; Franck, *loc. cit.*, n. 18, at 520 ("The similarities of the Libyan case to *Marbury* extend beyond judicial tactics. Both raise the specter of political actors exercising powers *mala fide* and *ultra vires* and what courts are to do about them.").

<sup>60</sup> The *Lockerbie* cases have produced a lively debate on the limits of the Security Council powers, and on the question of how these limits could be enforced. Martenczuk, *loc. cit.*, n. 1, at 518.

of the “political” character of the questions posed.<sup>61</sup> The ICJ also reasoned that the fact that “a legal question also has a political aspect does not suffice to deprive it of its character as a legal question and to deprive the Court of a competence expressly conferred on it by its Statute.”<sup>62</sup> In short, the ICJ indicated that as long as jurisdictional basis is appropriately ascertained, it should and will exercise its jurisdiction over a highly political question, including over the actions of the Security Council.

These ICJ precedents collectively support the conclusion that even under the current Charter scheme the ICJ is empowered to review an action of the Security Council. As long as requirements for the ICJ’s intervention are met, such as a request by an eligible United Nations body for an advisory opinion,<sup>63</sup> or the existence of jurisdiction in a contentious case, then the current Charter does not comprise an obstacle to the ICJ’s judicial review.

### 3. MORE IN-DEPTH EXAMINATION OF THE CHARTER PROVISIONS: THE ICJ’S AUTHORITY FOR A JUDICIAL REVIEW AS A “PRINCIPAL AND PRINCIPLED JUDICIAL ORGAN”

Despite the lack of explicit wording, there are many relevant provisions scattered throughout the Charter which, when combined, unambiguously support the judicial review authority of the ICJ. First of all, it should be noted that the United Nations system itself does not attempt to give the Security Council an “exclusive” power even in matters of maintaining international peace and security. Under the United Nations scheme, the Security Council has only the “primary” responsibility, not the “exclusive” responsibility, for the maintenance of international peace and security.<sup>64</sup> In other words, the Charter does not preclude other principal organs of the United Nations from deliberating issues of international peace and security: the other bodies also possess their own respective, even though secondary, responsibilities in maintaining international peace and security.

A good example in this regard appears to be the “Uniting for Peace” Resolution in 1950.<sup>65</sup> When it was proved that the Security Council was sometimes unable to fulfil its duty under the Charter, as was obviously shown in its dealing with the Korean War in June 1950, the General Assembly passed a resolution in which the General Assembly was authorized to take necessary actions in the Security Council’s

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<sup>61</sup> See Summary of the Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory* (9 July 2004) (“Israeli Wall Case”), retrieved from the ICJ website at [www.icj.org](http://www.icj.org), at 4.

<sup>62</sup> *Ibid.*

<sup>63</sup> A request for an advisory opinion should also be made by an eligible United Nations organ for an issue falling under the jurisdiction of the body. Otherwise, it would be subject to an *ultra vires* challenge by other states and bodies. See Summary of the Advisory Opinion in *Israeli Wall Case*, *loc. cit.*, n. 61, at 2.

<sup>64</sup> See Article 24 of the Charter.

<sup>65</sup> U.N. GAOR, U.N. Doc. GA/Res/ 377 (V), (3 Nov. 1950).

stead to maintain international peace and security.<sup>66</sup> When its legality was later challenged in the *Certain Expenses* case, the ICJ ruled that the General Assembly's exercise of *de facto* enforcement action did not violate the Charter; this was achieved through holding that the Security Council's responsibility is only a primary, not and exclusive, one; the peace-keeping operation performed under this resolution was found a valid exercise of the General Assembly's authority under the Charter.<sup>67</sup> In other words, even if the issue was unambiguously about maintaining international peace and security, the General Assembly could nonetheless deal with the issue if such an exercise falls within the boundaries of the General Assembly's independent authority. Viewed from this standpoint, an argument that all issues having an impact on international peace and security are exclusively reserved for the Security Council's deliberation has no logical ground in the Charter.

Secondly, it follows as a corollary that, as the principal (and principled) judicial organ of the United Nations,<sup>68</sup> the ICJ should have a legitimate power, by *necessary implication*, to review "any" legal issues arising from the actions of the United Nations bodies,<sup>69</sup> even if that review inevitably touches upon issues of international peace and security.<sup>70</sup> In the world of globalization in the twenty-first century, it is hard to imagine a topic totally detached from the issue of international peace and security, since all aspects interwoven with all others in one way or another. Moreover, there is no specific substantive restriction on the issues to be dealt with by the ICJ.<sup>71</sup> On the contrary: Article 96 provides that "the Security Council may request the ICJ to give an advisory opinion on *any* legal question"<sup>72</sup> (emphasis added).

Also, Article 12 appears to provide another strong support for the notion that there is no restriction on the substantive issues dealt with by the ICJ. Article 12 offers the clear intent of those who framed the Charter that the General Assembly should refrain from discussing an issue when the same topic is being discussed by the

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<sup>66</sup> See *ibid.*

<sup>67</sup> *Ibid.* This position was also confirmed by the ICJ in the Preliminary Objection phase of *Military and Paramilitary Activities In and Around Nicaragua* ("Nicaragua Case"), *ICJ Rep. 1984*, at paras. 91-98.

<sup>68</sup> See Article 92 of the Charter.

<sup>69</sup> In fact, there are no matters that are, by nature, excluded from judicial review *a priori*. Fassbender, *loc.cit.*, n. 4, at 4.

<sup>70</sup> Under international law, the Organization 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. See *Reparation for Injuries Suffered in the Services of the United Nations*. Advisory Opinion (1949), *ICJ Rep. 1949*, at 174.

<sup>71</sup> Neither the UN Charter nor the ICJ Statute provides for any restrictions on the freedom of the ICJ to act. Simma, Bruno (ed.), *The Charter of the United Nations: A Commentary* (New York, Oxford University Press, 1994), at 403.

<sup>72</sup> See Article 96 of the Charter. In the *Nicaragua Case*, the ICJ reasoned that the status as principal judicial organ allows it to deal with "any legal questions." It thus stated: "It is for the Court, the principal judicial organ of the U.N., to resolve any legal questions that may be in issue between parties to the dispute." See the *Nicaragua Case*, *ICJ Rep. 1984*, at paras. 433-34. The merit of the case was determined in 1986.

Security Council. If the framers wanted the same result with respect to the ICJ, they could easily have included the same or similar language in Chapter XIV of the Charter because they obviously knew how to deal with such an overlapping jurisdiction situation. An “inference” to apply Article 12 to the ICJ is not appropriate, either, because a sound argument could be made that there is a clear distinction between the General Assembly and the ICJ: the former is a political organ, which basically shares the same character with the Security Council, whereas the latter is a judicial organ, completely different in nature and applying different standards in resolving a dispute. A functional division of power between two political organizations, which is common, cannot be presented, as the only ground on which to curtail the function of a judicial organ.

Thirdly, the functions of the Security Council and the ICJ concerning the settlement of disputes are exercised independently of one another.<sup>73</sup> They apply different standards: the ICJ has to decide exclusively on the basis of international law under Article 38 of the ICJ Statute,<sup>74</sup> whereas the Security Council has to decide primarily according to political criteria.<sup>75</sup> Treating them as performing fundamentally the same function would make of the term “principal judicial organ” merely empty words. There is no point in having a “principal judicial organ” if that organ is deprived of the power to exercise its judicial power (at least to provide its judicial opinion) over one branch of the organization, the function of which is the key element of the organization’s success.<sup>76</sup> Furthermore, if the ICJ were compelled to give legal effect to *ultra vires* actions of the Security Council, it would lead to paradoxical results, given the other provisions of the Charter.

Lastly, there are many other less visible yet relevant Articles scattered within the Charter that provide helpful guidance. Article 36 (3) provides that in making recommendations, the Security Council “should also take into consideration that legal disputes should as a general matter be referred by the parties to the International Court of Justice.”<sup>77</sup> Article 92 says that the ICJ Statute “forms an integral part of the present Charter”, and Article 93 further mentions that all members of the United Nations become *ipso facto* parties to the Statute.<sup>78</sup> The judges of the ICJ are elected by joint votes in the General Assembly and the Security Council,<sup>79</sup> and the expenses

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<sup>73</sup> Simma, *op. cit.*, n. 71, at 990.

<sup>74</sup> See Article 38 of the ICJ Statute.

<sup>75</sup> Simma, *op. cit.*, n. 71, at 403.

<sup>76</sup> Judge Weeramantry pointed out in his dissenting opinion in the ICJ’s decision to reject Libya’s application for provisional measures: “[T]he Court must recognize its role as the principal judicial organ of the United Nations charged with the task, *inter alia*, of deciding in accordance with international law such disputes as are submitted to it. The Court acts as a guardian of the Charter and of international law in international arena, and there is no higher body charged with judicial functions and with the determination of questions of interpretation and application of international law.”

<sup>77</sup> See Article 36 (3) of the Charter.

<sup>78</sup> See Articles 92 and 93 of the Charter.

<sup>79</sup> See Article 4 of the ICJ Statute.

of the ICJ are borne by the UN.<sup>80</sup> In addition, the Security Council should endeavour to ensure that states have recourse to the ICJ to settle their legal disputes.<sup>81</sup> Article 94 further expects the Security Council to assist the prevailing party in seeking its relief as granted by the ICJ when the losing party fails to comply with the judgment of the ICJ.<sup>82</sup> In a nutshell, these Articles all support the argument that the ICJ was envisioned as having and is entitled to have at least some sort of judicial review power over the acts of the other political bodies of the United Nations.

In any event, if the framers did want the ICJ to be powerless for the judicial review purpose despite these provisions, they could probably have inserted unambiguous language to that effect in the Charter. When ambiguous, as here, the question should be resolved by finding “necessary implication” from construing all of the relevant provisions with the purposes and principles of the organization in mind.

As has been clearly indicated by many examples in both domestic and international governmental structures, there is no inherent obstacle to the exercising by a political organ and a judicial organ of dual jurisdictions over the same issue as long as one organ does not undermine the integrity of the other. In other words, the question should be where the line should be drawn between the authorities of the two organs such that the balance of power between them is maintained. The exact location of the line may differ from organization to organization depending upon the nature of the organization involved, but there must be a line if the organization were to claim its existence as being based on both the law and on legal principles.

Such being the case, when a case is legitimately brought before the ICJ – that is, when a proper jurisdiction of the ICJ as provided in the Charter and the Statute is ascertained – it is the *duty* of the ICJ to review and settle legal issues when there is no other ground on which to decline to exercise the jurisdiction. For example, in a contentious case, there should be mutual consent to the ICJ’s jurisdiction among the parties;<sup>83</sup> for an advisory opinion, the request from the General Assembly or the Security Council to that effect should first be obtained.<sup>84</sup> When that condition is fulfilled, there is no explicit prohibition in the Charter that bars the ICJ from reviewing the Security Council’s resolution in the course of exercising its jurisdiction in that particular case.

On the other hand, the lack of coercive power on the part of the ICJ to force the Security Council to follow the ICJ’s decision does not necessarily support the conclusion that the Charter framers failed to consider a scheme of judicial review. Even if an advisory opinion were not binding, and a decision in a contentious case is binding only upon the parties in that particular case,<sup>85</sup> it can nonetheless serve as guidance in the future action of the United Nations organs, including those of the

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<sup>80</sup> See Article 33 of the ICJ Statute.

<sup>81</sup> See Article 36 (3) of the Charter.

<sup>82</sup> See Article 94 of the Charter.

<sup>83</sup> See Article 36 of the ICJ Statute.

<sup>84</sup> See Article 65 of the ICJ Statute.

<sup>85</sup> See Article 59 of the ICJ Statute.

Security Council and member states. The mere implication of illegality or abnormality would have as strong an impact as explicit judgment in nullifying the action at issue.<sup>86</sup> Given that which has been experienced and witnessed over the decades since the creation of the United Nations, such non-binding opinions of the ICJ have produced almost the same impact on the behaviours of the United Nations and its members. This has been made possible through the so-called “mobilization of shame” effect<sup>87</sup> or by establishing new customary law. Needless to say, having a coercive power is an essential element in the administration of law, be it municipal or international; it is, however, not an indispensable element in recognizing and developing law, especially in the international law system where, unfortunately, no central enforcement agency exists as of now.<sup>88</sup>

#### 4. A HARMONIOUS JUDICIAL REVIEW: A JUDICIAL REVIEW WITHOUT DIRECT COLLISION

When it comes to the judicial review of a Security Council action by the ICJ, many observers would be concerned about the possible judicial supremacy of the ICJ, where the judges’ opinion overthrows a Security Council resolution, as has been seen in municipal settings. The judicial review, however, does not necessarily have to be limited to the case of the “judicial supremacy” version, in which the ICJ can vitiate a Security Council action after a direct petition for review by an individual state: this was illustrated by Judge Schwebel’s argument in the *Pan Am 103* case.

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<sup>86</sup> Louis Henkin’s eloquent explanation is helpful in this context. He wrote: “It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time. Every day nations respect the borders of other nations, treat foreign diplomats and citizens and property as required by law, observe thousands of treaties with more than a hundred countries.” *How Nations Behave – Law and Foreign Policy*, 2nd edn. (New York, Columbia University Press, 1979), at 47. This is also confirmed by the compliance record of ICJ decisions. One commentator reviewed the compliance record of the ICJ decisions since 1987 to fathom how the state parties respond as a result of the ICJ decisions. The record shows a solid, although not perfect, compliance by states which have been parties to the respective ICJ procedures. See generally Paulson, Colter, “Compliance with final judgments of the International Court of Justice since 1987”, 98 *AJIL* (2004), at 434; see also Ren, Kathleen and Cronin-Furman, “The International Court of Justice and the United Nations Security Council: Rethinking a complicated relationship”, 106 *Colum L. Rev.* (2006), at 447.

<sup>87</sup> See ILO Conventions regarding the functions and authority of the Committee of Experts.

<sup>88</sup> Roger Fisher pointed out that an organized force is not essential to the compliance of the law. He said: “When, in the *Youngstown* case, the Supreme Court ordered the Secretary of Commerce to return the steel mills which the President had ordered him to seize, the Court had no regiment at its command. But despite the fact that the Supreme Court sitting in Washington had no greater force at its command *vis-à-vis* the Government than does the International Court of Justice sitting at The Hague, the steel mills were returned. The more closely one examines law within this country and within others, the less significant the element of force.” Fisher, Roger, “Bringing law to bear on governments”, 74 *Harv. L. Rev.* (1961), at 1132.

This mode of “direct” judicial review will bind all United Nations organs in all future cases as in the judicial review by domestic supreme courts of many countries.

It is doubtful, however, whether such system will prove feasible or helpful in the current decentralized international order composed of independent sovereign actors. It would indeed be problematic to apply such a “direct” judicial review formula to the international setting where central legislative, judicial or enforcement mechanism is still lacking. It is not practical for the 15-member ICJ to operate as the highest entity in the United Nations and the ultimate decision maker for the international community. Unfortunately, the member states are not ready to accept an international society in which a judicial organ has the final say in the operation of the United Nations, nor does the current Charter envision such a judicial supremacy system.<sup>89</sup> That will become possible only when a much higher degree of homogeneity and organization is attained in the future. Unless and until such a point is reached, the ICJ may consider a variety of “indirect” judicial review whenever it is called upon to examine or give effect to a Security Council resolution, both in the advisory opinion situation and the contentious case context.

Even a cautious, indirect approach will still be meaningful as an effective alternative to “direct” judicial review. Mere warnings of illegality or suggestions of alternative options from the ICJ may well serve as a check on the *ultra vires* or unlawful activity of the United Nations bodies, including of the Security Council. The ICJ cannot force the Security Council to take a particular measure in a particular case; however, the next time the Security Council faces a similar issue, it will be more likely that the Security Council will pay attention to the Charter principles and procedures as interpreted by the ICJ. The *Pan Am 103* case itself is a good example of this analogy: although the ICJ decided its merits as based only upon an issue of technicality, namely, the filing date of the Libyan government, there was a clear indication that the resolution adopted under the auspices of the US and the UK may have experienced some legal problems. These two countries and other countries in similar situations would probably pay closer attention to such issues in any future case. In that respect, any judicial evaluation by the ICJ of a Security Council action, equipped with legal terms and standards, will have its own *raison d'être*.<sup>90</sup>

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<sup>89</sup> Apparently, the framers, too, did not want to have this supremacy model of judicial review when they incorporated Article 59 of the ICJ Statute, which provides that the decision of the ICJ has no binding force except between the parties and in respect of that particular case. Even the supporters of the judicial review by the ICJ also recognize that, even if there is a review, the issue of whether the ICJ can strike down or invalidate the Security Council’s measures still remains unresolved. *See Sabahi, loc. cit.*, n. 57, at 4.

<sup>90</sup> Advisory opinions, even non-binding, have far-reaching effect. *Sinna, op. cit.*, n. 71, at 979.



## 5. HOW TO AVOID IRRESPONSIBLE JUDICIAL ACTIVISM: SUGGESTION FOR A TWO-STEP ANALYSIS

Any judicial review by the ICJ, whether “direct” or “indirect,” should not turn into irresponsible judicial activism. Given the harsh reality of international society as a highly volatile, decentralized entity, coupled with the urgent need quickly to tackle vital issues, time is of the essence when the Security Council is faced with various kinds of international emergencies.<sup>91</sup> The judicial review by the ICJ must not, therefore, hamper the otherwise legitimate implementation of duties by the Security Council. To filter unbridled judicial activism by the ICJ, a two-step analysis may be helpful.

The first step is a procedural issue. This concerns whether a particular case has been brought legitimately before the ICJ. If the answer is in the affirmative, there should be a presumption that the ICJ’s handling of the case is, including all relevant actions by the Security Council, reasonable and legitimate, hence not a case of inappropriate judicial activism. To the extent the ICJ exercises its judicial review function strictly as based upon the Charter provisions by following the jurisdictional requirements for, respectively, advisory opinions and contentious cases, such exercise alone, without more, should not be construed as irresponsible judicial activism by the ICJ. Stated differently, once the ICJ has legitimate jurisdictional basis for a particular case and the case involves a legal analysis of the Security Council action, the ICJ’s review of the action itself should not constitute inappropriate judicial activism on the part of the ICJ. A party participating in the case may challenge the ICJ’s decision by arguing that the case has not properly been brought before the ICJ; an ultimate decision on that issue will, however, probably be reserved to the ICJ because it is a “jurisdictional” issue where a court has the final say.

The second step in evaluating the ICJ’s judicial review of the Security Council action to determine whether it is the ICJ’s proper implementation of its duty or its attempt at improper judicial activism involves substantive issues. In other words, the ICJ should exercise its prudential judgment in reviewing an action of the Security Council lest its judicial intervention undermine the integrity of the function of the Security Council. As such, even if a jurisdictional ground is ascertained, its “justiciability” needs carefully to be examined in each case in order to ensure that the ICJ does not exceed its authority. This is especially important where, as here, the danger of disrupting an international decision-making process through multifarious voices is much more obvious and the resulting diplomatic impact is farther-reaching and more expansive.

Despite apparent differences in scope and elements, domestic jurisprudence dealing with this type of issue will probably offer guidance in this issue. Setting aside

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<sup>91</sup> In Rwanda, the delay to the Security Council action caused the deaths of 800,000 people in less than 100 days. See the PBS documentary film on the Rwanda genocide and the failure of the UN mechanism, broadcast in 1999.

the traditional paradigm of a dichotomy between international law and municipal law, it is the time for scholars of international law to offer a creative idea.<sup>92</sup>

There may be instances where judicial involvement is totally undesirable, and where judicial process is simply being abused as an excuse to delay a prompt action of the Security Council.<sup>93</sup> At the other end of the spectrum, there may be instances where the Security Council is simply pushing forward with its decision of which the illegality, either substantively or procedurally, is manifest on the surface.<sup>94</sup> Most of the cases before the ICJ would lie between these two extremes within the spectrum. In each instance, therefore, the ICJ will have to locate cases scattered along the spectrum while keeping in mind that a wider scope of judicial review will probably distort the Security Council's enforcement action under Chapter VII, while a narrower scope of judicial review will make of the ICJ a paper tiger rendered harmless by the powerful Security Council. A guideline to help the ICJ to navigate through this labyrinth is thus in order.

If the question of this nature is raised in a US court, the political question doctrine will firstly come into play in most instances. Although other countries also have a similar jurisprudence of judicial restraint, the American one seems to have provided the most organized rationale in this regard. Similar jurisprudence from other countries will, however, be equally applicable to this analysis. As one American commentator mentioned, "the political question doctrine is a useful tool for demarcating the responsibility to interpret the Constitution that is shared by the courts and the political branches."<sup>95</sup> To the extent that it is believed that the political question doctrine has successfully assisted the American courts in filtering non-justiciable cases, this doctrine may be a good candidate for transplant, *mutatis mutandis*, to the ICJ in this

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<sup>92</sup> Gardam, *loc. cit.*, n. 16, at 285.

<sup>93</sup> Judge Schwebel provides us with a good example: a country having committed an aggression against its neighbour applies to the Court when targeted by the Council for an enforcement action under Chapter VII for the purpose of delaying such action. See the Judgment on Preliminary Objections, *loc. cit.*, n. 9, at 627; Andrews, *loc. cit.*, n. 54, at para. 1.3 ("Libya's claims are nothing more than a collateral attack on the decisions taken by the Security Council in its efforts to maintain international peace and security.").

<sup>94</sup> For example, it is possible that a Security Council decision in fact adjudicates a legal dispute between the two states. The Security Council therefore operates as a *de facto* judicial entity in a particular situation. In this case, it is axiomatic that the ICJ can review and decide on the legality of such a Security Council decision when the matter duly comes before the ICJ.

<sup>95</sup> Mulhern, J. Peter, "In defense of the political question doctrine", 137 *U. Pa. L. Rev.* (1988), at 97. The usefulness of the political question doctrine, as developed in the US jurisprudence, in addressing these issues is further evidenced by the fact that in the course of the ICJ procedures the United States has made efforts in addressing the admissibility issue involving highly political disputes, and that many other states also tend to refer to US arguments on admissibility in one way or another in subsequent ICJ procedures. See Gray, Christine, "The use and abuse of the International Court of Justice: Cases concerning the use of force after Nicaragua", 14 *EJIL* (2003), at 869-81.

process.<sup>96</sup> As one commentator suggested, the internationalization of the political question doctrine may provide the best vehicle for the ICJ to identify those legal claims with the potential to undermine the integrity of the Security Council.<sup>97</sup> Indeed, the Security Council's function mainly includes political, diplomatic, and military components quite similar to those of the executive branch under the American Constitution,<sup>98</sup> and political question jurisprudence is frequently raised in these areas. It goes without saying that disputes involving questions concerning the legality of the actions of the Security Council pursuant to Chapter VII tend to be of a highly political nature.<sup>99</sup> In addition, unlike the U.S. Constitution, where an explicit textual basis for political question doctrine is absent, there is a textual ground for the ICJ to refuse to give any legal opinion even if it has an arguable jurisdiction to do so. Article 65 of the ICJ Statute provides that "The Court *may* give an advisory opinion", that is, it has no obligation to comply with the request for an advisory opinion. The framers might have thought that the ICJ would have to maintain a way to get around an inappropriate case for a judicial organ.

At any rate, the US court's approach to political question is well explained by Justice Brennan of the US Supreme Court in *Baker v. Carr*, 369 US 186 (1962). The elements to be considered by the US Supreme Court in declining to exercise its otherwise valid jurisdiction are: (i) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (ii) a lack of judicially discoverable and manageable standard for resolving the issue; (iii) the impossibility of deciding the issue without an initial policy determination of any kind clearly for non-judicial discretion; (iv) the impossibility of a court's undertaking an independent resolution without expressing a lack of the respect due coordinate branches of government; (v) an unusual need for unquestioning adherence to a political decision already made, and (vi) the potential for embarrassment from multifarious pronouncements by various departments on one question.<sup>100</sup>

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<sup>96</sup> As a matter of fact, Judge Sir Robert Jennings also raised this point in his dissenting opinion in the Judgment on Preliminary Objections. ("The Court should have found that it did not have jurisdiction in the case; and even if it had jurisdiction, that the Libyan case should have been dismissed as inadmissible."); American representative also mentioned the same possibility in the oral argument. See Andrews, *loc. cit.*, n. 54, at para. 1.3.

<sup>97</sup> See David, *loc. cit.*, n. 8, at 82.

<sup>98</sup> It may seem appropriate to compare the distribution of the functions of the UN Organizations among the principal organs with the constitutional separation of powers of the supreme organs of national governments. Simma, *op. cit.*, n. 71, at 978 ; The multilateral treaty popularly called "the UN Charter" in important ways resembles the Constitution of the United States, insofar as it establishes a system for the exercise of designated powers by the two political organs of the United Nations: the General Assembly and the Security Council. Franck, *loc. cit.*, n. 18, at 520.

<sup>99</sup> Martenczuk, *loc. cit.*, n. 1, at 528.

<sup>100</sup> Justice Powell of the United States Supreme Court once explained in *Goldwater v. Carter*, 444 U.S. 996 (1979), that the issue is fundamentally reduced to the following three questions: (i) Does the issue involve the resolution of questions committed by the text of the Constitution to a coordinate branch of Government?; (ii) Would resolution of the question demand that a court move beyond

This list does furnish a good starting point for the ICJ's judicial review analysis. The *Pan Am 103* case may be evaluated by this standard: (i) first of all, a legal issue is reserved for the ICJ by a "textually demonstrable constitutional commitment," namely the Charter; (ii) there is a judicially discoverable and manageable standard to resolve the dispute, namely, the interpretation of the Montreal Convention, and the customary international law concerning the non-extradition of nationals; (iii) the core issue in this case is the extradition of the alleged terrorists for a trial, which is not a policy decision at first glance, but rather a legal one; (iv) pronouncing a legal opinion on the surrendering of two suspects does not give rise to the level of lack of respect due the Security Council,<sup>101</sup> as an objective evaluation of the dispute would only enhance the respect for the Security Council; (v) there is no unusual need of questioning a political decision already made in this case, since, unlike an impending war, there is no exigency in obtaining custody of the suspects with sufficient evidence already accumulated, and (vi) as many nations were already doubting the legality of the Security Council's demand for extradition, a legal decision had to be made to clarify the uncertainty, rather than to compound a confusion triggered by multifarious voices.

All in all, in applying the political question doctrine as outlined above, if the case had proceeded with more meaningful substantive analyses in *Pan Am 103*, the ICJ could have refused to apply the political question doctrine and reached an ultimate decision in that case. If the ICJ adopts the political question doctrine in a particular case, this means it dismisses the case without reaching an ultimate decision. The practical outcome will be the same as a determination of the absence of jurisdiction.

In the *Israeli Wall* case of 2004, the ICJ engaged in a similar exercise. One of the issues in the case was whether the ICJ should exercise its discretion and should thus refrain from exercising jurisdiction in this highly political case. After considering various aspects of the case, the ICJ concluded that it has jurisdiction to provide its opinion to the General Assembly, and that there is no compelling reason for it to use its discretionary power not to give that opinion.<sup>102</sup> It appears, however, that if the ICJ had applied the political question doctrine theory as outlined above, it could have provided a more reasoned and organized decision on that issue.

Using the political question doctrine and expanding it to make it more appropriate to the international context, the ICJ will be able to establish its own rule of justiciability. Through such jurisprudence, the ICJ may decline a judicial review even if it has the jurisdiction to perform one. This two-step analysis for the ICJ to exercise judicial review will be able to standardize the process and thus enhance the legitimacy of the review. The process is summarized in the diagram below.

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areas of judicial expertise?, and (iii) Do prudential considerations counsel against judicial intervention?

<sup>101</sup> Of course, this argument can have the reverse effect: some could argue that the mere taking of the case in a highly politically charged incident constitutes the lack of respect.

<sup>102</sup> See *Israeli Wall Case*, *loc. cit.*, n. 61, at paras. 43-65.

## 6. CONCLUSION: INTERNATIONAL “RULE OF LAW”

Pascal has stated that strength without justice is tyrannical, and justice without strength is a mockery; therefore, it is important that the Security Council as an organ with strength and the ICJ as an organ with justice cooperate with and respect each other. More importantly, it is crucial to understand that the current Charter does permit the ICJ to exercise its judicial review authority over the actions of the Security Council. The *Pan Am 103* case provided the ICJ with an important opportunity to re-focus its attention on the important question of the extent to which the Security Council functions within the constraints of international law.<sup>103</sup> The dominance of the US and its allies in the Security Council has caused serious doubts among nations regarding the neutrality of the Security Council’s decision-making process. If rogue states present a problem, so too does a rogue Security Council. The rationale that the Security Council can do whatever it deems appropriate appears equivalent to saying that the Security Council can do no wrong, a statement never to be accepted in the millennia of the rule of law.<sup>104</sup>

A judicial review by the ICJ does not have to be a “direct” review as seen in a domestic legal setting. In fact, the spirit of the current Charter prohibits such a direct judicial review, given the judicial supremacy of the ICJ and the co-operation, co-existence and co-involvement of the ICJ and the Security Council in important world affairs.<sup>105</sup> The Security Council and the ICJ exercise their competence and authority independently and separately.<sup>106</sup> The Security Council should not ignore the ICJ and the ICJ should not hamper the operation of the Security Council in dealing with emergency issues around the world.

In exercising judicial review over Security Council actions, the ICJ may consider a two-step analysis. The first is whether the ICJ indeed has jurisdiction in that case, whether as an advisory opinion or as a contentious case. The existence of legitimate jurisdiction over a particular case provides the presumption that the ICJ is also authorized judicially to review all relevant legal issues, even including those related actions of the Security Council. The Security Council should not lodge a complaint just because its actions are reviewed by the ICJ. Such “supremacy of the Security Council” is equally erroneous as is the “supremacy of the ICJ,” and the case precedents of the ICJ clearly reject such a “supremacy” or “exclusivity” theory. Instead,

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<sup>103</sup> Gardam, *loc. cit.*, n. 16, at 290.

<sup>104</sup> See generally Brownlie, Ian, “The decisions of political organs of the United Nations and the rule of law”, in Macdonald, Ronald St. John (ed.), *Essays in honor of Wang Tieya* (London: Martinus Nijhoff Publishers, 1994, 1994); see Sabahi, *loc. cit.*, n. 57, at 9; Arias, Inocencio, “Humanitarian intervention: Could the Security Council kill the United Nations?”, 23 *Fordham Int’l L. J.* (2000), at 1013-14; Fishman, Andrew K., “Between Iraq and a hard place: the use of economic sanctions and threats to international peace and security”, 13 *Emory Int’l L. Rev.* (1999), at 727.

<sup>105</sup> See Ren and Cronin-Furman, *loc. cit.*, n. 86, at 460-62.

<sup>106</sup> See Fassbender, *loc. cit.*, n. 4, at 4.

they stand for cooperation, co-existence and co-involvement on the parts of the Security Council and the ICJ.

The second step relates to a more substantive analysis by the ICJ. Even if the ICJ duly finds it has jurisdiction in a particular case, if it determines that reviewing the case and reaching a decision would undermine the basic principles of the United Nations or the integrity of the Security Council, it should refuse to review the case. The actions of the Security Council will remain legitimate and stand as such. The ICJ may consider applying the so-called political question doctrine developed in domestic jurisprudence as a starting point from which to develop its own standard.

A more activist World Court could, if able to maintain a cautious stance not to overstep its Charter boundaries, transform itself from a UN backwater into an institution of major political importance.<sup>107</sup> The current efforts at the United Nations to reform the Security Council may provide an important catalyst towards addressing this issue more directly; it could include an explicit provision in this respect. The focus of the current efforts should be how, in the operation of the Security Council, to enhance the “rule of law” beyond discussions on the number of permanent members of the Security Council. As a final note, let me repeat the conclusion of Bernd Martenczuk:

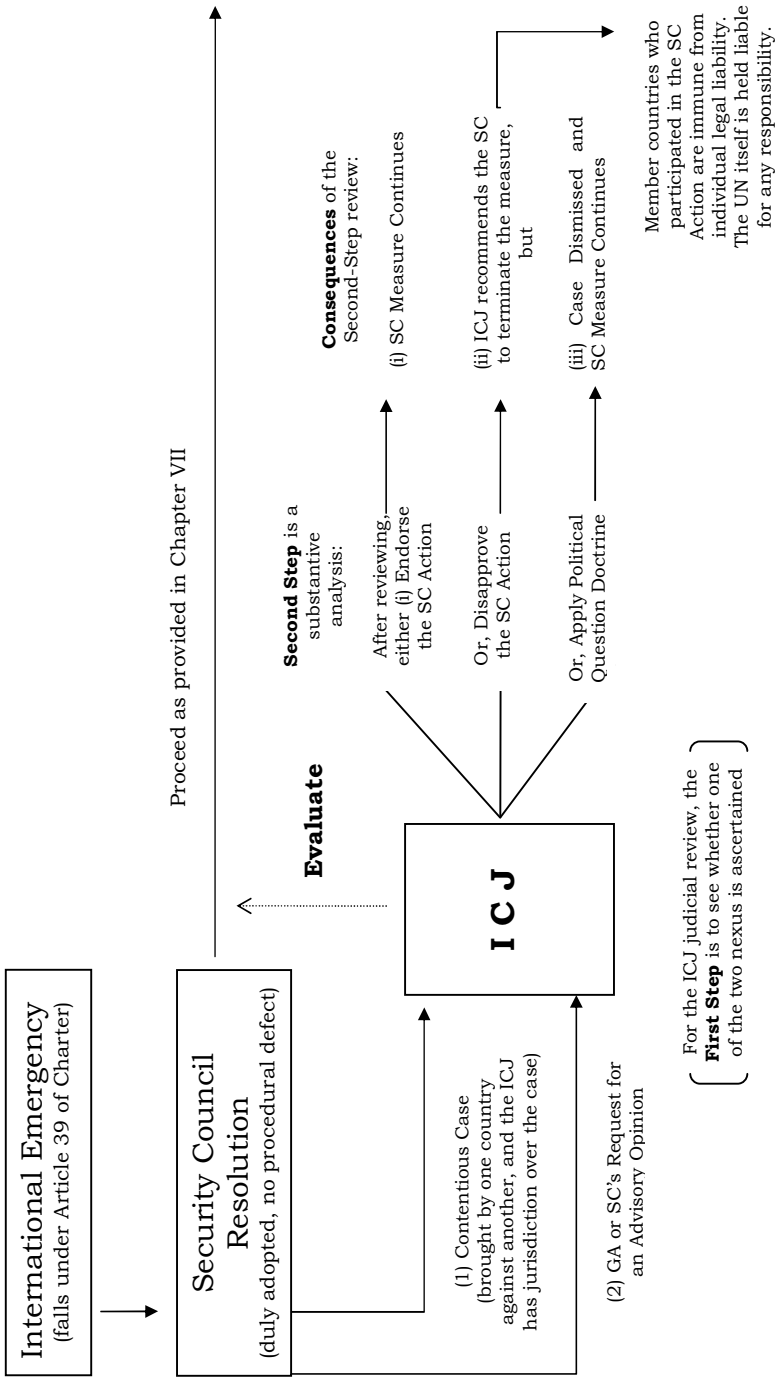
There is no contradiction between the rule of law and international peace and security. By promoting the former, the International Court of Justice will contribute to the maintenance of the latter.<sup>108</sup>

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<sup>107</sup> See Watson, *loc. cit.*, n. 4, at 33. This will be particularly the case because as time goes by the ICJ will encounter increasing numbers of cases where relevant states call on the ICJ to review the legitimacy of the Security Council’s action. See Sabahi, *loc. cit.* n. 57, at 47.

<sup>108</sup> Martenczuk, *loc. cit.*, n. 1, at 520-22.

## ICJ's Judicial Review (attachment)



# THE EROSION OF COMMUNITY RIGHTS TO INTELLECTUAL PROPERTY: AN ASIAN PERSPECTIVE\*

Naazima Kamardeen\*\*

[T]here would be no plant breeders in long white coats working on experimental farms if it were not for the prior knowledge gained from rural communities. Indigenous knowledge is not only the foundation of modern science in this and many other fields... it is also what could be described as the reference and referral centre for modern plant breeding.<sup>1</sup>

## 1. INTRODUCTION

The TRIPS agreement (Trade Related Aspects of Intellectual Property Rights Agreement) under the World Trade Organization (WTO) regulates the protection of intellectual property rights by those states that are its members.

The protection of such rights has led to fierce differences of opinion, heated debates and much name-calling between the nations of the developed world and those of the developing world. This was very clearly evidenced in the disagreement in the pharmaceutical sector, brought into focus by the HIV/AIDS epidemic; it called for swift action by the countries of Africa, where the disease is most prevalent. The countries could not afford to pay the high prices for the treatment available, and looked to cheaper generic solutions to help millions of people fight the disease. The action almost created a rift among the membership, and it was only in the 2001 Doha Ministerial Conference that the problem was addressed.

The next area where discord is already rife is one with enormous implications for the future – a future where greater power is found in smaller units. This is the

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<sup>1</sup> Sahai, Suman (ed.), *Bioresources and Biotechnology: Policy Concerns for the Asian Region* (New Delhi: Gene Campaign, 1999), at 132.



field of bio-technology. It has been regarded as the “newest, most dominant technology of our times”.<sup>2</sup>

Section 5 of TRIPS extends patent protection to certain living beings, and asks members to provide patent or “patent like” protection for such beings. Article 27 (3) (b) qualifies this by providing that members may either grant or refuse patent protection for plants and animals. However, it also provides that members must provide patent protection for micro-organisms. Further, it mandates that plant varieties should be protected by patents or by an effective *sui generis* system, or by a combination of both.

Apart from the contentious issue of whether life forms should be patented at all, one of the inherent problems associated with this area is that the term *sui generis* has not been defined. Also, many developing countries such as Sri Lanka have no effective Intellectual Property systems in place; they do, however, have a large variety of traditional crops that have been bred and developed by farmers as well as by public-funded research institutes. These are available in the public domain and do not “belong” to anyone in particular.<sup>3</sup> Conventional notions of property ownership, modelled along the lines of individual-style ownership, are not appropriate in a field where community ownership has been the norm. TRIPS will thus create a clash between concepts of individual ownership, on the one hand, and community ownership, on the other; it will force certain countries to abandon the latter in favour of the former, or risk forfeiting the right to use the product or process.

This paper will examine the various approaches that could be taken by developing countries to provide to plant and animal life protection that will conform to TRIPS, and yet be within the framework of the laws currently in place. The feasibility of these approaches will be analyzed, with a view to identifying the most effective one. It will also consider how the rights of indigenous communities can be safeguarded using TRIPS, as the world moves ever closer to an order based on WTO rules.

## 2. BACKGROUND AND INTRODUCTORY REMARKS

### 2.1. The WTO and its importance in the field of intellectual property

What we regard today as intellectual property is essentially the product of human intellect. Its intangible nature has resulted in the remaining unrecognized of its true worth and unappreciated until relatively recently. Nevertheless, modern humans appear to have been able to recognize those rights as also being proprietary, and has sought to safeguard them in almost the same way as a tangible property interest is safeguarded: by identifying them, and by providing for a means by which the right-holder

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<sup>2</sup> *Idem*, at 122.

<sup>3</sup> Gunawardene, Jagath, *The Draft Act to Provide Protection for New Plant Varieties (Breeders' Rights)* (Briefing paper published by the Law and Society Trust Colombo under the Regional Program on Farmers' Rights to Livelihood initiated by the South Asia Watch on Trade, Economics and the Environment (SAWTEE), 2003), at 2.

can, to the exclusion of others, hold and enjoy them. Within this broad area identified as 'intellectual property' lie subdivisions such as patents, trademarks, and copyrights.

Intellectual property has become as valuable a commodity as a tangible good or service, hence its importance in world trade. Although there had been prior efforts to codify and protect intellectual property<sup>4</sup> it was not until 1994 that intellectual property rights were included in any world trade forum. This happened at the conclusion of the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) as part of the Uruguay Round of multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT). After the World Trade Organization (WTO) succeeded GATT, the obligations under the TRIPS now form part of the WTO.

The WTO is an organization that embodies the new world order – the rule of the economically powerful. Members join primarily through self-interest, and the procedure for the settlement of trade disputes acknowledges the reality of a market-driven world. In contrast to the International Court of Justice (ICJ), the dispute settlement body of the United Nations, which admits only States as parties to disputes before it, and the GATT, which allowed a country to “block” an adverse decision, the Dispute Settlement Understanding (DSU) of the WTO is ruthlessly efficient: it allows the victor to force the losing party into compliance by threatening to take retaliatory measures in any sector, not merely in the sector in which the dispute arose. In order for this to be of any real concern, the threat of the loss of market access or the tariff barrier (or indeed any other form of punishment) must be significant enough to frighten the losing party into compliance, and it is submitted that only countries with enough economic clout can do so. Hence, the WTO remains very much a rich person's club.

It has been argued that pharmaceutical and other high-tech industries were behind the proposal to link Intellectual Property Rights (IPRs) to trade in the first place.<sup>5</sup> With the growth of technology as an important factor in international competition, and with the challenge offered by the newly-developing countries, the leadership of US firms in high-tech areas was eroding. Further, piracy and counterfeiting was seen to be another reason for a decline in productivity and competitiveness. This perception caused many of the industrial lobbies, including the software and pharmaceutical sectors, to pressure the US government to link IPRs with trade, to ensure that the sectors could avoid piracy and could also secure high returns on their research and development.<sup>6</sup>

With TRIPS falling under the purview of the WTO, it was anticipated that the rules applying to the WTO would necessarily also apply to the manner in which members resolved their intellectual property disputes. Since the WTO enjoys almost

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<sup>4</sup> Namely, the Paris Convention for the Protection of Industrial Property of March 1883, and the Berne Convention for the Protection of Literary and Artistic Works of 1886. By incorporation, they now form part of members' obligations under the WTO.

<sup>5</sup> Corraera, Carlos M., *Intellectual Property Rights, the WTO and Developing Countries – The TRIPS Agreements and Policy Options* (New York: Zed Books; 2000), at 4.

<sup>6</sup> *Ibid.*

world-wide membership, it is apparent that TRIPS is now a force to be reckoned with. Further, it has proved to be an excellent means by which IPRs can be protected. However, a closer analysis reveals that the playing field is far from even. Developing countries' share in world Research and Development (R&D) expenditures is a mere four per cent of total R&D expenditure worldwide. Further, it has been estimated that 95 per cent of all patents granted in the United States between 1977 and 1986 were given to applicants from ten developed countries. Developing countries constituted less than two per cent.<sup>7</sup> Since it is largely the developed countries who are the major players in the IPR field, it is easy to see whose interests are being safeguarded by such measures. As for the success of the TRIPS agreement, it has been shown that a positive correlation exists between the increase in exports from the US, and the strengthening of patent protection in developing countries.<sup>8</sup>

## 2.2. The TRIPS agreement: a broad overview

The agreement seeks to confer a wide variety of rights on the owners of intellectual property. Of the provisions in TRIPS, Articles 3 and 4 deserve special mention, and make up the core of the entire agreement. Article 3 calls for "National Treatment", whereby members must afford to foreigners treatment that is no less favourable than that which it affords to its own nationals with regard to the protection of intellectual property. Article 4 provides, subject to certain exceptions, that any special privileges granted by a member to any country (Most Favoured Nation, or MFN, Treatment) will automatically extend to other countries as well. The effect of these two provisions is to ensure that members do not draft intellectual property laws that give greater protection to domestic than to external players, and also that smaller regional groups do not seek compromises among themselves.

## 2.3. The North-South dimension of TRIPS

TRIPS has been viewed as an agreement that seeks to raise the standards of protection in developing countries to the level of those in developed countries.<sup>9</sup> While TRIPS has necessitated changes to the Intellectual Property regime of almost every country, the more drastic changes will have to be made within the laws of the developing countries, many of which prior to TRIPS had no comprehensive Intellectual Property laws. For some developing countries, TRIPS covers new subject matter, among them product patents for food, pharmaceuticals, and micro-organisms.<sup>10</sup>

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<sup>7</sup> *Ibid.*, at 5.

<sup>8</sup> *Ibid.*, at 6.

<sup>9</sup> Watal, Jayashree, *Intellectual Property Rights in the WTO and Developing Countries* (Netherlands: Kluwer Law International, 2001), at 2-3.

<sup>10</sup> *Ibid.*, at 4.

It has been argued that there has been a North-South battle with regard to TRIPS.<sup>11</sup> One of the most obvious factors is the difference in the respective levels of development of each sector, and the fear of the South that TRIPS will become yet another tool for Northern supremacy. The battle could also stem from an ideological difference in the interpretation of what is meant by the ownership of intellectual property. In the Western world, intellectual property is an extension of ordinary property, and embodies a private ownership interest. However, in many areas of the developing world, and especially in indigenous communities, intellectual property rights are rights claimed by communities as a whole, over their cultural knowledge.<sup>12</sup> Hence, it is a community right, as opposed to a private right. This community-owned entity is therefore incapable of being owned or enjoyed in the same sense that a private right can, and this remains the chasm between the developed and the developing worlds.

### 3. THE KEY AREAS OF THE DEBATE

The two main substantive areas in which the North-South debate will be examined are the pharmaceutical sector, where an understanding has already been reached, and the bio-technical sector, where trouble is now beginning to brew. The debate over the pharmaceutical sector will be revisited for the purposes of establishing a pattern of facts, then drawing upon those lessons as a suggestion of how (or how not) to resolve future problems.

#### 3.1. The pharmaceutical industry and its lessons

##### 3.1.1. *The WTO and access to medicine*

Article 27 of the TRIPS agreement requires each WTO member to make both product and process patents available for any inventions in all fields of technology, provided that they are new, involve an inventive step, and are capable of industrial application. Further, governments will not be able to discriminate with respect to the enjoyment of patent rights based on the place of invention, the field of technology, and whether products are imported or locally produced.<sup>13</sup> Article 27 (2) provides for a few limited instances in which patents may be denied. These include the protection of human, animal or plant life or health, serious prejudice to the environment, and also on grounds of public policy and morality. Further, diagnostic, thera-

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<sup>11</sup> In this paper, the terms “developed countries” or the “North”, and “developing countries” or the “South” do not necessarily denote geographical dimensions, but are used to define the difference between those who advocate greater IPR protection and those who do not.

<sup>12</sup> Greaves, Tom (ed.), *Intellectual Property Rights for Indigenous Peoples – A Sourcebook* (OK, USA: Society for Applied Anthropology, 1994), at ix.

<sup>13</sup> Article 27(1).

peutic, and surgical *methods* for the treatment of humans and animals may also be excluded from patentability.<sup>14</sup>

The effect of all this is to include many fields, among them pharmaceuticals, as pointed out specifically in the Congress's Statement of Administrative Action (SAA) on the Uruguay Round Trade Agreements.<sup>15</sup> The TRIPS agreement makes special provisions for those countries that do not yet have systems of patent protection in place for the specific areas of pharmaceutical, agricultural and chemical products. Notwithstanding the concessions allowed in Part VI,<sup>16</sup> those members should immediately provide an interim system that permits patent applications for these products to be filed.<sup>17</sup> The date of filing gives priority for application purposes. Further, the criteria for patentability should be those of the time when the application was filed.<sup>18</sup> In addition, the country must provide exclusive marketing rights for a period of five years after the product receives marketing approval, or until a patent is rejected or granted, whichever period is shorter.<sup>19</sup>

The US used these provisions against India, and obtained a decision in its favour, mandating that India was in violation of its obligations of Articles 63,<sup>20</sup> 70.8<sup>21</sup> and 70.9<sup>22</sup> of TRIPS by not having a valid mailbox system in place.<sup>23</sup> As for the scope of the protection, Article 28 specifies that a patent will give the holder the right to exclude others from making, using, offering for sale, selling, or importing the product. Hence, for the pharmaceutical industry at least, the agreement is a fool-proof safeguard.

### 3.1.2. *Developments prior to Doha*

Prior to the Doha round, several developing countries had discovered that their access to medicines to combat the deadliest of diseases was being hampered severely by TRIPS. This prompted Zambia, on behalf of the African Group, to submit a request for a new item called Intellectual Property and Access to Medicines to be placed on the Council's agenda.<sup>24</sup> Accordingly, the Council discussed this matter, focusing on two main issues, namely, the interpretation of the provisions of the TRIPS

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<sup>14</sup> Emphasis added. See Article 27(3)(a).

<sup>15</sup> H.R. Doc. 103-316, 103d Cong., Sess. (1994).

<sup>16</sup> Developing countries are allowed a grace period of a total of five years and least-developed countries a total of ten years to implement their obligations under TRIPS.

<sup>17</sup> Article 70(8)(a).

<sup>18</sup> Article 70(8)(b).

<sup>19</sup> Article 70(9).

<sup>20</sup> This deals with the transparency obligation, whereby members are required to notify the Council of any changes they have made in their laws.

<sup>21</sup> The "mailbox rule", ns. 17 and 18.

<sup>22</sup> The grant of exclusive marketing rights. See n. 19.

<sup>23</sup> See *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R.

<sup>24</sup> Document IP/C/M/30, paras. 229-252, discussed in Gervais, Daniel, *The TRIPS Agreement: Drafting History and Analysis*, 2nd edn. (London: Sweet and Maxwell, 2003), at 42.

agreement to clarify the flexibility that members were afforded, and the relationship between the TRIPS agreement and affordable access to medicines.<sup>25</sup>

The Council received two papers on the matter. One was from the EC, and the other was from a group of developing countries, including the African Group, Brazil, India, and Sri Lanka.<sup>26</sup> The concerns embodied in each paper reflected the concerns of those countries as representing the North and South. The EC paper suggested that Articles 30 and 31 be interpreted as narrowly as possible, so as not to curtail the rights of patent holders except in cases of “national emergency and other situations of extreme urgency”.<sup>27</sup>

In contrast, the paper submitted by the developing countries suggested that the TRIPS agreement provide the “broadest flexibility” in allowing parallel imports and compulsory licenses. While the EC would have interpreted Article 31 (f) as prohibiting the supply to foreign markets, the developing countries were of the view that Article 31 (f) did not prevent the grant of compulsory licenses to supply foreign markets; they also felt that members were free to determine the grounds for granting compulsory licenses.<sup>28</sup>

Article 31 does not specifically mention the words “compulsory license”; however, this is the interpretation that can be drawn from the reading. Further, Article 31 provides for the use of the patent without authorization in cases of “national emergency or other circumstances of extreme urgency”. It fails, nevertheless, to define these terms.

Following the discussions, it was agreed that the Council should take a more prioritized approach to the matter, focusing on the objectives and principles of TRIPS, as laid out in Articles 7 and 8 of the Agreement. Article 7 specifies that the

[P]rotection and enforcement of IP rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technical knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8, which deals with principles, allows members to take reasonable steps consistent with the TRIPS agreement in order to prevent both the abuse of IP rights by the holders and the unreasonable restraint of trade, as well as the international transfer of technology. Two other matters were also identified as being of importance:

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<sup>25</sup> Gervais, *op. cit.*, n. 24, at 42.

<sup>26</sup> *Ibid.* The complete list includes Barbados, Bolivia, Cuba, the Dominican Republic, Ecuador, Honduras, Indonesia, Jamaica, Pakistan, Paraguay, the Philippines, Peru, Thailand, and Venezuela.

<sup>27</sup> *Ibid.* Article 30 states that members may provide limited exceptions to the rights conferred by a patent, provided that those exceptions do not unreasonably prejudice the rights of the patent holder. Article 31 provides for the unauthorized use of a patent, subject to a long list of provisions. These include, in Article 31(f), that such use shall be “authorized predominantly for the supply of the domestic market of the member authorizing such use”.

<sup>28</sup> *Ibid.*, at 43.

the provisions relating to compulsory licensing, and the provisions relating to parallel imports.

### 3.1.3. *The South Africa AIDS case*

In 1997, South Africa, faced with an HIV/AIDS crisis of epidemic proportions, drafted a new Medicines Act.<sup>29</sup> It gives the Health Minister the powers to override patent laws in a health emergency. Of particular importance is section 15C, which empowers the Health Minister to allow compulsory licensing and parallel imports.

Over 39 pharmaceutical companies filed action against the government of South Africa on the basis that the law violated its obligations under TRIPS.<sup>30</sup> However, after three years, due to “an extremely high amount of international pressure”<sup>31</sup> the case was eventually withdrawn. This incident served to remind the membership that a workable solution had to be found as soon as possible.

### 3.1.4. *The Doha round and the pharmaceuticals debate*

A separate declaration on TRIPS and public health was one of four issues on the Doha agenda. This separate Declaration<sup>32</sup> affirmed what had already been said in the main agreement, namely, that the TRIPS agreement should be interpreted in a manner that does not prevent members from taking steps to protect public health. It recognized “the gravity of the public health problems affecting many developing and least developed countries, especially those resulting from HIV/AIDS, TB, malaria and other epidemics”. Veering away from the view that TRIPS was an instrument for the protection of private rights, it went on to say that “we stress the need for the WTO agreement on TRIPS to be part of the wider national and international action to address these problems.”

In paragraph 4 it states that “TRIPS does not and should not prevent members from taking measures to protect public health... we affirm that TRIPS can and should be interpreted and implemented in a manner supportive of WTO members’ rights to protect public health and, in particular, to promote access to medicines for all.” It authorized members to use the provisions in TRIPS that provide flexibility for this purpose. Paragraph 5 identifies some of them as including the rights to grant compulsory licenses and to determine what constitutes a “national emergency or other circumstances of extreme urgency”. HIV/AIDS TB and malaria or other epidemics are considered to be “a national emergency or other circumstances of extreme urgency”.

Two specific tasks were also set out. The TRIPS council had to find a solution to the problems that developing countries may face in making use of compulsory

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<sup>29</sup> Medicines and Related Substances Control Amendment Act 90 of 1997. <ftp://ftp.hst.org.za/pubs/govdocs/acts/1997/act90.pdf>.

<sup>30</sup> Reported at <http://www.cptech.org/ip/health/sa/pharma-v-sa.html>.

<sup>31</sup> *Ibid.*, at para. 2.

<sup>32</sup> Document WT/MIN(01)DEC/2.

licenses if they have little or no pharmaceutical manufacturing capacity. They were required to report to the General Council on this by the end of 2002. In addition, Least-Developed Countries (LDCs) were given time till 1 January 2016 for the implementation of the rights related to pharmaceuticals, with the option of postponing them further.<sup>33</sup> LDCs were also exempt at least until 1 January 2016 from the obligation to provide exclusive marketing rights as provided by Article 70(9).<sup>34</sup>

### *3.1.5. Responses to Doha*

On 30 August 2003, the General Council adopted the Decision on the Implementation of paragraph 6 of the Doha Declaration.<sup>35</sup> It acknowledges that “exceptional circumstances exist justifying waivers from the obligations set out in paragraphs (f) [domestic market use] and (h) [remuneration to right-holder] of Article 31 of the TRIPS agreement with respect to pharmaceutical products.” It defines “pharmaceutical product” as including a component required to address public health problems.<sup>36</sup>

The Decision also sets out the procedure to be followed when importing such products into the country where it is needed. First, the importing member should notify the TRIPS Council that it intends to import a specific quantity of a named drug, and that it lacks the manufacturing capacity in the pharmaceutical sector. It should also confirm that it has granted or intends to grant a compulsory licence, where the pharmaceutical product is patented in its territory.<sup>37</sup> Further, the exporting member should issue a compulsory licence containing certain conditions as to the amount to be produced, as well as the undertaking that the final destination of the products shall be only those markets of the members who notified the Council of their needs.<sup>38</sup>

The Decision makes provision for adequate remuneration for the products, taking into consideration their economic value in the importing country.<sup>39</sup> Members are also encouraged to prevent re-exportation of these products.<sup>40</sup>

Paragraph 11 says that these provisions will be replaced by the subsequent amendments to the TRIPS agreement, due to begin in December 2003. However, these amendments have not yet been agreed upon.

When analyzing this decision, and the effect it has upon TRIPS, one realizes that little has changed. The interpretation sought to be given takes a middle path

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<sup>33</sup> Document IP/C/25 entitled *Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products*.

<sup>34</sup> Document WT/L /478 entitled *Least-Developed Country Members – Obligation under Article 70.9 of the TRIPS Agreement with Respect to Pharmaceutical Products*.

<sup>35</sup> WT/L/540.

<sup>36</sup> *Ibid.*, para. 1.

<sup>37</sup> *Ibid.*, para. 2(a).

<sup>38</sup> *Ibid.*, para. 2(b).

<sup>39</sup> *Ibid.*, para. 3.

<sup>40</sup> *Ibid.*, para. 4.



between allowing members to issue compulsory licences, and prohibit them from accessing medicines altogether. However, much remains in the hands of individual nations and the manner in which they seek to interpret these provisions. The EC, in their Communication on this decision, issued on 17 November 2003,<sup>41</sup> welcomed the decision and pledged to help to implement it. They stated that “to make the system really work, members will have to refrain from overly restrictive interpretations of the decision which could affect its efficiency.” The US issued a statement on paragraph 6 of the Doha Declaration and TRIPS.<sup>42</sup> Although it commences with the words “we are committed to helping countries that are experiencing public health crises”, it goes on to take a hard stand on the issue, conceding only the minimal divergence from TRIPS. For example, it says “Compulsory Licenses are appropriate, but it must be borne in mind that these are the exceptions, rather than the norm”. It says that measures should be taken to see that the rights granted under this measure are not exploited.

The US cannot afford to deviate far from this position, considering that a hard-line approach was taken when the implementation of the Bill for the Uruguay Round Trade Agreements was debated before Congress. The SAA contends that TRIPS mandates that “WTO countries must make patent protection available for essentially all fields of technology, including pharmaceuticals...”<sup>43</sup> Further, the SAA interprets the conditions under which members may make unauthorized use of a patented invention as “stringent”.<sup>44</sup> The US took this very attitude in many of the discussions following Doha, maintaining that the exceptions to TRIPS should be limited to diseases such as HIV/AIDS, TB, malaria, and other serious, infectious epidemics.<sup>45</sup> It alone opposed the draft of 16 December 2002 proposed by the Council chairman, arguing that the scope of disease coverage went beyond what was originally agreed to in Doha.<sup>46</sup> This caused considerable delay, as the members realized that US support was needed if the proposal was to work; they could not proceed without it. The US was also not amenable to an EU proposal that attempted to list a specific number of diseases, and provide for a mechanism whereby developing and least-developed countries could appeal to have further diseases added to the list.<sup>47</sup>

One of the dangers of having the pharmaceutical industry exert such great influence over the ultimate outcome is the fact that many of these companies are based in the Western world. Today, diseases are also polarized in terms of geography, and the serious, infectious epidemics mentioned exist largely in the developing world. Having conquered these diseases, the pharmaceutical companies have turned to finding cures for the more cosmetic problems of those in the developed world. Noting this,

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<sup>41</sup> [http://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm).

<sup>42</sup> [http://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm).

<sup>43</sup> Statement of Administrative Action, 7(a).

<sup>44</sup> Statement of Administrative Action, 7(b).

<sup>45</sup> 19 BNA International Trade Reporter (ITR) 2162, 12/19/02.

<sup>46</sup> 20 ITR 7, 02/13/03.

<sup>47</sup> 20 ITR 8, 02/20/03.

the World Health Organization agreed on 28 May 2003 to establish a body to be responsible for examining the impact of IP rights protection on the development of new drugs.<sup>48</sup> The resolution calls for the collection of data and an analysis of IP rights, innovation, and public health issues. It will also look into identifying funding and other incentives for the development of new medicines to fight diseases that mainly affect developing countries.

This action plan confirms the fact that the WHO has realized that pharmaceutical companies no longer have the entire world's health interests at heart. For example, the resolution noted that, out of a total of about 1,400 new products developed by the pharmaceutical industry between 1975 and 1999, only 13 were for tropical diseases and just three were for TB, both endemic in the developing world.<sup>49</sup> The WHO resolution also calls for the newly established body to analyze the "pharmaceutical and public health implications of relevant international agreements" such as TRIPS, so that governments "are able to maximize the positive and mitigate the negative impacts of those agreements."<sup>50</sup>

### *3.1.6. Concluding remarks*

The course of events leading up to Doha, and the subsequent negotiations and documents that have followed, have displayed only a grudging willingness by all parties to submit to certain concessions they perceive as being unfavourable to them. While bargaining and haggling are inevitable parts of any trade negotiation, they are not a productive means of negotiation on issues of public health, given that these can have long-term implications. Hence, a hard-nosed attitude will not work optimally in this area. Further, even though the pharmaceutical sector wields considerable influence in the deals that are ultimately agreed, the legitimacy of the sector's concern is at question, given the data showing that they are really no longer interested in the diseases that afflict the developing world, where the larger (although poorer) part of the world's population lives. Also, the traditional herbs and medicinal plants owned by communities as a whole are at risk of being patented and used by these companies as well. The pharmaceutical sector has established for itself an unenviable reputation, thus the conclusion may easily be reached that it will not strive to use community-owned herbs and plants in a manner benefiting society as a whole, but will, rather, attempt to exclude these communities from using them altogether.

It is also interesting to evaluate the approach taken in interpreting obligations under the TRIPS agreement in the light of the standards advocated by public international law. According to Article 31 of the Vienna Convention on the Law of Treaties, treaties

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<sup>48</sup> 20 ITR 23, 05/06/03.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

[S]hall 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.<sup>51</sup>

When the Doha Declaration, and the events that followed it, are examined, it would seem as if the member states to the WTO have forgotten this basic premise of public international law. The haggling over the interpretation of words indicates that certain countries are unwilling both to interpret these terms in good faith and to give to them their ordinary meaning, because it does not serve their own selfish interests to do so. The example of the pharmaceutical sector has shown us that, instead of “reducing tension by reaching strengthened commitments to resolve disputes”<sup>52</sup> there has in fact been greater tension and less commitment. The pattern of behaviour, as evidenced by the pharmaceutical industry, does not augur well for the newer areas in which conflicts still exist, and where the major issues have as yet not been resolved.

### 3.2. The patenting of plant and animal life: Article 27 (3) of TRIPS

Article 27(3) of TRIPS specifies those products and processes that are excluded from patentability. Article 27(3)(b) lists plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, members are required to protect plant varieties either by awarding patents or by an effective *sui generis* system – or by any combination of these. This means that micro-organisms produced by humans using inventive methods may be patented, along with processes that are non-biological and microbiological. The provision comes very close to the fine line that exists between life and non-life forms. The issues raised by the provision and its implications cover such areas as the ethical debate over the patenting of life forms, the definition of the term ‘life forms’ itself, the appropriation of traditional knowledge, farmers’ rights, and the definition of a *sui generis* system, to name but a few. The subsequent portion of the paper will consider each of these issues, as well as the legal framework within which solutions are being sought.

#### 3.2.1. *The definition of life forms: what may be patented*

Patent law has drawn a distinction between inventions and discoveries, and has permitted only inventions to be patented. However, the boundaries of what would be termed “inventions” have been pushed back by genetic engineering; the result is that today, it is up to the interpretation given by the particular country that decides what is patentable or not.<sup>53</sup> Such a circumstance leads to various and different

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<sup>51</sup> Vienna Convention on the Law of Treaties, 1969, available at <http://www.walter.gehr.net/wkengl.html>

<sup>52</sup> TRIPS Agreement, Preamble.

<sup>53</sup> The TRIPS Agreement does not define this term, leaving it to each country to decide.

standards. Developed nations and entities such as the US, the EU, and Japan grant patents to substances that are new in the sense that they were not previously available to the public, as opposed to being new in the sense that they have never existed before.<sup>54</sup> The European Patent Convention provides that even if biological material has previously occurred in nature, it shall be patentable if it is isolated by means of a technical process.<sup>55</sup> The EU has also passed a Directive on the Legal Protection of Biotechnological Inventions allowing for the patenting of microbiological processes.<sup>56</sup> This entails that in certain developed countries, the novelty requirement is interpreted to mean that “new” is no longer “not pre-existing”, but “novel” in a prior art sense.<sup>57</sup> The interpretation, it is submitted, brings inventions closer to the realm of discoveries. Hence, with regard to biological materials, it allows for the patenting of genes, thus giving the right-holder almost limitless rights with regard to the use of that gene in genetic engineering.<sup>58</sup> However, developing nations are unwilling to go so far. Mexico and Brazil, for example, have excluded the patentability of all genetic materials. The Brazilian patent law of 1996 denies patents to living beings or “biological materials found in nature”, even if they are isolated. This also includes the “genome or germplasm” of any living being.<sup>59</sup>

It is clear that such divergences in interpretation will only cause more confusion and division among the WTO membership, as each member seeks to have their own respective standards upheld. Countries with large R&D sectors that have patented these micro-organisms are not going to give up the rights that they confer so easily. For example, it has been noted that patents with regard to cotton, corn, and soybean are being aggressively enforced and are being used to establish competitive advantage in the marketplace.<sup>60</sup> However, granting patents in this area may actually have a counterproductive effect as the granting could block innovation and further research. It has been noted that “patents on genes of wide utilization in agriculture can block the development of new varieties in clear contradiction to the objectives for which the (patent) system was designed.”<sup>61</sup> These examples illustrate the fact that allowing the patenting of life forms does not in the long run serve society, but only the short-term goals of a few interested parties.

### 3.2.2. *Should life forms be patented?*

The ethical question as to whether life forms should be patented at all is another issue, and one with which international trade does not concern itself. Today, many

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<sup>54</sup> Corraera, *op. cit.*, n. 5, at 177-178.

<sup>55</sup> EPC, Article 3.2.

<sup>56</sup> Article 4. Available at [http://www.eu.int/eur-lex/pri/en/oj/dat/1998/1\\_213/1\\_21319980730en0013002.pdf](http://www.eu.int/eur-lex/pri/en/oj/dat/1998/1_213/1_21319980730en0013002.pdf)

<sup>57</sup> *Ibid.*

<sup>58</sup> Corraera, *op. cit.*, n. 5, at 178.

<sup>59</sup> *Ibid.*

<sup>60</sup> Corraera, *op. cit.*, n. 5, at 182.

<sup>61</sup> *Ibid.*

countries would choose to answer the question from a commercial or financial standpoint, and very few have cited moral or ethical reasons for restricting the patenting of life forms. TRIPS does provide for exclusion from patentability based on moral grounds,<sup>62</sup> yet again, the interpretation of what constitutes a moral ground is also left to the discretion of each country. The European Patent Office rejected the patentability of the Harvard “Oncomouse” based on moral grounds, but this decision was reversed by its Technical Board of Appeals.<sup>63</sup> The patent for the oncomouse, issued in 1988, was the first transgenic animal patent to be issued. It must be borne in mind that the animal was to be used in the testing of cancer. It illustrates that the decisions are also difficult to make, probably due to the fact that the dividing line between what is moral and what is immoral in this area is becoming increasingly more blurred.

### 3.2.3. *Farmers’ rights and intellectual property*

The debate on the patenting of life forms will reach its most crucial stage in the area of agriculture and Plant Genetic Resources (PGRs). The next section of the paper will discuss the importance of PGRs, and the impact of Intellectual Property rights in this field on the rights of farmers in developing countries, who have traditionally owned the intellectual rights over the plant varieties that they have developed, within their communities.

#### 3.2.3.1. *The importance of the farmer as a developer of new seed varieties*

We are inclined to think of the farmer merely as a person who produces the food we eat. However, the farmer plays the important roles of grower, breeder, scientist, and researcher. Farmers do not merely use seeds; they help to conserve and improve new plant varieties. It has been noted that their activities “ensure crop evolution whereby new varieties arise through genetic recombinations, mutation and hybridization within and between cultivated and wild plant populations”.<sup>64</sup> Another important factor is that many of these traditional crops have been bred, developed, and kept alive by farmers and are available in the public domain.<sup>65</sup> The contributions made by farmers to the development of plant diversity have been recognized by the International Undertaking on Plant Genetic Resources (IU).<sup>66</sup> However, farmers are

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<sup>62</sup> Article 27(2) states: “Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by domestic law”.

<sup>63</sup> *Correra, op. cit.* n. 5, at 188.

<sup>64</sup> *Brush, Steven, Providing Farmers’ Rights through In Situ Conservation of Crop Genetic Resources* (Report to the Commission on Plant Genetic Resources, University of California, 1994), cited in *Correra, op. cit.*, n. 5, at 167.

<sup>65</sup> *Gunawardene, op. cit.* n. 3, at 2.

<sup>66</sup> *Correra, op. cit.*, n. 5, at 167.

frequently not viewed as plant breeders, with the result that another individual or organization may use the seed that has been preserved and developed by the farmer, add an inventive step to it, and patent it – with no benefit accruing to the farmer.

Also, the various legal instruments that govern this area send out mixed signals. While the Convention on Biological Diversity (CBD) has sought to establish rules on the access to genetic resources and on benefit sharing, UPOV<sup>67</sup> has sought to limit the rights relating to such access. All of these will in turn have an impact on the way TRIPS is implemented. While plant breeders' rights seek to restrict access to certain protected varieties, it has been recognized that freer access is vital if the world's food demands are to be met. The Food and Agricultural Organization (FAO) had recognized that PBRs were not incompatible with its objectives of accessing and using PGRs for food and agriculture.<sup>68</sup> UPOV's previous models had also allowed this, by permitting the use of protected varieties as the source material for further variation and the re-use by farmers of saved seeds. Both of these activities are regarded as important methods of diversity generation. However, the revision of UPOV, as well as the growing willingness to patent plant materials, has threatened the concept of free access to these resources.

In the negotiations of the IU, it has been stressed that access to PGRs for food and agriculture is essential for sustainable agriculture. The IU aims at a system of "shared access", whereby those participating in a multi-lateral system will be able to share in the benefits. There has also been concern that increased IP rights will make the exchange of this information difficult, if not impossible.<sup>69</sup> Accordingly, certain countries may be unwilling to enter into a shared access regime if the genetic resources maintained and developed by their farmers and communities are to be appropriated by foreign companies, who will then patent those resources and prevent those very countries that supplied the original resources from having access to and using the protected material. This conflict has been described as follows:

The Third World farmer has a three-fold relationship with the corporations that demand a monopoly of life forms and life processes. Firstly, the farmer is a supplier of germplasm to TNCs [trans-national corporations]. Secondly, the farmer is a competitor in terms of innovation and rights to genetic resources. Finally, the Third World farmer is a consumer of the technological and industrial products of TNCs. Patent protection displaces farmers as competitors, transforms them into suppliers of free raw materials, and makes them totally dependent on industrial suppliers for vital inputs such as seeds.<sup>70</sup>

### 3.2.3.2. Bio-piracy and bad faith

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<sup>67</sup> The International Union for the Protection of New Varieties of Plants. See the discussion, *infra*.

<sup>68</sup> Resolution 4/89, cited in Corraera, *op. cit.*, n. 5, at 168.

<sup>69</sup> Corraera, *op. cit.*, n. 5, at 170.

<sup>70</sup> Shiva, Vandana and Radha Holla-Bhar, "Piracy by patent: The case of the neem tree", in Mander, Jerry and Edward Goldsmith (eds.), *The Case Against the Global Economy and For a Turn Toward the Local* (San Francisco: Sierra Club Books, 1996), at 157.

The current regime of IPR protection of genetic resources is also not equitable. Apart from the ethical issues already discussed, there are three other factors that merit consideration: first, a large number of patents have been granted on genetic resources obtained from developing countries, often without the knowledge and consent of those who possess these resources. This has led to charges of bio-piracy, which involve resources that are protected without further improvement. For example, researchers of Colorado State University were awarded a patent for quinoa without having added anything to it.<sup>71</sup> Further, patents have also been granted for products based on plant materials and knowledge developed and used by local and indigenous communities, such as the cases of the neem tree, kava, and turmeric. A patent on turmeric granted to the University of Mississippi in 1993 was invalidated by the US Patent Office at the request of India's Council for Scientific and Industrial Research.<sup>72</sup> Some of these patents are in direct violation of the laws that govern this area. For example, it has also been argued that the growing and marketing of "Texmati" or "Texbasmati" – the basmati grown in Texas – is a violation of the Geographical Indication provisions of TRIPS, as well as a direct violation of the CBD. It violates TRIPS because it assumes the name of the long-grained, fragrant rice grown in regions of India and Pakistan. It violates the CBD because it appropriates the ownership rights of India and Pakistan to the germplasm found in their territories.<sup>73</sup>

Secondly, some patents have been granted based on the function, and not on the structure, of the invention. This means that the invention is described on the basis of what it does, rather than its constituents. The result is a far wider scope than should be awarded; it restricts access by others to a wide segment of germplasm. For example, it has been noted that patents have been awarded for any genetic manipulation of cotton, regardless of the germplasm used, as well as a patent awarded to Lubrizol for sunflower seed, where the exact properties were not set out.<sup>74</sup>

Thirdly, certain entities have sought to register PBRs for resources that have been deposited in genebanks and are being held in trust for the international community. This should not be allowed under any circumstances, as it amounts to theft, pure and simple. The Consultative Group on International Agricultural Research (CGIAR) has called for a moratorium on granting IPRs on designated germplasm that are held in CGIAR's collections in research centres around the world. CGIAR has stated that such germplasm is held in trust for the world community and therefore should not be patented by anyone.<sup>75</sup>

All of these types of activities have increased the fear of developing countries, many of which are rich in bio-resources, that they will be at the losing end of the deal if IP rights are enforced and strengthened.

### 3.2.3.3. *The role of patents in restricting access*

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<sup>71</sup> US patent No. 5, 304 718, cited in *Correra, op. cit.*, n. 5, at 172.

<sup>72</sup> *Correra, op. cit.*, n. 5, at 172.

<sup>73</sup> *Sahai, op. cit.*, n. 1, at 126.

<sup>74</sup> *Correra, op. cit.*, n. 5, at 172.

<sup>75</sup> *Ibid.*

As mentioned before, access to PGRs is necessary for the continuous adaptation and improvement of plants for food and agriculture. Innovation in breeding activities takes place in an incremental manner, and is based on the modification of that which is already in existence. As long as there is access to these resources, the cycle that has been in place for hundreds of years can continue. The grant of IP rights, however, threatens to break the cycle and bring it to a complete standstill. According to Article 28 (1) (a) of the TRIPS agreement, patents relating to products confer the right to prevent third parties who do not have the patent holder's consent from "making, using, offering for sale, selling, or importing..." the product. Regarding process patents, the patentee, while preventing the use of the process, may also prevent the commercialization of a product obtained directly by that process. Hence, if a process to produce a plant is protected, the plant so created would also be protected.<sup>76</sup>

Further, while a patent-holder cannot exercise his/her rights in an area where the patent is not registered, the presence of a patent can prevent the importation of products containing the patented invention. Thus, the total exclusion of competitive products can be effected by the awarding of a patent.<sup>77</sup> Such restrictive practices have resulted in seed companies' becoming increasingly inventive in their pursuit of monopolies, and have consolidated in perhaps the greatest threat to world food security: the creation of "terminator" technology.

#### *3.2.3.4. Terminator technology and farmers' rights*

An invention in genetic engineering, owned jointly by a US seed company, Delta and Pine Land, and the US Department of Agriculture, was granted a patent in 1998.<sup>78</sup> It was dubbed the "terminator" gene. The technology employed is known as Genetic Use Restriction Technologies (GURTS). This technology prevents the plant from producing its own seeds,<sup>79</sup> or from growing properly unless a particular chemical is applied.<sup>80</sup> The result of terminator technology will be that farmers can no longer save seeds for the subsequent season, as the life cycle of the seed has been terminated. The farmer has, furthermore, to use the fertilizer and chemicals advocated for the particular crop, as the crop will fail to grow or yield the optimum harvest unless those particular chemicals are applied. The possibilities of this technology are alarming, to say the least. The concept of a non-germinating seed is perhaps the worst-case of all scenarios, as it signifies a break in the cycle of life. On a more commercial level, it will force farmers to be dependent on the seed companies. The plight of the subsistence farmer in developing nations is even harsher. It is estimated that in developing nations, the tradition of saving seed from one cropping season

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<sup>76</sup> *Ibid.*, at 176.

<sup>77</sup> *Ibid.*

<sup>78</sup> US patent no. 5,723,765.

<sup>79</sup> These are called variety-GURTS or V-GURTS.

<sup>80</sup> These are called trait-GURTS or T-GURTS.



to the next, particularly in crops like paddy, is as high as 90 per cent or more.<sup>81</sup> Also, once the farmer is dependent on a particular type of fertilizer or chemical, he has to buy it irrespective of the price.<sup>82</sup> The monopolistic situation thus created serves only to make it harder for the farmer to continue with his livelihood.

There is no justification for GURT technology, save that it will bring economic benefits to those who own it. Further, GURT technology raises the fear that seeds incorporating V-GURTs will drift to traditional crops grown in neighbouring fields and render them sterile. In addition, farmers whose crops are affected by the V-GURT seeds could also find themselves in unwitting violation of the patent rights of the holder of the patent for the V-GURTS, even though they did not incorporate the seeds willingly. There have been reports of expanding V-GURT technology to include animals and insects. These remain largely unverified.<sup>83</sup> In response to public concerns, Monsanto, one of the largest seed companies in the world, announced that it would not introduce V-GURT technology. However, none of the seed companies has abandoned V-GURT research; it has, furthermore, been reported that V-GURT technology is currently being used in the US.

At a more global level, the International Agricultural Research Centers (IARCs), supported by the CGIAR and the Rockefeller Foundation, have decided not to allow any terminator technology into their breeding material. India has followed, with a clause in its Protection of Plant Varieties and Farmers' Rights Bill which refuses protection to seeds and planting materials incorporating GURTs. Nevertheless, GURT technology remains a potential, and undeniably real, danger.

### 3.2.3.5. *The developing country farmer and the developed country farmer: the fundamental difference*

While GURT technology and the increased awarding of restrictive patents will affect farmers everywhere, their destructive potential is heightened with regard to the farmers in the developing world. Unlike farmers in developed nations, who are supported by subsidies from their governments, farmers in developing nations are subsistence farmers, and often have no savings to fall back on. Some even incur debt in order to buy the seed for the current planting season, and repay the debt only when the crop is harvested. There is no subsidy system to protect them, nor is there social security. Further, they are now unable to take out bank loans, as many banks will not lend to farmers on account of the latter's poor credit history. It is, quite literally, a suicidal situation.<sup>84</sup>

### 3.2.3.6. *Farmers' rights to traditional knowledge: sharing the benefits*

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<sup>81</sup> Sustainable farming systems through traditional plant genetic resources and indigenous knowledge based practice (2002) Helvitas, Sri Lanka, cited in Gunawardene, *op. cit.*, n. 3, at 2.

<sup>82</sup> For a discussion on this point, see Watal, *op. cit.*, n. 9, at 162.

<sup>83</sup> Watal, *op. cit.*, n. 9, at 162.

<sup>84</sup> In Sri Lanka, for example, the suicide rate among farmers is estimated to be the highest in the country.

As mentioned above, a fundamental issue appears to be that concepts of ownership vary between North and South. Traditional communities have, for long years, practised the concept of community ownership. This stems from the notion that nature cannot be owned, and that crop varieties are sacred gifts from the Creator.<sup>85</sup> However, today these communities have been forced to accept a world order where all property must be claimed and owned. If they are tardy in claiming their rights, they stand to lose them forever. Among the intellectual property rights held by traditional communities in their folk varieties are included the rights to the information encoded in their DNA as well as knowledge about production and use of their folk varieties.<sup>86</sup>

While it is true that farmers have a right to this knowledge, it is equally true that bio-technical companies, due to the vast resource bases to which they have access, are capable of extracting the maximum benefit from such knowledge. However, the issue seems to be that neither the companies nor the laws to which they subscribe appear to recognize the need to reward the farmers by sharing with them at least some of the benefits. As for benefit sharing, it has been noted that very few companies reciprocate towards the farmers by agreeing to share benefits when they are allowed to access genetic resources or traditional knowledge.<sup>87</sup> The other method for protecting farmers' rights in this regard is through legislation, the next point for consideration.

### *3.2.4. Legal responses to the issue of benefit sharing and the recognition of farmers' rights*

This section deals with the various legal instruments that have attempted to identify the issues and offer some solutions. As TRIPS ultimately rules, each of these will be compared with TRIPS to ascertain the level of validity of the principles in the face of TRIPS.

#### **The TRIPS agreement**

The TRIPS agreement is today the single most powerful legal document that affects both intellectual property and the rights of those who claim them. Interestingly enough, it contains no provisions that recognize either the concept of community ownership or the sharing of benefits among various interest groups such as farmers and breeders. It has been suggested that this might be covered by Article 39;<sup>88</sup> however, Article 39 deals with the protection of undisclosed information, and appears to pertain more closely to trade secrets than to traditional knowledge. A more bene-

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<sup>85</sup> Soleri, Daniela, David Cleveland *et al*, "Gifts from the Creator: intellectual property rights and folk crop varieties", in Greaves, *op. cit.*, n. 12, at 21.

<sup>86</sup> *Ibid.*

<sup>87</sup> Watal, *op. cit.*, n. 9, at 174.

<sup>88</sup> For a fuller discussion, see von Lewinski, S. (ed.), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (Netherlands: Kluwer Law International, 2004), at 32.

ficial option seems to be the *sui generis* protection system advocated by Article 27 (3), which asks members to provide for the protection of plant varieties either through the granting of patents or by an effective *sui generis* system, or by a combination of both. This topic was discussed in Doha, and the following statement was issued in the Ministerial Declaration:<sup>89</sup>

We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS agreement under Article 71.1... to examine, *inter alia*, the relationship between the TRIPS agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments... In undertaking this work, the TRIPS Council shall... take fully into account the development dimension.

However, to date, nothing has been forthcoming along these lines. It must be borne in mind that the Council has thus far been preoccupied with resolving the issues in the pharmaceutical sector, and has probably not created the opportunity to start on this one. Nevertheless, the problem has indeed been identified, and that is as much as may be expected, at least for the moment.

### **The Convention on Biological Diversity (CBD)**

The CBD is one of the instruments opened for signature at the Rio Conference;<sup>90</sup> it addresses the economic rights and needs of indigenous people. The CBD<sup>91</sup> highlights two important aspects of the debate: first, it recognizes that indigenous communities are dependent on biological resources. Preambular paragraph 12 mentions the “close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources”. Secondly, it recognizes the concept of benefit sharing. The same paragraph mentions the desirability of equitably sharing the benefits derived from the use of such traditional knowledge, innovations, and practices. These are, however, not embodied in the main text, and are helpful only in shaping the thought process behind the Convention. The operative section is Article 8(j): it calls for States to respect, preserve, and maintain such knowledge, and also calls on them to encourage the equitable sharing of the benefits arising from their utilization.

However, the CBD looks at the issue of benefit sharing from the perspective of conservation and the sustainable use of biological diversity, rather than from an intellectual property perspective. This is due to the fact that it is an environmental treaty, falling under the auspices of the United Nations Environmental Program (UNEP). Further, and more importantly, it is a UN document, subject to the lethargic and inefficient dispute settlement mechanism of the International Court of Justice (ICJ), which pales in comparison with the razor-sharp DSU of the WTO. WTO

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<sup>89</sup> Para. 19 of the Ministerial Declaration, WTO Doc. WT/MIN(01)DEC/W/1 of 14 November 2001.

<sup>90</sup> The United Nations Conference on Environment and Development, held in Rio de Janeiro, 1992.

<sup>91</sup> <http://www.biodiv.org/convention/articles.asp>.

members know that they will face the risk of retaliation if they fail to comply with a DSB ruling; UN members need not heed the ICJ ruling since there is no risk of losing any trading advantages, and may feel obliged to comply only for the sake of international comity – not as compelling a reason as the loss of trading benefits. Also, since only States may be parties to any ICJ disputes, it functions less well than does the WTO, where States have greater responsibility for their trade decisions, and consequently, for the actions of the private individuals who operate under them.

### The World Intellectual Property Organization (WIPO)

In 1998 the WIPO began to analyze the intellectual property aspects of traditional knowledge; in 2001 it issued a report.<sup>92</sup> Apart from this, the WIPO proposes to provide training workshops in intellectual property for holders of traditional knowledge. It also proposes to conduct case studies and pilot projects on the interfaces between intellectual property and traditional knowledge.<sup>93</sup> Since 2000, a special body, designated the Intergovernmental Committee on Intellectual Property and Genetic Resources, has been working on such topics as the development of model clauses for genetic resource contracts, work on a possible *sui generis* system for the protection of traditional knowledge, and the consideration of the Final Report on National Experiences with the Legal Protection of Expressions of Folklore.<sup>94</sup> However, none of these efforts has as yet yielded any concrete measures in helping to protect the interests and needs of indigenous and local communities with regard to their traditional knowledge.<sup>95</sup>

### UPOV

The International Union for the Protection of New Varieties of Plants, referred to commonly by the name UPOV,<sup>96</sup> seeks to promote plant breeding activities throughout the world, and to offer incentives for the creation of new and improved plant varieties. The criteria for protection under UPOV<sup>97</sup> involve no inventive step, nor any showing of usefulness. Rather, they require only that the plant variety be commercially novel,<sup>98</sup> distinctive,<sup>99</sup> uniform<sup>100</sup> and stable.<sup>101</sup>

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<sup>92</sup> WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, 2001, <http://www.wipo.int/globalissues/tk/report/final/index.html>.

<sup>93</sup> See e.g., WIPO/UNEP, *The Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of Biological Resources and Associated Traditional Knowledge, Selected Case Studies* (Submission to the Executive Secretary of the Convention on Biological Diversity for consideration at the Fifth Conference of the Parties to the Convention on Biological Diversity, held at Nairobi, Kenya in May 2000).

<sup>94</sup> Stoll, Peter-Tobias and Anja von Hahn, "Indigenous peoples, indigenous knowledge and indigenous resources in international law", in von Lewinski, *op. cit.*, n. 88 at 30.

<sup>95</sup> *Ibid.*

<sup>96</sup> UPOV is the acronym of the French title.

<sup>97</sup> <http://www.upov.int/en/publications/conventions/1991/content.htm>.

<sup>98</sup> UPOV Convention 1991, Article 6.

Since UPOV asks neither for inventiveness nor for usefulness, the standards are lower than are those for patent protection. This has been seen as beneficial to breeders, by allowing them to claim protection for plant varieties that are quite similar, without making drastic changes in their agronomic traits.<sup>102</sup> Further, UPOV contains the “farmers’ privilege” allowing the farmers to use saved seeds for future crops. Article 15 (2) permits the Contracting Parties to allow farmers to use protected varieties, provided that it is for propagating purposes, on their own holdings, and is the product of the harvest they have obtained by planting. Additionally, UPOV also allows the “research exemption”<sup>103</sup> whereby protected materials may be used as a basis for developing new varieties. It has been suggested that UPOV provides the best model of a *sui generis* system as envisaged by Article 27 (3) (b) of TRIPS.<sup>104</sup> Some scholars argue that there are very few alternatives to UPOV. Since the establishment of a *sui generis* system that is actually effective could involve considerable amounts of time and money, a system beyond UPOV complying with the effectiveness required by TRIPS is considered “very unlikely”.<sup>105</sup> They believe that UPOV will probably become the global standard left unspecified by TRIPS.<sup>106</sup>

However, UPOV is not without its own flaws. It differentiates between farmers and breeders, as evidenced by the “farmers’ privilege” section. This is contrary to the view taken in traditional communities, of farmers *as* breeders. If farmers are not breeders, then that role is presumably adopted by those who commercially exploit the plant varieties: the seed companies. Since the seed companies do not in order to secure rights under UPOV have to add an inventive step, it is literally an open invitation to these companies to appropriate a plethora of rights to themselves, leaving farmers with very little. Although farmers under UPOV may still be able to grow and save their seeds, they will be unable to share in the benefits of the commercial exploitation of the seeds that they have helped to differentiate and to preserve.

These concerns have been raised by developing countries, notably India, which has a large percentage of subsistence farmers. Of particular importance to them is the fact that UPOV permits dual protection of plant varieties; it entails that the same variety can be protected by Plant Breeders’ Rights (PBR) as well as by patents.<sup>107</sup> It is feared that such a mechanism as PBR will be used to obtain patent protection for varieties that fail to meet the patent criteria (inventiveness and usefulness). It is further argued that the UPOV system, which involves elaborate testing and approval prior to the award of a UPOV certificate, is far too expensive for the average small

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<sup>99</sup> *Ibid.*, Article 7.

<sup>100</sup> *Ibid.*, Article 8.

<sup>101</sup> *Ibid.*, Article 9.

<sup>102</sup> Hassemer, Michael, “Genetic resources”, in von Lewinski, *op. cit.*, n. 88 at 172.

<sup>103</sup> UPOV Convention 1991, Article 15(1).

<sup>104</sup> Hassemer, *loc. cit.*, n. 102, at 174.

<sup>105</sup> *Ibid.*, at 175.

<sup>106</sup> *Ibid.*

<sup>107</sup> Gene Campaign, *Why India/Developing Countries Need an Alternative to UPOV* (New Delhi, Gene Campaign, 1998).

company, farmers' co-operative or farmer/breeder. This will leave the area of the market open to the large seed companies who have the financial capability to make such heavy investments. Such a system, it is argued, will cause the farmers to sell their varieties for a pittance to the large seed companies, who would in turn exploit them for huge returns.<sup>108</sup>

Further, there is dissatisfaction with the way countries have sought to incorporate UPOV standards into local legislation. Scholars believe that government entities in developing countries have not incorporated UPOV provisions into local law in a manner that benefits farmers, while those in developed countries have been able to extract the maximum possible advantage from such instruments.<sup>109</sup> It has also been noted that in many instances no provisions have been made in domestic law with regard to rights over crop wild relatives, traditional crop varieties, or newly developed crop varieties already in the public domain.<sup>110</sup> There is no way in which farmers could be compensated in cases where one or more of these are employed to create a new variety which would then be protected by a breeder's right. In such an event, it could result in the farmer who nurtured the original variety paying a fee for the use of the derived crop.

It is interesting to note that the proponents of UPOV as a viable alternative to be used in determining a *sui generis* system appear to be Western scholars, while the opposition to UPOV stems from the developing world.<sup>111</sup> Part of the problem seems to be that the developed world cannot conceive of the farmer as being anything but a farmer. Many may envision the farmer as a village yokel, engaging in the routine and monotonous task of ploughing the field from morning to night. The developing world accords the farmer greater respect, and understands that he plays an important part in conserving and promoting biodiversity. Sahai points out that

[W]e need to overcome the bias that most of us suffer from, that of acknowledging the research conducted by scientists in white coats working in laboratories of universities as "Science" and dismissing the complex knowledge systems contained in rustic, rural communities as something infinitely less and not worthy of acknowledgement.<sup>112</sup>

### 3.2.5. Alternative possibilities: CoFab as an option

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<sup>108</sup> *Ibid.*

<sup>109</sup> Gunawardene, *op. cit.*, n. 3, at 3, highlights the fact that the USA, Australia, and the EU have incorporated the "farmers' privilege" as a mandatory right, while the Draft Sri Lankan Act to Protect New Plant Varieties has relegated it to the position of an option, to be decided by the Minister in charge of the subject.

<sup>110</sup> *Ibid.*

<sup>111</sup> The contributors to von Lewinski's book are from European nations. Gene Campaign and Gunawardene are Indian and Sri Lankan respectively. Watal, though originally from India, has been in the USA for some time. Consequently, her views take a middle path, advocating the pursuit of Western standards as a matter of necessity, rather than of choice.

<sup>112</sup> Sahai, *op. cit.*, n. 1, at 132.

One of the options that might be considered to fill the vacancy created by the *sui generis* requirement is the Convention on Farmers and Breeders (CoFaB).<sup>113</sup> This was drafted in New Delhi in 1998, at the initiation of Gene Campaign.<sup>114</sup> It has been proposed as an alternative to UPOV, and is presented as a forum for implementing Farmers and Breeders' rights in developing countries. Article 5 specifies the rights of farmers and breeders; Article 5 (1) proposes that the farming community be entitled to a fee from breeders every time a landrace or traditional variety is used for the purpose of breeding or improving a new variety. Article 5(2) proposes that breeders be entitled to the right to authorize the commercial exploitation of the plant variety that they have bred. Article 5(4) reserves to the contracting parties the right to legislate in a manner that increases the scope of the breeders' rights, especially with regard to marketing rights.

While CoFaB appears to be the only text that recognizes, and rewards, traditional communities for their rights over intellectual property, it is also the text with the lowest amount of influence. It is only a proposed treaty, and has no legal effect whatsoever. However, it demonstrates the standard that developing countries want to set, and could be useful in future negotiations on a possible amendment to Article 27 (3) (b) of TRIPS.

### 3.2.6. *Securing rights through contracts*

It has also been proposed that contracts, conducted in good faith, are the most practical answer to the problem of trying to reconcile intellectual property rights of the formal and informal natures.<sup>115</sup> A contract, since it is tailor-made, could address the issues that both parties think is most important, and specify the rights and obligations only to the extent to which the parties feel comfortable. However, given the vast disparity between the parties with regard to economic influence, access to information and, consequently, all-important bargaining power, this will also fail to function well, as it will result in the farmers' suffering the raw end of the deal.

### 3.2.7. *Projections for the future*

Bio-technology is the tool of the future. There are vast possibilities for enrichment in this field; hence, developing nations should ultimately seek to reap the rewards of bio-technology. Further, if the vast numbers of subsistence farmers in these countries are to survive in the modern era, it becomes imperative for them to do so. It has been suggested that developing nations should identify the development of competitive skills in research in bio-technology as an important policy objective.<sup>116</sup> However, given the technological gap between developed and developing countries,

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<sup>113</sup> <http://www.genecampaign.org>.

<sup>114</sup> An Indian Non-Governmental Agency specializing in Intellectual Property, Genetic Resources and Indigenous Communities. See <http://www.genecampaign.org>.

<sup>115</sup> Watal, *op. cit.*, n. 9, at 177.

<sup>116</sup> *Ibid.*, at 183.

collaboration, not confrontation, has been offered as the means by which this is to be achieved. Watal suggests that developing nations open up their IPR laws and allow for greater protection, while attempting to raise themselves to the standard where they can conduct independent research, develop sound R&D bases, and implement a strong IPR regime to protect them.

This line of reasoning ignores a fundamental factor crucial to the debate: that of occupying the field. By the time developing nations acquire the know-how required to protect their indigenous knowledge, most of it would no longer be indigenous, and would probably long before have been patented by the developed world. Also by that time, the traditional communities that originally owned the knowledge would find they could no longer apply it. This is particularly true in an era when knowledge is becoming increasingly ephemeral, and today's discovery is tomorrow's waste.

#### 4. CONCLUSION

When compared with the problems that arose with regard to pharmaceutical companies, the bio-technological area seems to be better prepared. While the pharmaceutical sector waited until the AIDS crisis arose before they began seeking solutions, debate and proposals for reform have been going on in the pharmaceutical sector since the 1990s. Part of the reason may be that entire communities stand to lose their livelihoods in these largely agricultural nations, hence the threat, as well as the consequences, are substantial, to say the least. It is true that developing nations must raise themselves into a position where they too can reap the benefits of bio-technology. It is, however, also true that developing nations need to protect the wealth of knowledge they possess until such time as they are able to harness it. While building up R&D can take years, even decades, developing good legal regimes can be accomplished in a relatively shorter time.

It is submitted that, as at least a short-term solution, developing nations should identify their priorities and enact legislation to protect the local communities and repositories of Intellectual Property. If government entities lack the requisite knowledge, they should work in conjunction with non-governmental entities, which appear to be far better aware of the thorny issues involved. While TRIPS provides no adequate protection, the ambiguity of its language (especially that in relation to *sui generis* methods of protection) better advantage could have been taken of this factor by developing nations, who are, after all, free to adopt their method of choice. The fact that they have not chosen to do so is squarely their fault.

A key question to have emerged is whether discussions on these subjects have developed far enough for them to be handled immediately in the WTO, or whether members should wait until technical discussions in the WIPO are resolved.<sup>117</sup> The topic should be addressed before it escalates any further. Traditional communities

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<sup>117</sup> TRIPS: Reviews, Article 27.3(B) and Related Issues. [http://www.wto.org/english/tratop\\_e/trips\\_e/art27\\_3b\\_background\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm)



have shouldered the burden of maintaining the diversity of the crops that sustain us all this while. We must not fail them now.

NOTE



# VIETNAM'S BORDER DISPUTES: LEGAL AND CONFLICT MANAGEMENT DIMENSIONS\*

Ramses Amer and Nguyen Hong Thao\*\*

## 1. INTRODUCTION

The main purpose of this study is to examine the progress made in managing Vietnam's border disputes. Another purpose is to analyze the challenges that lie ahead relating to those border disputes that are still unsettled. Both the legal and the conflict management dimensions of the disputes are addressed and analyzed.

The agreements reached between Vietnam and neighbouring countries are identified and outlined. The remaining disputes are identified in relation to the nature of their respective differences. The continuity and changes in the approaches to dispute settlements are analyzed. The degree of success in managing the border disputes is assessed. The challenges of managing the remaining unsettled disputes are discussed.

## 2. VIETNAM'S BORDER DISPUTES

The following overview of how Vietnam's border disputes have been and are being handled is divided into two sections. The first section deals with the border disputes that have been formally settled through agreements or through joint-develop-

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\* This study draws on earlier and on-going research carried out by the two authors individually on Vietnam's territorial disputes as well as on other aspects of the developments in the South China Sea. This empirical portion and the analysis of the management of border disputes are a revised and updated version of the corresponding parts in Ramses Amer and Nguyen Hong Thao, "The Management of Vietnam's Border Disputes: What Impact on Its Sovereignty and Regional Integration?", 27 *Contemporary Southeast Asia* (2005), at 429-452. A travel grant from The Swedish School of Advanced Asia-Pacific Studies (SSAAPS) made possible a working visit by Amer to Vietnam in March, 2006 during which an earlier version of this manuscript was discussed. The views expressed in this study represent only those of the two authors.

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ment arrangements. These settled disputes are outlined in chronological order according to the year in which they were settled or the first agreement was reached. The second section outlines the unresolved border disputes.

## 2.1. Settled border disputes

- On 18 July 1977 Laos and Vietnam signed a treaty delimiting their land boundary. Following the completion of the demarcation process a complementary treaty was signed on 24 January 1986. On 1 March 1990 an additional protocol was signed as was, on the same day, an agreement on border regulation.<sup>1</sup>
- On 7 July 1982 Vietnam and the then People's Republic of Kampuchea (PRK) signed an agreement on "historic waters" in the Gulf of Thailand.<sup>2</sup> On 20 July 1983 the two countries signed a Treaty on the principles for the settlement of border problems and an Agreement on border regulations.<sup>3</sup> On 27 December 1985 the two countries signed the Treaty on the Delimitation of the Vietnam-Kampuchea Frontier.<sup>4</sup> On 10 October 2005 the two countries signed a Supplementary Treaty to the 1985 Treaty.<sup>5</sup>
- On 5 June 1992 an agreement was reached between Malaysia and Vietnam to engage in joint development in areas of overlapping claims to continental shelf areas lying to the south-west of Vietnam and to the east-north-east off the east coast of Peninsular Malaysia.<sup>6</sup>

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<sup>1</sup> For details on the settlement and demarcation of the land border between Laos and Vietnam see Gay, Bernard, *La nouvelle frontière lao-vietnamienne. Les accords de 1977-1990*. Histoire des frontières de la péninsule indochinoise – 2, Travaux du Centre d'histoire et civilisations de la péninsule indochinoise publiés sous la direction de P.B. Lafont (Paris: L'Harmattan, 1995). See also a report carried by the *VNA News Agency* reproduced in *British Broadcasting Corporation, Summary of World Broadcasts, Part Three, Far East, 2975 B/6-7* (19 July 1997) (hereafter "BBC/FE").

<sup>2</sup> For the full text of the Agreement of 7 July 1982 see *BBC/FE/7074 A3/7-8* (10 July 1982). The text of the Agreement has also been reproduced in an English-language version as "Appendix 2" in Kittichaisaree, Kriangsak, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (Singapore, Oxford and New York: Oxford University Press, 1987), at 180-181.

<sup>3</sup> *BBC/FE/7393 A3/1* (23 July 1983). See also Quang, Nghia, "Vietnam-Kampuchea border issue settled", 4 *Vietnam Courier* (1986), at 8-9.

<sup>4</sup> For reports from Vietnam and the PRK announcing the signing of the Treaty and for details see *BBC/FE/8143 A3/1-3* (30 December 1985). See also Quang, *loc. cit.*, n. 3, at 8-9.

<sup>5</sup> "PM Khai holds talks with Cambodian counterpart". From the website of the *Ministry of Foreign Affairs of Vietnam* (<http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns05101140825>) (accessed on 23 October 2005)

<sup>6</sup> Information derived from the website of the *Ministry of Foreign Affairs of Malaysia* (<http://www.kln.gov.my/>). See also Amer, Ramses, "Vietnam and its neighbours: the border dispute dimension", 17 *Contemporary Southeast Asia* (1995), at 306 (hereafter Amer, "Vietnam and its neighbours"). See also Nguyen, Hong Thao, "Joint development in the Gulf of Thailand", 7-3 *Boundary and Security Bulletin* (1999), at 79-88 (hereafter Nguyen, "Joint development"); and Nguyen, Hong Thao, "Les délimitations maritimes concernant le Vietnam: accords conclus et

- On 9 August 1997 Thailand and Vietnam reached an agreement delimiting their continental shelf and Exclusive Economic Zones (EEZ) boundaries in a disputed area in the Gulf of Thailand to the south-west of Vietnam and to the north-east of Thailand.<sup>7</sup>
- On 30 December 1999 China and Vietnam signed a *Land Border Treaty* settling the land border dispute between the two countries.<sup>8</sup>
- On 25 December 2000 China and Vietnam signed the *Agreement on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves in the Gulf of Tonkin* settling their maritime boundary disputes in the Gulf.<sup>9</sup> On the same day the two countries signed an agreement on fishery co-operation in the Gulf of Tonkin.<sup>10</sup> On 29 April 2004 the two countries signed the Supplemen-

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negociations en cours”, in *Le Vietnam et la mer*, ouvrage coordonné par Monique Chemillier-Gendreau (Travaux du colloque organisé les 16 et 17 juin 2000 par l’Association d’Amitié Franco-Vietnamienne) (Paris: Les Indes Savantes, 2002), 53-56 (hereafter Nguyen, “Les délimitations”).

<sup>7</sup> BBC/FE/2996 B/4-5 (13 August 1997). See also Nguyen, Hong Thao, “Vietnam’s first maritime boundary agreement”, 5-3 *Boundary and Security Bulletin* (1997), at 74-79 (hereafter Nguyen, “Vietnam’s First”); Nguyen, Hong Thao, “Vietnam and Thailand settle maritime disputes in the Gulf of Thailand”, 2 *The MIMA Bulletin* (1998), at 7-10; and Nguyen, “Les délimitations”, *loc. cit.*, n. 6, at 51-53.

<sup>8</sup> “The Land Border Treaty” was announced to have been officially signed at Hanoi on 30 December 1999. See “Viet Nam, China sign land border treaty”, *Vietnam News Agency (VNA)* (30 December 1999). From the website of *Vietnam News Agency* (<http://www.vnagency.com.vn/Asp/Readnews4.asp?FileN=frac3012.020>) (accessed on 31 December 1999); and, “Signature du traité sur la frontière terrestre Vietnam-China”, *Agence vietnamienne de l’information (AVI)* (30 décembre 1999). From the website of *Vietnam News Agency* (<http://www.vnagency.com.vn/asp/Tthoisuf4.asp?stq=2>) (accessed on 31 December 1999). See also “Vietnam, China sign land border treaty”, 146 *News Bulletin* (31 December 1999). From the website of *Nhan Dan* (<http://www.nhandan.org.vn/english/19991231/index.html>) and <http://www.nhandan.org.vn/english/19991231/bai-news6.html>) (accessed on 27 January 2000).

<sup>9</sup> The “Agreement on the Demarcation of Waters, Exclusive Economic Zones and Continental Shelves in the Bac Bo (Tonkin) Gulf” (name used in Vietnamese sources at the time of signing) was officially signed on 25 December in Beijing. See “Viet Nam, China sign joint statement for comprehensive cooperation” (25 December 2000). From the website of the *Ministry of Foreign Affairs of Vietnam* (<http://www.mofa.gov.vn:8080/.../6279f8d7fcf98966c7269c10028184c?>) (accessed on 28 December 2000). See also “China, Viet Nam sign agreements”, 44(2) *Beijing Review* (11 January 2001), at 9-10. The full text of the Agreement has been reproduced in two recent studies. See Zou, Keyuan, “The Sino-Vietnamese agreement on maritime boundary delimitation in the Gulf of Tonkin”, 34 *Ocean Development and International Law* (2005), at 22-24 (hereafter Zou, “The Sino-Vietnamese”); and Nguyen, Hong Thao, “Maritime delimitation and fishery cooperation in the Tonkin Gulf”, 34 *Ocean Development and International Law* (2005), at 41-44 (hereafter, Nguyen, “Maritime delimitation”).

<sup>10</sup> For details on the fishery agreement, see Zou, Keyuan, “Sino-Vietnamese fishery agreement for the Gulf of Tonkin”, 17 *The International Journal of Marine and Coastal Law* (2002), at 127-148. For broader studies on both agreements see Nguyen, “Les délimitations”, *loc. cit.*, n. 6, at 67-74; and Nguyen, Hong Thao, “The Gulf of Tonkin: A case study of dispute settlement”, in Askandar, Kamarulzaman (ed.), *Management and Resolution of Inter-State Conflicts in Southeast Asia*, (Penang:

tary Protocol to the Agreement on Fishery cooperation in the Tonkin Gulf and the Regulations on preservation and management of the living resources in the Common Fishery Zone in the Gulf of Tonkin.<sup>11</sup>

- On 11 June 2003 Vietnam and Indonesia signed an agreement on the delimitation of their continental shelf boundary in the area to the north of the Natuna Islands.<sup>12</sup>

## 2.2. Unsettled border disputes

- Despite the agreements of the 1980s between Cambodia and Vietnam the periods of tension since the 1990s relating to the border disputes displayed that there was still a need to address their border disputes.<sup>13</sup> The agreement Supplementary Treaty to the 1985 Treaty has settled the land border dispute; however, the maritime disputes are still awaiting resolution.<sup>14</sup>
- Between Malaysia, Thailand and Vietnam there is a multilateral dispute relating to an area of overlapping claims in the Gulf of Thailand.<sup>15</sup>
- Between Malaysia and Vietnam the major dispute relates to Vietnam's sovereignty claim to the whole Spratly archipelago, which overlaps the Malaysian claim to

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Southeast Asian Conflict Studies Network, 2003), at 207-214 (hereafter Nguyen, "The Gulf of Tonkin").

<sup>11</sup> "Viet Nam, China ink deal on fisheries in Tokin Gulf" (1 May 2004). From the website of the *Vietnam News Agency* (<http://vietnamnews.vnagency.com.vn/2004-04/30/Stories/07.htm>) (accessed on 1 May 2004). See also "Protocol on China-Vietnam agreement on fishery cooperation in Beibu bay signed", From the website of the *People's Daily Online* (English version) ([http://english.people.com.cn/2004004/30/eng20040424\\_142001.html](http://english.people.com.cn/2004004/30/eng20040424_142001.html)) (accessed on 4 October 2004).

<sup>12</sup> For information about the recent agreement with Indonesia see "Vietnam-Indonesia boundary agreement benefits regional stability", in *1306 News Bulletin* (27 June 2003). From the website of *Nhan Dan* (<http://www.nhandan.org.vn/english/20030627/index.html> and <http://www.nhandan.org.vn/english/20030627/bai-news3.html>) (accessed on 22 December 2003).

<sup>13</sup> The agreements between Vietnam and Cambodia reached in the 1980s remained not recognized by all parties within Cambodia for most of the 1990s. New bilateral talks on the status of the borders between these countries have been initiated towards reaching a solution to the outstanding disputed issues. This has thus far resulted in the Supplementary Treaty of October 2005 relating to the land border. Therefore, in the context of this study the maritime disputes between Vietnam and Cambodia are not considered as resolved and they are listed among the as yet unsettled disputes.

<sup>14</sup> For details on the disputes between Cambodia and Vietnam relating to the land and maritime areas see Amer, Ramses, "The border conflicts between Cambodia and Vietnam", 5(2) *Boundary and Security Bulletin* (1997), at 80-91 (hereafter Amer, "The border conflicts"); and Amer, "Vietnam and its neighbours", *loc. cit.*, n. 6, at 299-301. For information on the maritime dispute see also Nguyen, "Les delimitations", *loc. cit.*, n. 6, at 59-63.

<sup>15</sup> For an overview of the maritime conflicts and co-operative agreements in the Gulf of Thailand see Prescott, Victor, *The Gulf of Thailand* (Kuala Lumpur: Maritime Institute of Malaysia (MIMA), 1998). The area is currently included in the JDA between Malaysia and Thailand, but is recognised by the two countries as claimed by Vietnam (Amer's discussions with officials in Bangkok in December 1998, April 1999, and November 2000).

- the southern part of the archipelago.<sup>16</sup> These parts of the Archipelago are also claimed by China and partly claimed by the Philippines.
- Between the Philippines and Vietnam there is a dispute in the South China Sea where Vietnam's sovereignty claim to the whole Spratly archipelago overlaps the Filipino claim to the major part of it.<sup>17</sup> These parts of the Archipelago are claimed by China and also partly claimed by Malaysia.
  - Between China and Vietnam the overlapping sovereignty claims to the Paracel and Spratly archipelagos are still unresolved. The same applies to China's claims to historical waters within the so-called dotted line to the east of the Vietnamese coast in South China Sea.
  - Between Brunei Darussalam and Vietnam a potential overlapping claim to the 200-mile EEZ could emerge if the two countries began to assert such claims over islands and reefs both claim in the South China Sea.<sup>18</sup>

### 3. BETWEEN CONFLICT MANAGEMENT AND TENSION

#### 3.1. The 1970s

The developments since the end of the Vietnam War in 1975 show that during the latter half of the 1970s Vietnam and Laos reached agreements relating to their land border with the demarcation being finalized in 1986. A closer look at this process shows that before 1945, the two countries were different administrative parts of French Indochina. After gaining independence in 1954 the two countries opted to recognize the colonial administrative limits as boundaries. In June 1956, when the Prime Minister and the Minister of Foreign Affairs of Laos visited Hanoi, the two sides agreed to open negotiations on boundary demarcation. The wars in Laos and Vietnam prevented such negotiations prior to the 1970s. During the 1970s negotiations the two countries agreed to use the colonial administrative lines drawn on the 1:100,000-scale map of Bonne printed by the Indochina Geography Institute in 1946. In essence, Laos and Vietnam agreed to apply the *uti possidetis* principle in the process of demarcating their land border. The negotiations resulted in the two agreements of 1977 and 1986. Laos and Vietnam utilized the principle of *uti possidetis* even before that principle became universally accepted through a decision by the International Court of Justice in 1986. In other words, the two countries made a

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<sup>16</sup> Amer, "Vietnam and its neighbours", *loc. cit.*, n. 6, at 305-306; Prescott, J.R.V., *The Maritime Boundaries of the World* (London and New York: Methuen, 1985), at 218-222 (hereafter Prescott, *The Maritime Boundaries*); and Valencia, Mark J., *Malaysia and the Law of the Sea. The foreign policy issues, the options and their implications* (Kuala Lumpur: Institute of Strategic and International Studies (ISIS Malaysia), 1991), at 54-66.

<sup>17</sup> *Ibid.*, at 54-66; Amer, "Vietnam and its neighbours", *loc. cit.*, n. 6, at 306-308; and Prescott, *The Maritime Boundaries*, *op. cit.*, n. 16, at 218-222.

<sup>18</sup> Valencia, *op. cit.*, n. 16, at 48-50 and 66-67.



contribution to the development of international law.<sup>19</sup> Officially, the two countries did not refer to any border dispute between them, yet the outcome of the demarcation process demonstrated that some differences existed and were resolved in the negotiation and demarcation processes.<sup>20</sup>

### 3.2. The 1980s

During the 1980s there were the agreements between Vietnam and the then PRK in 1982, 1983, and 1985. No progress was made in negotiating the border disputes with member-states of the Association of South-East Asian Nations (ASEAN) or with China. The Cambodian conflict prevented progress to the extent that no talks, apart from those with Indonesia and Cambodia, on border issues took place between Vietnam and its other neighbours for the duration of the Cambodian conflict 1979-1991.

### 3.3. The 1990s

#### 3.3.1. *Members of ASEAN*

The 1990s witnessed considerable progress in negotiations. A joint development agreement (JDA) was reached with Malaysia in 1992 over an area of bilateral dispute in the Gulf of Thailand. The process of negotiations between Vietnam and Thailand eventually resulted in the agreement on maritime boundaries of 1997 over the areas of bilateral dispute in the Gulf of Thailand. In 1995 Vietnam and the Philippines agreed on a 'code of conduct' to be observed by the two countries in the South China Sea.<sup>21</sup> More notable progress during the 1990s was the initiation of trilateral talks between Vietnam, Malaysia, and Thailand relating to an area of the Gulf of Thailand where the claims of the three countries overlap. These talks were made possible by the maritime boundary agreement between Vietnam and Thailand in 1997.<sup>22</sup>

In the case of the JDA with Malaysia, both Vietnam and Malaysia made unilateral claims to the continental shelf in the 1970s. The then Republic of Vietnam (South) (ROV) did so in 1971, and Malaysia in 1979; they thus created an area of overlapping

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<sup>19</sup> *Frontier Dispute Case (Burkina Faso v. Republic of Mali)*, ICJ Rep. 1986.

<sup>20</sup> For details on the settlement and demarcation of the land border between Laos and Vietnam see Gay, *op. cit.*, n.1.

<sup>21</sup> Amer, Ramses, "Expanding ASEAN's conflict management framework in Southeast Asia: The border dispute dimension", 6 *Asian Journal of Political Science* (1998), at 46.

<sup>22</sup> Amer, Ramses, "Conflict management within the Association of Southeast Asian Nations (ASEAN): assessing the adoption of the 'Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia'", in Askandar, Kamarulzaman (ed.), *Management and Resolution of Inter-State Conflicts in Southeast Asia* (Penang: Southeast Asian Conflict Studies Network, 2003), at 117-118.

claims. The 1992 JDA implied that Malaysia agreed to nominate the Petroleum Nasional Berhad (PETRONAS) and Vietnam, the Vietnam Oil and Gas Corporation (PETROVIETNAM) to undertake, respectively, the exploration and exploitation of petroleum in the "Defined Area" and to enter into appropriate commercial arrangements. Four years after the conclusion of the commercial arrangement, on 29 July 1997, the first petroleum was extracted from the Bunga Kekwa field.<sup>23</sup>

In the case of the agreement with Thailand it can be noted that the Gulf of Thailand is a semi-enclosed sea, long but narrow, with an average width of 215 nautical miles. Therefore, based on the provisions of the 1982 United Nations Convention on the Law of the Sea (1982 UNCLOS) the whole Gulf is subject to the jurisdictional claims of coastal states up to 200 nautical miles. Both Vietnam and Thailand made unilateral claims to the continental shelf in the early 1970s. The ROV did so in 1971 and Thailand in 1973, thus creating an area of overlapping claims. Each country failed to take into account off-shore features along the coast of the other country when making these claims. In addition, overlapping claims to EZZ led to problems with illegal fishing.<sup>24</sup> In 1992 negotiations were initiated and after five years the two sides agreed to settle both the continental shelf and EEZ disputes through delimiting a single maritime boundary. The agreement of 9 August 1997 reaffirms the tendency to using a single boundary for both the continental shelf and the EEZ in zones that extend for a distance of less than 400 nautical miles between opposite coasts. It is also of relevance in the context of the effects on islands of the international law of maritime delimitation. In the case of Vietnam it was the first agreement on maritime delimitation.<sup>25</sup>

### 3.3.2. *China*

Following full normalization of bilateral relations between China and Vietnam in November 1991, the border disputes caused a fluctuating level of tension during the 1990s. In order to address this situation the two countries developed a system of talks at the expert, governmental, and high levels to deal with the tensions and with the border issues as such. Talks at the expert level were initiated in October 1992. The talks at the governmental level began in August 1993, and the twelfth round of talks was held in December 2005.<sup>26</sup> Talks at both levels led to a notable decrease in tension by the end of the decade, and also to the agreement on a Land

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<sup>23</sup> Nguyen, Hong Thao, *Le Vietnam et ses différents maritimes dans la mer de Bien Dong (Mer de Chine méridionale)* (Paris: Edition A. Pédone, 2004), at 99-108.

<sup>24</sup> For an overview of the interplay of negotiations and tension in the period 1992-1995 see Amer, "Vietnam and its neighbours", *loc.cit.*, n. 6, at 309-311.

<sup>25</sup> For more detailed analyses, see *ibid.*, at 88-99 and 107-108; and Nguyen, "Vietnam's first", *loc.cit.* n. 7, at 74-78.

<sup>26</sup> The twelfth round of talks was held in Hanoi on 8-10 December 2005, "Viet Nam, China to complete landmark demarcation in 2008", From the website of the *Ministry of Foreign Affairs of Vietnam* (<http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns051212154021>) (accessed on 9 January 2006).

Border Treaty at the end of 1999 that entered into force on 6 July 2000 when the two countries exchanged documents relating to the ratification of the agreement in Beijing.<sup>27</sup> The talks on the Gulf of Tonkin were also well underway by the end of the decade. In late 2000, the two countries signed the *Agreement on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves in the Gulf of Tonkin*.<sup>28</sup> This agreement entered into force on 30 June 2004 when the two countries exchanged documents relating to the ratification of the agreement in Hanoi.<sup>29</sup> The ratifications proceeded; the entry into force of the agreement was made possible by the completion of the talks on an additional protocol to the agreement of fishery co-operation signed on the same day in December 2000 as was the boundary agreement. Agreeing on the protocol constituted a prerequisite to proceeding with the ratification of the maritime boundary agreement.

However, talks on the so-called “sea issues” (South China Sea – East Sea, according to Vietnam), initiated in November 1995 and with the tenth round of talks held in June 2005,<sup>30</sup> have made very little progress. This is due in part to disagreement over determining the issues to be included in the agenda, with Vietnam pushing for the inclusion of the issue of the Paracels, on the one hand, and China insisting that this topic should be excluded, on the other. Nevertheless, the level of tension relating to the disputes in the South China Sea has been considerably reduced since 1999 – a trend that has continued to prevail into the subsequent millennium.<sup>31</sup>

The negotiation process relating to the land border dispute did not, despite regular rounds of talks of the joint working group, change significantly in frequency before 1998; however, during 1999 the joint working group on the land border met on four

<sup>27</sup> The joint working group on the land border dispute held sixteen rounds of talks from February 1994 to the signing of the *Land Border Treaty* in December 1999. For details about the talks as well as the ratification process in 2000, see Amer, Ramses, *The Sino-Vietnamese Approach to Managing Boundary Disputes*, 3(5) *Maritime Briefing* (Durham: International Boundaries Research Unit, University of Durham, 2002), at 13-31. (hereafter Amer, *The Sino-Vietnamese Approach*)

<sup>28</sup> The joint working group on the Gulf of Tonkin dispute met seventeen times from March 1994 to the signing of the *Agreement on the Demarcation of Waters, Exclusive Economic Zones and Continental Shelves in the Gulf of Tonkin* in December 2000. For details about the talks and the context in which they took place, see Amer, *The Sino-Vietnamese Approach*, *op. cit.*, n. 27, at 11-34 and 50-58.

<sup>29</sup> “Vietnam, China exchange documents ratifying Tonkin Gulf demarcation agreement”. From the website of *Nhan Dan* ([http://www.nhandan.org.vn/english/news/010704/domestic\\_vietnamchina.htm](http://www.nhandan.org.vn/english/news/010704/domestic_vietnamchina.htm)) (accessed on 19 July 2004). See also “Two China-Vietnam Beibu Gulf agreements take effect”. From the website of the *People’s Daily Online* (English version). ([http://english.people.com.cn/200407/01/eng20040701\\_148157.htm](http://english.people.com.cn/200407/01/eng20040701_148157.htm)) (accessed on 3 October 2004).

<sup>30</sup> The tenth round of talks on “sea issues” was held in Beijing on 21 and 23 June 2005. “Vietnamese and Chinese experts hold talks on sea issues”. From the website of the *Ministry of Foreign Affairs of Vietnam* (<http://www.mofa.gov.vn/en/nr04087104143/nr040807105001/ms050627151155>) (accessed on 24 July 2005).

<sup>31</sup> For more details on the management on the border disputes between China and Vietnam, see Amer, *The Sino-Vietnamese Approach*, *op. cit.*, n. 27 and Amer, “Assessing Sino-Vietnamese relations through the management of contentious issues,” 26 *Contemporary Southeast Asia* (2004), at 328-345 (hereafter Amer, “Assessing Sino-Vietnamese”).

separate occasions, and each round lasted at least two weeks on any of these. This increase in the number and in the duration of the rounds of talks can be attributed to the political pressure to reach a common understanding and to provide the political leaders with the basis on which to sign a treaty.<sup>32</sup>

Reaching an agreement was by no means a simple task given the geographical characteristics of the border areas: these encompass both mountainous terrain, not easily accessible, and other parts including rivers – which present their own sets of issues to be settled. Other difficulties are posed by the movement of border markings and activities carried out by the population and local authorities in the border area. This was clearly shown in incidents and the resulting tension in late 1997 and early 1998.<sup>33</sup> Also, the military clashes along the border during the second half of the 1970s – in particular, in connection with the Chinese attack on Vietnam in February and March 1979 – had left some areas in dispute along the border. Among the more notable such areas were some 300 metres between the provinces of Guangxi and Lang Son, which prevented the re-opening of the railway between the two countries during the first half of the 1990s. An agreement was eventually in February 1996 reached to do so.<sup>34</sup>

As the Treaty encompassed no demarcation, such a process had to be carried out. Consequently, the two countries established a Joint Committee for the demarcation of the land border. It held its first meeting in Beijing between 19 November and 1 December 2000. The Joint Committee would focus on the demarcation of the border and on the planting of “landmarks”.<sup>35</sup> The first “single marker” was “planted” on 4 January 2002.<sup>36</sup> The on-going demarcation process between China and Vietnam is expected to be finalized in 2008 “at the latest”.<sup>37</sup>

In August 2002 Vietnam published the text of the Treaty, although it included no maps.<sup>38</sup> In September of the same year, Le Cong Phung, a Vice-Foreign Minister, gave additional information about the Treaty. He outlined the background to the negotiation process, the process itself, and the mechanisms and principles used in

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<sup>32</sup> For details see Amer, *The Sino-Vietnamese Approach*, *op. cit.*, n. 27, at 26-29.

<sup>33</sup> For details see *ibid.*, at 22-24.

<sup>34</sup> For details see *ibid.*, at 9 and 16-17.

<sup>35</sup> BBC/FE/4016 G/3 (6 December 2000). Report carried by the website of the *Voice of Vietnam* (in Vietnamese). See also “Viet Nam and China meet on borderline demarcation”, *Vietnam News Agency (VNA)* (1 December 2000), From the website of the *Vietnam News Agency*, (<http://vnagency.com.vn/Asp/Readnewse4.asp?Filn=>) (accessed on 2 December 2000).

<sup>36</sup> “First single marker planted on Vietnam-Chinese border line” (4 January 2003). From the website of the *Ministry of Foreign Affairs of Vietnam* (<http://www.mofa.gov.vn:8080/Web%20server/ForeignPolicy.nsf/f6f55a44edc7e3b4c7>) (accessed on 4 April 2003).

<sup>37</sup> “Viet Nam, China to complete landmark demarcation in 2008”. From the website of the *Ministry of Foreign Affairs of Vietnam* (<http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns051212154021>) (accessed on 9 January 2006).

<sup>38</sup> The full text of the Land Border Treaty without maps has been published as “The Land Border Agreement between the Socialist Republic of Vietnam and the People’s Republic of China”, in *Công Báo / Official Gazette of the Socialist Republic of Vietnam*, No. 41 (25 August 2002), at 3- 16.

settling disputed areas along the border. The core disputed areas – referred to as “Areas C” – encompassed 164 areas covering 227 km<sup>2</sup>. Of these areas some 113 km<sup>2</sup> were defined as belonging to Vietnam, and around 114 km<sup>2</sup> as belonging to China. Le Cong Phung stated that the outcome of the negotiations “conformed” with principles agreed upon and in so doing they ensured “fairness and satisfaction for both sides”.<sup>39</sup>

The negotiation process relating to the delimitation of the Gulf of Tonkin with regular rounds of talks of the joint working group differed little in frequency on a yearly basis up to 1999. The developments during 2000 showed that an increase occurred, with six rounds of expert-level talks held during that year, in March, May, June, September, October-November, and late November, respectively, as compared to only one round of talks during the whole of 1999.<sup>40</sup>

The core issue in the negotiations to be settled in the Gulf of Tonkin revolved around the principle to be applied in order to divide the Gulf. In this context the impact of islands was of importance, in particular, the Vietnamese-controlled Bach Long Vi Island. The first question was whether or not it qualified as an island according to the provisions of the 1982 United Nations Law of the Sea Convention (1982 UNCLOS). If it did, as was argued by Vietnam, then it was entitled to full maritime zones and – more importantly – the extent of the effects and thus impact it would have on the tracing of a line of equidistance if this principle were applied in the Gulf of Tonkin. An assessment of the agreed coordinates indicates that the impact of Bach Long Vi was not ‘valued’ fully in the delimitation. However, it was partly ‘valued’ as it was awarded a quarter of the impact, i.e. 15 nautical miles.<sup>41</sup>

Another potentially complicating factor in the negotiations was the status of the *Sino-French Agreement* of 1887. Vietnam would probably have favoured using it to delimit the Gulf of Tonkin since it would generally be to her own advantage. China would have opposed using it and argued that the 1887 Agreement was intended only to determine administrative control over the islands in the Gulf.<sup>42</sup> The agreement reached indicates that if the status of the *Sino-French Agreement* of 1887 was brought up during the negotiations, both sides eventually agreed that it would not have an impact on the delimitation of maritime zones.

The agreed co-ordinates indicate that the two sides reached an agreement on a line of equidistance after having settled their differences relating to the question of

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<sup>39</sup> The Vice-Minister also gave a detailed response to the accusations by overseas Vietnamese that the Vietnam had given up large areas of land to China. He refuted the accusations as “untrue and groundless”. For details, see “Vice-Foreign Minister on Vietnam-China land border treaty”, 9(97) *Vietnam Law & Legal Forum* (2002), at 21-23.

<sup>40</sup> For details, see Amer, *The Sino-Vietnamese Approach*, *op. cit.*, n. 27, at 31-35.

<sup>41</sup> Nguyen, *The Gulf of Tonkin*, *loc. cit.*, n. 10, at 210-213.

<sup>42</sup> For an argument along similar lines having parallels with the *Brevie Line* drawn in 1939 in the Gulf of Thailand, see Zou, Keyuan, “Maritime boundary delimitation in the Gulf of Tonkin”, 30 (3) *Ocean Development and International Law* (1999), at 238-240.

how islands should have an impact on the delimitation, in particular Bach Long Vi Island.<sup>43</sup>

The maritime boundary agreement over the Gulf of Tonkin reaffirms the Vietnamese position of using a single line for both the continental shelf and an EEZ in an area at a distance of less than 400 nautical miles between opposite coasts. The Boundary Agreement is also relevant from the following perspectives: the effects of islands, both coastal and outlying (Bach Long Vi); the role of low-tide elevations in delimitation; the issues of the outlet of a boundary river; and the question of a closing line for the Gulf.<sup>44</sup>

The agreement on fishery is an example of a twin-step solution for settling fishing disputes and delimiting an EEZ. The EEZ can be divided, yet the application of the fisheries regime can be delayed in order to minimize economic dislocation for states. In the case of the Gulf of Tonkin, the regime of the EEZ as regards fisheries will be applied only after four years for the Transitory Fishery Zone and fifteen years for the Common Fishery Zone.<sup>45</sup>

### 3.3.3. *South China Sea*

In the context of the multilateral dispute relating the Spratly archipelago and the broader issue of the situation in the South China Sea, Vietnam is actively involved in the ASEAN-China dialogue. The most tangible outcome of that dialogue was the signing of the "Declaration on the conduct of parties in the South China Sea" (DOC) on 4 November 2002, during the Eight ASEAN Summit in Phnom Penh, Cambodia. The DOC is seen as an important step in the process aiming at establishing and agreeing on a 'code of conduct' in the South China Sea. The parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UNCLOS.<sup>46</sup>

In this context, the agreement between the Chinese National Offshore Oil Company (CNOOC) and the Philippines National Oil Company (PNOC) on 1 September 2004 on the seismic survey of the South China Sea is of interest.<sup>47</sup> The area of the

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<sup>43</sup> For more detailed analyses, see Amer, IBRU; Nguyen, "The Gulf of Tonkin", *loc. cit.*, n. 10, at 207-214; Nguyen, "Maritime delimitation", *loc. cit.*, n. 9, at 25-44; and, Zou, 'The Sino-Vietnamese', *loc. cit.*, n. 9, at 13-24.

<sup>44</sup> For more details, see Nguyen, "Maritime delimitation", *loc. cit.*, n. 9, at 28-30.

<sup>45</sup> For more details, see Nguyen, "Maritime delimitation", *loc. cit.*, n. 9, at 30-32.

<sup>46</sup> Nguyen, Hong Thao, "Vietnam and the code of conduct for the South China Sea", 32 *Ocean Development and International Law* (2000), at 105-130. See also Nguyen, Hong Thao, "Declaration on parties' conduct in South China Sea (the East Sea) – a step towards the establishment of the code of conduct for the region", 9(99), *Vietnam Law & Legal Forum* (2002), at 19-21.

<sup>47</sup> The official announcement of the agreement was made by the Philippines on 6 September 2004 ("RP-China agreement on joint marine seismic undertaking in the sea constitutional – Rumulo / DFA hails PGMA's successful state visit to China; Signed agreements to boost trade and investment between RP and China" SAF-AGR-524-04, September 2004, Press Release, Department of Foreign

seismic survey covers some parts of the Spratly archipelago. Vietnam has officially stated that the agreement has been concluded without consulting other parties. It has “requested” China and the Philippines to inform Vietnam about the content of the agreement. Vietnam also reiterated its claims to sovereignty over both the Spratly and the Paracel archipelagos. Finally, it called on all other signatories to join Vietnam in “strictly implementing the DOC”.<sup>48</sup>

In 2005 there were further developments. First, on 7 March it was announced by the Department of Foreign Affairs of the Philippines that the Maritime and Ocean Affairs Center, Department of Foreign Affairs of the Philippines, would host the Third Philippines-Vietnam Joint Oceanographic Marine Scientific Expedition in the South China Sea (JOMSRE-SCS III) between 6-9 April 2005.<sup>49</sup> On 11 March the Spokesman of China’s Ministry of Foreign Affairs announced in response to a question on China’s views on the reports that the two countries would conduct “joint marine research” in the South China Sea. He expressed China’s “concern” about the joint marine research and that the “relevant parties” would follow the “principles enshrined in the Declaration on the Declaration on Conduct of parties in the South China Sea” in their marine research.<sup>50</sup> Second, on 14 March a “Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea” was signed between the CNOOC, PETROVIETNAM, and the PNOOC. The term of the agreement is three years. The signing of the agreement “would not undermine the basic position held by the Government of each party on the South China Sea issue”.

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Affairs. From the website of the *Department of Foreign Affairs* (<http://www.dfa.gov.ph/news/pr/pr2004/sep/pr524.htm>) (accessed on 29 September 2004).

<sup>48</sup> Vietnam’s reaction to the agreement between China and the Philippines came on 9 September 2004 in response to a question raised by the correspondent of *Agence France Press* to the Spokesperson of the Ministry of Foreign Affairs of Vietnam (“Answer to correspondent by Mr. Le Dzung, the spokesman of the Vietnamese Ministry of Foreign Affairs on 9<sup>th</sup> September 2004”). From the website of the *Ministry of Foreign Affairs of Vietnam* ([http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns041028222202](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns041028222202)) (accessed on 29 September 2004).

<sup>49</sup> Information derived from “DFA-MOAC To host third joint scientific research expedition in the South China Sea”, SAF-AGR-133-05 (17 March 2005), Press Release, Department for Foreign Affairs. From the website of the *Department of Foreign Affairs* (<http://www.dfa.gov.ph/news/pr/pr2005/mar/pr133.htm>) (accessed 17 March 2005). The Vietnamese counterpart was the Academy of Science and Technology of Vietnam. See “Information on Vietnam-Philippines joint scientific expedition in April 2005 in the East Sea. Answer to correspondent by Mr. Le Dzung, the spokesman of the Vietnamese Ministry of Foreign Affairs on 15<sup>th</sup> March 2005”. From the website of the *Ministry of Foreign Affairs of Vietnam* ([http://www.mofa.gov.vn/tt\\_baochi/pbnfn/ns050315170200/](http://www.mofa.gov.vn/tt_baochi/pbnfn/ns050315170200/)) (accessed on 22 March 2005).

<sup>50</sup> Information derived from “Foreign Ministry spokesman Kong Quan’s comment on Philippines-Vietnamese joint marine research in the South China Sea, 2005/03/11”. From the website of the *Ministry of Foreign Affairs of the People’s Republic of China* (<http://www.fmprc.gov.cn/eng/xwfw/s2510/t186844.htm>) (accessed on 11 March 2005).

However, the parties expressed their “resolve to transform the South China Sea into an area of peace, stability, cooperation and development”.<sup>51</sup>

#### 3.3.4. *Indonesia*

Vietnam's negotiations with Indonesia in the 1990s did not bring about a breakthrough in the negotiations on their border dispute. The two countries failed to capitalize on the traditional good bilateral relations. Furthermore, the impact of the Asian Financial Crisis on Indonesia brought other, more pressing, needs onto the agenda for the Indonesia leaders. Thus, no progress was made in negotiating the border disputes, yet stability was maintained. This state of affairs continued to prevail into the early 2000s<sup>52</sup> until a breakthrough was made in 2003; it led to the agreement of June 2003 settling the border dispute between the two countries. However, the pressing domestic issues to be dealt with by Indonesia have prevented the ratification of the agreement and it has thus not yet entered into force.

#### 3.3.5. *Cambodia*

The 1990s also witnessed the re-emergence of the border issues in Vietnam's relations with Cambodia. In particular the land border issue caused periods of tension in bilateral relations, with leading Cambodian politicians openly accusing Vietnam of border violations. Vietnam has repeatedly rejected such accusations. The initiation of renewed talks on the border issues in the late 1990s led to no agreement by the end of the decade. Doubt was first cast on the status of the agreements of 1982, 1983, and 1985 by the Cambodian side. By the late 1990s, however, the agreements seem to have become acceptable to both sides as the basis for further talks. The bilateral talks progressed into the year 2000 and a Vietnam official stated that an agreement would be reached by the end of that year.<sup>53</sup> However, this did not materialize, and for a few years talks were more sporadic. Eventually, the two countries managed to make progress in the talks on the land border and on 10 October 2005 they signed

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<sup>51</sup> Information derived from “Tripartite Agreement for joint marine seismic undertaking in the agreement area in the South China Sea. Answer to correspondent by Mr. Le Dzung, the spokesman of the Vietnamese Ministry of Foreign Affairs on 14<sup>th</sup> March 2005”. From the website of the *Ministry of Foreign Affairs of Vietnam* ([http://www.mofa.gov.vn/tt\\_baochi/pbnfn/ns050314164241/](http://www.mofa.gov.vn/tt_baochi/pbnfn/ns050314164241/)) (accessed on 22 March 2005).

<sup>52</sup> For details on the nature of the dispute and talks up to 2000, see Nguyen., “Les délimitations”, *loc. cit.*, n. 6, at 56-58.

<sup>53</sup> For references to a settlement of the border issues between Vietnam and Cambodia by the end of 2000, see “Vietnam, Cambodia meet on border issues”, 344 *News Bulletin* (1 November 2000) (English language bulletin). From the website of *Nhan Dan* (<http://www.nhandan.org.vn/english/20001101/index.html> and <http://www.nhandan.org.vn/english/20001101/bai-news1.html>) (accessed on 15 December 2000); and, “Viet Nam, Cambodia to solve border issue this year, affirms Vietnamese Deputy Prime Minister” (3 November 2000). From the website of the Ministry of Foreign Affairs of Vietnam (<http://www.mofa.gov.vn:8080/.../302e3aad9ebfd3c7c725698c000552b2?>) (20 December 2000).



a Supplementary Treaty. Both countries completed their respective ratification processes on 29 November 2005; following the exchange of ratification documents, the Supplementary Treaty entered into force in 6 December 2005.<sup>54</sup> Cambodia and Vietnam expect their demarcation to be completed in December 2008.<sup>55</sup>

A closer look at the agreements of the 1980s display that in the agreement of 1982 the “historic waters” were defined as being located between the coast of Kien Giang Province, Phu Quoc Island and the Tho Chu islands on the Vietnamese side, and between the coast of Kampot Province and the Poulo Wai islands on the Cambodian side. The agreement stipulated that the two countries would hold, “at a suitable time”, negotiations to determine the maritime frontier in the “historic waters”. Pending such a settlement the two countries would continue to regard the Brevie Line drawn in 1939 as the diving line for the islands within the “historic waters”, and the exploitation of the zone would be decided by “common agreement”.<sup>56</sup> In the 1985 Treaty on the Delimitation of the Vietnam-Kampuchea Frontier the principle *uti possidetis* would be applied. Furthermore, the common land border would be based on the administrative lines drawn on a 1:100,000-scale map in use before 1954 or up to that year.<sup>57</sup>

To use maps printed in the 1950s presented the two countries with some problems: one was that the maps did not incorporate any geographical changes to have occurred since then. Moreover, the acknowledgement that these two kinds of maps (Bonne, and UTM) were of the same validity in delimitating and demarcating the boundary line caused difficulties when the demarcation was to be carried out in areas where there were divergences between these maps or between the maps and the geographical conditions, particularly in the Mekong River delta where floods cause annual changes. The 1985 Treaty delimited most of the boundary line, but due to the factors mentioned above, there were still some provisional elements that needed further field surveys. The Supplementary Treaty of 2005 was a necessary step not only to reconfirm the validity of the 1985 Treaty, but also to settle remaining delimita-

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<sup>54</sup> “New achievement in Vietnam-Cambodia relations”, From the website of *Nhan Dan* ([http://www.nhandan.org.vn/english/news/081205/domestic\\_new.htm](http://www.nhandan.org.vn/english/news/081205/domestic_new.htm)) (accessed on 9 January 2006).

<sup>55</sup> “New achievement in Vietnam-Cambodia relations”, ([http://www.nhandan.org.vn/english/news/081205/domestic\\_new.htm](http://www.nhandan.org.vn/english/news/081205/domestic_new.htm)) (accessed on 9 January 2006); and “Vietnam and Cambodia discuss master plan on border demarcation”. ([http://www.nhandan.org.vn/english/news/231205/domestic\\_vn.htm](http://www.nhandan.org.vn/english/news/231205/domestic_vn.htm)) (accessed on 9 January 2006). Both from the website of *Nhan Dan*.

<sup>56</sup> BBC/FE 7074 A3/7-8, Kittichaisaree, *op. cit.*, n. 2, at 180-181. Interestingly enough, the “full text” of the Agreement transmitted by the official Cambodian news agency (SPK) on July 8 omitted the sentence: “Patrolling and surveillance in these historical waters will be jointly conducted by the two sides”, which was included in Article 3 of the version published by the Vietnamese News Agency and reproduced in Kittichaisaree’s study (BBC/FE/7074 A3/8, 7076/A3/7; and Kittichaisaree, *op. cit.*, n. 2, at 180-181).

<sup>57</sup> For reports from Vietnam and the PRK announcing the signing of the Treaty and for details, see BBC/FE/8143 A3/1-3. See also Quang, *loc.cit.*, n. 3, at 8-9.

tion issues and to move the demarcation process ahead.<sup>58</sup> Following the ratification of the Supplementary Treaty the two countries have agreed to push ahead with the demarcation process with the goal of completing it by the end of 2008.<sup>59</sup>

#### 4. BROADER TRENDS IN THE MANAGEMENT OF VIETNAM'S BORDER DISPUTES

From the above analysis it can be noted that the resolution of the Cambodian conflict in October 1991 was a watershed in the management of Vietnamese border disputes with other South-east Asian countries. Prior to this development Vietnam had settled its border dispute with only one country: Laos. As noted above the agreements reached with Cambodia in the 1980s have not resolved the border disputes, as is seen in the continued differences and renewed attempts at negotiations in the late 1990s and the early 2000s. Since the settlement of the Cambodian conflict, Vietnam agreed in 1992 on a JDA with Malaysia over areas of overlapping claims in an area of the Gulf of Thailand. Then, Vietnam and Thailand agreed on maritime boundaries between the two countries in the Gulf of Thailand in 1997. The agreements with Thailand have also paved the way for talks between Vietnam, Thailand, and Malaysia relating to the area of the Gulf of Thailand where the claims of the three countries overlap. Furthermore, the 1995 agreement with the Philippines on a 'code of conduct' to be observed in the South China Sea is another notable example of progress after the resolution of the Cambodian conflict.

In the case of the management of the border issues between China and Vietnam the normalization of bilateral relations certainly facilitates the management of the disputes. However, the most interesting feature is the fact that the full normalization took place without resolution of the border issues. This can best be understood in the light of the major efforts that both countries have invested in managing and resolving the border issues since full normalization. In other words, full normalization would not have been possible if resolving the border issues had been a pre-condition for full normalization.<sup>60</sup>

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<sup>58</sup> Nguyen, Hong Thao and Hoang Hai Oanh, "Legal aspects of the Supplementary Treaty to the 1985 Treaty on Boundary Delimitation between Vietnam and Cambodia", 12 (137) *Vietnam Law & Legal Forum* (January 2006), at 17-20.

<sup>59</sup> "Vietnam and Cambodia discuss master plan on border demarcation". From the website of *Nhan Dan* ([http://www.nhandan.org.vn/english/news/231205/domestic\\_vn.htm](http://www.nhandan.org.vn/english/news/231205/domestic_vn.htm)) (accessed on 9 January 2006).

<sup>60</sup> For more detailed analyses of the normalization process *per se* and the way in which the border disputes were addressed during this process, see Amer, *The Sino-Vietnamese Approach*, *op. cit.*, n. 27, at 7-8; Sino-Vietnamese relations is derived from Amer, Ramses, "Sino-Vietnamese normalization in the light of the crisis of the late 1970s", 67 *Pacific Affairs* (Fall 1994), at 365-366 and 376-382; Amer, Ramses, "Sino-Vietnamese relations: past, present and future", in Thayer, Carlyle A. and Ramses Amer (eds.), *Vietnamese Foreign Policy in Transition* (Singapore: Institute for Southeast Asian Studies; and New York: St Martin's Press, 1999), at 73-77 and 105-108; and Amer, "Assessing Sino-Vietnamese", *loc. cit.*, 31, at 320-328.

Overall, Vietnam has made considerable progress in managing and resolving its border disputes. Some bilateral disputes still remain unresolved, yet these are managed through various measures such as a JDA, a code of conduct, and talks. The multi-lateral dispute over the Spratlys is more complicated due to the nature of the disputes. Thus far Vietnam has made the greatest progress in its bilateral agreements with the Philippines and China, respectively, when it comes to managing disputes in the area. Vietnam also contributes to the policy towards the South China Sea and the Association's attempts at promoting peace and stability in the area. Differences such as those between Vietnam and China relating to the Paracels, and also with regard to areas to the east of the Vietnamese coast and the west of the Spratlys, are likely to persist. However, both sides have made considerable progress in containing tension in recent years and have agreed on a number of measures to avoid and contain possible sources of tension.<sup>61</sup>

## 5. CONCLUDING OBSERVATIONS

Since the early 1990s, Vietnam has emerged as an active partner in settling border disputes by peaceful means in the region. During a period spanning only slightly longer than a decade, Vietnam has completed talks on six land and maritime disputes with the following countries: Malaysia, Thailand, China, Indonesia, and Cambodia. This is an impressive success rate in terms of the settlement of border disputes in the context of South-east Asia. Through these agreements, Vietnam has contributed to the development of international law such as the application of the *uti possidetis* principle, the equitable principle, the application of the single line for maritime delimitation, and in terms of the effects on islands of the maritime delimitation.

Could the progress in managing the border disputes be attributed only to Vietnam? The answer is no; credit has, though, to be given to Vietnam for striving to manage peacefully its border disputes with neighbouring countries. The policies implemented by Vietnam have positively contributed to the peaceful management of the disputes. Vietnam has also persisted in pursuing such policies in the context of those disputes that have yet to be settled.

Of course, the agreements with Cambodia, China, Indonesia, Laos, Malaysia, the Philippines, and Thailand, respectively, have been reached because these countries have also opted to pursue policies promoting negotiations on their border disputes with Vietnam. Thus, the peaceful management of Vietnam's border disputes is a result of the common interest between Vietnam and the neighbouring countries concerned to pursue such policies. It also reflects the vast improvement in overall relations between Vietnam and China, as well as among Vietnam and the member-states of ASEAN during the 1990s, i.e., after the formal resolution of the Cambodian conflict and the full normalization of relations between China and Vietnam in late 1991.

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<sup>61</sup> Amer, *The Sino-Vietnamese Approach*, *op. cit.*, n. 27, at 45-46.

Despite the positive developments the remaining disputes are a challenge. Vietnam and Cambodia must complete the demarcation of their land border and resolve their maritime disputes. Between Vietnam and China the demarcation of the land border must be completed. The two countries also need fully to implement the agreements reached relating to the Tonkin Gulf. Furthermore, Vietnam and China must continue bilateral talks on “maritime issues” (South China Sea/East Sea) and continue to strive for management of potential tension in the area; they need to refrain from any action that might cause tension. Vietnam and Indonesia need to complete the ratification process and proceed towards making their maritime agreements effective, i.e., these should enter into force. Vietnam must also pursue trilateral talks with Malaysia and Thailand on the area of trilateral dispute in the Gulf of Thailand. Finally, Vietnam and other concerned parties must continue to contribute to the peaceful management of the multilateral dispute over the Spratly archipelago in the South China Sea. The impact of the Tripartite Agreement among the national oil companies of China, the Philippines, and Vietnam on the South China Sea situation will have to be assessed in the years to come. It could potentially have a considerable impact on developments in the area.



# LEGAL MATERIALS



# STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW\*

## CHINA

### JUDICIAL DECISIONS<sup>1</sup>

#### **Maritime Claims under Chinese Law – Relevant International Convention – Application of International Maritime Dangerous Goods Code**

NEW NATIONAL ASSURANCE COMPANY LTD. v. SHANGHAI RIJIN-TOP EXPRESS INTERNATIONAL FORWARDING CO. LTD.

**Shanghai Maritime Court of PRC (SMC), 21 April 2005  
Civil Judgment (2004) TMC (Chu) No. 492**

#### Facts

On 15 September 2003, the defendant issued a Bill of Lading (B/L) numbered as DNB030909. Shipper: Auto Best Co. Ltd.; Consignee and Notify Party: Danny's Automotive Company; Cargo: Spare Tools and Accessories; No. of Pieces: 1,183 (Container GATU8063730); Port of Lading: Ning Bo, China; Destination: Johannesburg; Shipment: KOTA WAJAR 087; Freight to Collect.

According to a Marine Cargo Transportation Insurance Contract (No. 2199080) between the plaintiff and a company named Prologistics, claimed by the plaintiff as the agent of Danny's Automotive Company, Prologistics appeared as an insured

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\* Edited by B.S. Chimni and Joydeep Narayan Choudhuri. The years for which the State Practice has been collated are 2004 and 2005. However, in some instances, prior state practice has been included. This editorial decision was taken for two reasons: first, that readers may find useful the state practice of previous years; second, that often this previous state practice is available only in later years. The responsibility for the content of a contribution is that of each national contributor to the State Practice Section. The original footnote form has been retained in each contribution.

<sup>1</sup> Contributed by Yun Zhao, Assistant Professor, City University of Hong Kong.



party in the Contract. The plaintiff initiated the suit based on his subrogation rights, which were valued *in toto* at USD 67,874.76.

On 21 October 2003, the container GATU8063730 was confirmed as being totally lost in a fire on board the ship the *Sea Elegance*. The report by the Maritime Security Bureau of South Africa testified that a container with 20 tons of Calcium Hypochlorite (hereinafter CH) was neither declared nor labelled as dangerous cargo in Singapore, was not loaded appropriately, and it eventually exploded. The CH container was loaded onto the bottom floor of the larboard, beside a container of HO. In the same cabin, there were containers of plastics, rubber- and paper-based cargoes; the adjacent cabin was the engine room. In the International Maritime Dangerous Goods Code (hereinafter IMDG), CH is listed as dangerous goods (No. 1748, level 5.1). According to the regulations issued by the United Nations Maritime Organization on IMDG, this kind of dangerous shipping unit shall be loaded on the deck cabin, avoiding excessive sunlight and heat sources, and the packages should be stacked reasonably allowing adequate ventilation. The International Salvage Union and the International Group of P&I suggested that the CH can only be loaded on the deck and the chemical cargoes shall be packed in drums each containing no more than 45 kilograms. If the air temperature is higher than 35° Celsius, the shipper should take measures to lower the temperature of the container of No. 1748 cargoes in IMDG, or each container should not contain over 14 tons of those goods. From the investigation it has been evident that in temperatures of over 35° Celsius, the CH will become unstable and can possibly result in a fire or in an explosion. The experts reached a consensus that the explosion and fire on the *Sea Elegance* were caused by the unstable CH in the circumstance of an air temperature of over 35° Celsius.

### The Judgment

The Court rejected the Plaintiff's request by citing Articles 51 and 269 of the Maritime Code of the People's Republic of China, as well as Article 54 of the Civil Procedure Code of the People's Republic of China.

The accident was caused by the negligence of the CH's consignor. He failed to declare and to label the container as dangerous goods as defined in the IMDGC, which caused the improper loading and eventually resulted in fire and explosion. The consignors/shippers should have been more aware of the features of the goods than was the carrier. They were obligated to remind the carrier to pay attention to the character of the cargo and to take measures to prevent, and if necessary deal with, possible accidents. If a shipper failed to fulfil this obligation, he would be found responsible for any damage. In this case, the carrier loaded the cargoes unwittingly, so he and his employees were not negligent as regards the cause of the fire accident.

Even if the loss of the goods was because of the inappropriate loading by the employees of the carrier, the plaintiff would not be entitled to damages for there is a special rule in the legislations. According to the law as per Article 51 of the Maritime Code of the People's Republic of China, unless caused by the actual fault of the carrier, the carrier will not be liable for the loss of or damage to the goods incurred during the period of the carrier's responsibility arising or resulting from

a fire. The evidence provided by the plaintiff did not prove the existence of the actual fault of the carrier himself, so the carrier was exempted from the responsibility for the damages caused in the fire. The plaintiff did not justify his request for damages on the basis of inappropriate loading.

**Application of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 – Application for recognition and enforcement**

VYSANTHI SHIPPING COMPANY LTD. v. CHINA GRAINS, OILS & FEEDSTUFFS CO. LTD. AND OTHERS

**Tianjin Maritime Court of PRC (TMC), 29 October 2004  
Civil Order in Writing (2004) TMC (Que) No.1**

Facts

The dispute between the applicant and the first defendant on the B/L of the *Joanna V* Ship issued on 28 June 1996 had been heard by the London Court of International Arbitration (LCIA) and an award was issued on 14 March 2001. According to the award, the applicant should obtain USD 367,136.86 in general average contribution (GAC) and USD 28,500 in damages of resorting. The applicant should also obtain interest at seven per cent per annum on the above amount. The interest on damages of resorting (USD 28,500) would be calculated from 1 August 1996. The commencement time for calculating the GAC interest would, however, depend on the results of the negotiation between the applicant and the first defendant. If their negotiation failed, the arbitration court would decide the date. The end dates of the interest of both damages would be the day when the first defendant made the *de facto* payment to the applicant. On 20 June 2001, the LCIA made the second award, stating that the date of commencement for calculating the interest of the resorting damages should be 12 July 1996. In the same award, it was stated that the arbitration fees for the two arbitration procedures would be paid by the first defendant. On 13 February 2002, the third award was made to confirm that the cost of the whole dispute should be paid by the first defendant.

On 28 March 2002, the first defendant and the second defendant brought an action before the Commercial Court of the Queen's Bench Division, applying for the setting aside of the above awards. On 10 July 2002, the court ruled that the defendants should perform as the award decided. On 17 January 2004, the Tianjin Maritime Court received the applicant's application for recognizing and enforcing the above three awards.

The Judgment

The court did not recognize and enforce the three awards brought forward by the applicant. These awards were made by the LCIA on 14 March 2001, 20 June

2001, and 13 February 2002, respectively. The applicant would pay the litigation fee (RMB 500).

The United Kingdom and the People's Republic of China are both parties to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. In line with the Convention and the relevant provisions in the law of People's Republic of China, arbitral awards made in the United Kingdom shall be recognized and enforced in the People's Republic of China. The Civil Procedure Law of the People's Republic of China rules in Article 219 and states as follows: "The time limit for the submission of an application for execution shall be one year, if both or one of the parties are citizens; it shall be six months if both parties are legal persons or other organizations." The Tianjin Maritime Court received the written application on 17 January 2004. Although the date when the awards were received by the parties was not clear and the time period for the performance of the awards was also not clear, the fact that the defendants brought the action before the British court on 28 March 2002 clearly proved that the first and second defendants, as well as the applicant, received the awards before that day. The application for recognition and enforcement had been overdue. The judgment of the British court was that the circumstances did not consist of a reasonable excuse for extending and/or breaking off the calculation of the six-month time limit during which one can successfully apply for the recognition and enforcement of foreign arbitral awards.

#### **Application of the 1993 Uniform Customs and Practice for Documentary Credits – Reimbursement under Letter of Credit**

INDUSTRIAL BANK OF KOREA v. QINGDAO HUATIAN HANDTRUCK CO. LTD. & TIANJIN BRANCH OF THE INDUSTRIAL BANK OF KOREA CO. LTD.<sup>2</sup>

**Shandong Higher People's Court, 15 December 2005  
(2005) Lu Min Si Zhong Zi No. 71**

#### Facts

'A', the Industrial Bank of Korea, issued an Irrevocable Documentary Credit numbered M04Z9403NU30011, whose beneficiary was 'D', the Qingdao Huatian Handtruck Co. Ltd. On the Documentary Credit it was stated that the expiry date/place was 10 May 2005/China, the amount was USD 23,900 payable at any bank, the deadline of payment was 90 days after sight, and the latest shipment date was 30 April 2004. The Documentary Credit also required documents such as the commercial invoice, the full set of the clean on board marine bill of lading, the packing list, the certificate of origin, etc. The period for the presentation of documents was within

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<sup>2</sup> Source: <<http://www.ccmt.org.cn/ss/writ/judgementDetail.php?sId=1845>>.

ten days after the date of issuance, and did not exceed the expiry date of the Documentary Credit. The documents mentioned above were submitted together with a sight draft of USD 23,900 to 'A' on 14 April 2004. However, on 27 April 2004, 'A' refused to pay, and the reason stated in its telegram was that the draft was a sight draft, not payable 90 days after sight. On 10 May 2004, a draft payable 90 days after sight was sent to 'A', but 'A' again refused to reimburse by telefax; the reason given was that the period for presentation of documents had expired. After several unsuccessful approaches and negotiations, on 5 November 2004, 'A' replied, "Though there are factors not satisfying the requirements to pay, we are willing to reimburse half of the amount (i.e., USD 11,950). If you agree, please acknowledge us by SWIFT." Both parties, however, failed to reach an agreement on the payment.

### The Judgment

Pursuant to Section 1(1) of Article 153 of the Civil Procedure Law of the People's Republic of China, the appellate court held that the appeal is dismissed, and the original judgment is affirmed. The litigation costs for the appeal case are RMB 5588, and they shall be paid by 'A'.

Since 'A' and the Tianjing Branch of the Industrial Bank of Korea Co. Ltd. (hereinafter "B") are a Korean corporation and its branch, the present case is a commercial case concerning foreign interests. Therefore, the provisions of the Civil Procedure Involving Foreign Interests should be applied. Since both the beneficiary's domicile and the issuing bank's domicile are the place of performance of the contract of documentary credit, D's domicile is also one of the places of performance. Therefore, the trial court has jurisdiction in the present case as the contract's place of performance is under the jurisdiction of the appellate court. Further, the parties to the case have reached an agreement to apply the Uniform Customs and Practice for Documentary Credits (1993 edition, hereinafter "UCP500") as the applicable law.

The main issue in the present case is whether A's reason for refusing to reimburse was valid. According to the provisions stipulated in the chapter of the "Documents" of the UCP500, drafts are not included in the definition of "documents". Therefore, unless there are special stipulations in the Documentary Credit clause, drafts are generally not documents in the sense of Documentary Credits. However, in the present case, there were special clauses on drafts. Since the Documentary credit is the contract between the issuing bank and the beneficiary, the parties should be bound by the clauses of the contract. Therefore, D's first draft did not appear on its face to be in compliance with the terms and conditions of the Credit; it constitutes an alteration to the original contract, and 'A' had the right to refuse to accept it. In this sense, A's reason for refusing to pay was valid. However, since the draft is not a kind of "document", its presentation should not be limited by the aforementioned deadline. Therefore, A's reason for the second refusal to pay was not valid, and the trial court should support D's claims to USD 23,900 and the interest accrued.

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS<sup>3</sup>**Special Marine Reserves****Interim Measures for the Administration of Special Marine Reserves**

In November 2005, Interim Measures for the Administration of Special Marine Reserves were promulgated in accordance with Article 23 of the Marine Environment Protection Law of the People's Republic of China (as revised in 1999) which stipulates:

Wherever there exist special geographical conditions or ecosystem, or special need for exploitation and utilization of biological and non-biological resources, special marine reserves should be established for special administration with effective protection measures and scientific exploitation mode.

The scope of application of this Decree is limited to the sea areas under the jurisdiction of the People's Republic of China.<sup>4</sup>

**Fishery Administrative Cruising within Exclusive Economic Zones  
Provisions on the Administration of Fishery Administrative Cruising within Exclusive Economic Zones**

Fishery administrative cruising started in the year 2000 in China upon the promulgation of the "Provisions on the Administration of Fishery Administrative Cruising within Exclusive Economic Zones (No. 8 [2000] of the BFMFPS)." Change of circumstances as well as the accumulation of experience in fishery administrative cruising in the following years called for a revision of the 2000 Provisions.

The change of circumstances includes the conclusion of fishery agreements with Japan and Korea (coming into force on 1 June 2000 and 30 June 2001, respectively). A substantial revision of the Provisions on the Administration of Fishery Administrative Cruising appears in Article 21, which extends the fishery administrative cruising to the high seas. It also confirms, in light of the Sino-Japanese Fishery Agreement and the Sino-Korean Fishery Agreement, administrative cruising in areas such as sea waters subject to temporary measures, transitional sea areas or condominium sea areas.

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<sup>3</sup> Contributed by Zhang Xinjun, School of Law, Tsinghua University, Beijing, China

<sup>4</sup> For the text of the Chinese version of the Decree No. 24 (2005) of the State Oceanic Administration promulgated on 16 November 2005, see the official website of the State Oceanic Administration of the People's Republic of China < <http://www.soa.gov.cn/bbs/060117.doc> > (accessed 15 June 2006).

**Excerpt from Provisions on the Administration of Fishery Administrative Cruising within Exclusive Economic Zones<sup>5</sup>**

**[No. 83 (2005) of China Fishery Administration Commanding Centre]**

**[Date of Promulgation: 14 November 2005]**

**[Effective date: 14 November 2005]**

Article 1. The present Provisions are formulated in accordance with the Fishery Law of the People's Republic of China and other laws and regulations in order to regulate and strengthen the administration of fishery administrative cruising, and to maintain the normal fishery production order as well as to maintain the marine rights and interests of the state in exclusive economic zones.

Article 2. The "fishery administrative cruising within exclusive economic zones" as mentioned in the present Provisions refers to the law enforcement whereby the fishery law enforcement authority, under the relevant laws and regulations of the state, sends out fishery administrative ships for carrying out supervision and inspection over and imposes an administrative penalty upon Chinese and foreign ships and persons that engage in fishery activities such as fishery production and survey of biological resources within the exclusive economic zones of China.

Article 8. The main tasks for the fishery administrative cruising within exclusive economic zones shall be:

(1) Investigating and regulating foreign ships that illegally enter into the exclusive economic zones of China for fishery activities;

(2) Carrying out supervision and on-the-spot regulation of foreign ships that are allowed to engage in fishery industry or surveys of biological resources within the exclusive economic zones of China;

(3) Carrying out supervision over the implementation of bilateral or multilateral fishery agreements of domestic and foreign fishing ships within the jointly managed fishing areas as determined by the agreements concluded between China and the relevant countries, and carrying out on-the-spot regulation of domestic fishing ships, investigating and administrating illegal fishery acts;

(4) Observing and recording the activities of domestic and foreign fishing ships;

(5) Assisting the settlement of fishery disputes or maritime casualties between domestic and foreign fishing ships;

(6) Participating in the salvation of fishing ships to which maritime safety accidents occur, and

(7) Fulfilling other tasks as assigned by the CFACC and the fishery bureau for sea areas.

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<sup>5</sup> Unofficial translation. The Chinese version appears in *Zhong Guo Shui Chan (China Fishery) No. 2 (2006)*, pp. 17-19.

Article 15. The visiting and inspection of foreign ships shall be conducted by following the prescribed visiting and inspection procedures. The investigation and regulation of foreign ships that violate the law shall be conducted in pursuance of the Interim Provisions on the Administration of Fishery Activities of Foreign Persons and Ships on Sea Areas Subject to the Jurisdiction of the People's Republic of China (Order No. 18 [1999] of the Ministry of Agriculture) and the Notice on Specific Handling Procedures for Fishery Cases Involving Foreign Persons and Ships (No. 11 [1999] of the Bureau of Fishery Management and Fishing Port Superintendence of the People's Republic of China).

Article 21. The fishery administrative cruising in the high seas, sea waters subject to temporary measures, transitional sea areas or condominium sea areas as prescribed by the fishery agreements concluded between China and other countries shall be conducted in accordance with the present Provisions.

Article 22. The power to interpret the present Provisions shall remain with the Bureau of Fishery Management and Fishing Port Superintendence of the People's Republic of China.

Article 23. The present Provisions shall come into force as of the date of promulgation, and the original Notice of the BFMFPS on Printing and Distributing the Provisions on the Administration of Fishery Administrative Cruising within Exclusive Economic Zones (No. 8 [2000] of the BFMFPS) shall be simultaneously repealed.

**Revising Implementation of the Clean Development Mechanism Projects under Article 12 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change  
Measures for Operation and Management of the Clean Development Mechanism (CDM) Projects**

On 31 May 2004, the People's Republic of China promulgated the decree "Interim Measures for Operation and Management of Clean Development Mechanism Projects" (Interim Measures).<sup>6</sup> The "Interim Measures" were modified by the "Measures for Operation and Management of Clean Development Mechanism Projects," promulgated on 12 October 2005. Although modification was limited to the minimum extent, a substantial change made in the new regulation is "benefit sharing" under Article 24. Under the "Interim Measures", the Chinese Government would retain the benefit from project owners in selling Certified Emission Reductions (CERs). However, the manner of "benefit sharing" was not specified. The new Article 24 sets up criteria for collecting fixed portions of revenue from different types of CDM projects.

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<sup>6</sup> The full text of the "Interim Measures" appears in the "State Practice of Asian Countries in the Field of International Law" section of the *Asian Yearbook of International Law*, Vol. 11 (2003-2004).

### **Excerpt from Measures for Operation and Management of Clean Development Mechanism (CDM) Projects<sup>7</sup>**

**[Order No. 37 (2005) Ministry Order of National Development and Reform Commission, Ministry of Science and Technology, Ministry of Foreign Affairs, and Ministry of Finance]**

**[Date of Promulgation: 12 October 2005]**

**[Effective Date: 12 October 2005]**

Article 24. Whereas emission reduction resource is owned by the Government of China and the emission reductions generated by a specific CDM project belong to the project owner, revenue from the transfer of CERs shall be owned jointly by the Government of China and the project owner, with the allocation ratio defined as below:

(1) the Government of China takes 65 per cent CER transfer benefit from HFC and PFC projects;

(2) the Government of China takes 30 per cent CER transfer benefit from the N2O project;

(3) the Government of China takes two per cent CER transfer benefit from CDM projects in priority areas defined in Article 4 and forestation projects.

The revenue collected from CER transfer benefits of CDM projects will be used in supporting activities on climate change. The detailed regulations on the collecting and using of the revenue will be formulated by the Ministry of Finance jointly with the NDRC and other relevant departments.

(4) The Article does not apply to the projects already approved by the Government of China before 12 October 2005.

### **Immunity of Properties of Foreign Central Banks against Judicial Compulsory Measures**

#### **Law of the People's Republic of China on the Immunity of Judicial Compulsory Measures against the Properties of Foreign Central Banks**

China has long maintained the position of supporting the doctrine of State immunity which bars a national court from adjudicating or enforcing claims against foreign States and their properties. The Chinese judicial practice is also consistent with that position. The Chinese court does not adjudicate or enforce claims relevant to properties of foreign central banks. Nevertheless, there has as yet been no legislation on the matter.

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<sup>7</sup> The Chinese text of the updated regulation can be viewed on the official website of the NDRC's (National Development and Reform Commission) Office of National Coordination Committee on Climate Change at <<http://cdm.ccchina.gov.cn/UpFile/File538.PDF>> (accessed 28 March 2006). The English version can also be viewed on the same official website <<http://cdm.ccchina.gov.cn/english/NewsInfo.asp?NewsId=100>> (accessed 28 March 2006).



The request for legislation came from Hong Kong, a Special Administrative Region (SAR) of China since 1997. Before that, Britain's State Immunity Act applied in Hong Kong. It granted to foreign central banks immunity from adjudication and enforcement for their properties in Hong Kong. When the British administration terminated on 1 July 1997, the British law no longer applied; some foreign central banks in Hong Kong thus expressed their concerns that there was no statutory protection for their properties from adjudication and enforcement. It is under such circumstances and upon receiving the request from the Hong Kong SAR Government in 2000 that the Central Government of China passed the present legislation.

**Text of Law of the People's Republic of China on the Immunity of Judicial Compulsory Measures against the Properties of Foreign Central Banks<sup>8</sup>**

**[Adopted at the 18th session of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on 25 October 2005, Order of the President, No. 41 (2005)]**

**[Date of Promulgation: 25 October 2005]**

**[Effective date: 25 October 2005]**

Article 1. The People's Republic of China grants to foreign central banks the immunity of judicial compulsory measures of protection and execution to their properties, unless the foreign central banks or the Governments of the countries to which the foreign central banks belong abandon this immunity in written form, or those properties are especially used for protection and execution.

Article 2. The term "foreign central banks" as mentioned in the Measures refers to the central banks of foreign countries and regional economic integration organizations, or those financial administrative organs performing the functions of central banks.

The term "properties of foreign central banks" as mentioned in the Measures refers to the cash, bills, bank deposits, securities, foreign exchange reserves, and gold reserves, as well as the real estate and other properties of foreign central banks.

Article 3. Where any foreign country does not grant the immunity to the properties of the central bank of the People's Republic of China or the properties of financial administrative organs of special administrative regions of the People's Republic of China, or grants an immunity which is lower than that as prescribed in this Law, the People's Republic of China shall handle it according to the principle of reciprocity.

Article 4. This Law shall come into force as of the date of promulgation.

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<sup>8</sup> Unofficial translation. The Chinese version appears in the *Gazette* of the Standing Committee of the National People's Congress of the People's Republic of China (2005, No. 8), published by the General Office of the Standing Committee on the National People's Congress.

## INDIA<sup>9</sup>

### JUDICIAL DECISIONS

#### **Implementation of domestic law on Prevention of Terrorism – Constitutional Validity of the Prevention of Terrorism Act – Scope and definition of ‘Terrorism’ – Terrorism and Human Rights – Security Council Resolutions 1368 (2001) and 1373 (2001)**

PEOPLE’S UNION FOR CIVIL LIBERTIES AND ANOTHER v. UNION OF INDIA

**Supreme Court of India, 16 December 2003  
AIR 2004 Supreme Court 456**

#### Facts

The Petitioners challenged the constitutional validity of certain provisions of the Prevention of Terrorism Act, 2002 (hereinafter POTA) contending that (a) the provisions of POTA fell under Entry 1 (Public Order) of List II (State List) of the Indian Constitution<sup>10</sup> and accordingly the Indian Parliament lacked the legislative competence; (b) that terrorist activity and its regulation (essentially as a ‘public order’ concept) was within the realm of a State(s), and therefore State(s) only had the competence to enact legislation. The primary issue was whether acts of terrorism aimed at weakening the sovereignty and integrity of the country could be equated with mere breaches of public order or public safety.

#### The Judgment

“Terrorist acts”, the Court noted, were

[M]eant to destabilize the nation by challenging its sovereignty and integrity, to raze the constitutional principles that we hold dear, to create a psyche of fear and anarchism among common people, to tear apart secular fabric, to overthrow democratically elected Government, to promote prejudice and bigotry, to demoralize the security forces, to thwart the economic progress and development and so on ... This cannot be equated with usual law and order problems within a State.

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<sup>9</sup> Contributed by V.G. Hegde, Associate Professor, School of International Studies, Jawaharlal Nehru University, New Delhi.

<sup>10</sup> Article 246 of the Indian Constitution provides for the distribution of legislative powers between Union and States. The various matters of legislation have been enumerated in three lists: List I or the Union List; List II or the State List; List III or the Concurrent List. The Union Parliament has exclusive powers of legislation with respect to subjects or items in List I. The State Legislatures have exclusive powers to legislate on subjects or items in List II. The legislative power on items in List III is concurrent.

Referring to the character of terrorism as “inter-state, inter-national or cross-border”, the Court stated that it was not “a regular criminal justice endeavour”. “Terrorism”, it noted, “is definitely a criminal act, but it is much more than mere criminality”.

Recognizing terrorism as a challenge to the whole community of civilized nations, the Court noted that terrorist activities in one country might take on a transnational character, carrying out attacks across one border, receiving funding from private parties or a Government across another, and procuring arms from multiple sources. Referring to domestic and international aspects of terrorism, the Court noted:

Terrorism in a single country can readily become a threat to regional peace and security owing to its spillover effects. It is, therefore, difficult in the present context to draw sharp distinctions between domestic and international terrorism. Many happenings in the recent past caused the international community to focus on the issue of terrorism with renewed intensity. The Security Council unanimously passed resolutions 1368 (2001) and 1373 (2001); the General Assembly adopted resolution 56/1 by consensus, and convened a special session. All these resolutions and declarations, *inter alia*, call upon Member States to take necessary steps to ‘prevent and suppress the financing of terrorist acts’. India is a party to all these resolutions. Anti-terrorism activities [at] the global level are mainly carried out through bilateral and multilateral co-operation among nations. It has thus become our international obligation also to pass necessary laws to fight terrorism.

The Court also referred to the Report of the Policy Working Group on the United Nations and Terrorism which urged the global community to concentrate on a triple strategy to fight terrorism. These strategies, as noted by the Court, were (a) to dissuade disaffected groups from embracing terrorism; (b) to deny groups or individuals the means to carry out acts of terrorism, and (c) to sustain broad-based international cooperation in the struggle against terrorism. Based on these, the Court averred:

Therefore, the anti-terrorism laws should be capable of dissuading individuals or groups from resorting to terrorism, denying the opportunities for the commission of acts of terrorism by creating [an] inhospitable environment for terrorism and also leading the struggle against terrorism. Anti-terrorism law is not only a penal statute but also focuses on pre-emptive rather than defensive State action.

On the issue of balancing the protection and promotion of human rights, on the one hand, with the combating of terrorism within the Constitutional mandate, the Court stated:

The protection and promotion of human rights under the rule of law [are] essential in the prevention of terrorism. Here comes the role of law and Court’s responsibility. If human rights are violated in the process of combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. The lack of hope for justice

provides [the] breeding grounds for terrorism. Terrorism itself should also be understood as an assault on basic rights. In all cases, the fight against terrorism must be respectful to human rights. Our Constitution laid down clear limitations on State actions within the context of the fight against terrorism. To maintain this delicate balance by protecting 'core' Human Rights is the responsibility of [the] Court in a matter like this. The constitutional soundness of [the] POTA needs to be judged by keeping these aspects in mind.

The Court also had to deal with the legality and constitutional validity of the POTA provisions relating to the forfeiture of property of any person prosecuted and ultimately convicted.<sup>11</sup> On this issue, the Court noted that:

Funding and financing play a vital role in fostering and promoting terrorism, and it is only with such funds that terrorists are able to recruit persons for their activities and make payments to them and their family to obtain arms and ammunition for furthering terrorist activities and to sustain the campaign of terrorism. Therefore, seizure, forfeiture and attachment of properties are essential in order to contain terrorism and are not unrelated to the same. Indeed, it is relevant to notice a resolution passed by the United Nations Security Council (Resolution No. 1373 dated 28 September 2001) which emphasized the need to curb terrorist activities by freezing and forfeiture of funds and financial assets employed to further terrorist activities. It will also be interesting to notice [...] the United Nations International Convention for the Suppression of the Financing of Terrorism but at the same time it is not necessary to go into those details in the present context. The scheme of the provisions indicates that the principles of natural justice are duly observed and they do not confer any arbitrary power, and forfeiture can only be made by an order of the Court against which an appeal is also provided to the High Court and the rights of [the] *bona fide* transferee are not affected. Therefore, for the present, it is not necessary to pronounce on the constitutional validity of these provisions and we proceed on the basis that they are valid.

The Court upheld the constitutional validity of the POTA and the provisions which were specifically challenged.

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<sup>11</sup> The constitutional validity of several provisions of the POTA were challenged which *inter alia*, included the powers of the investigating officers, the word 'abet' in the context of a terrorist act, the issue of knowledge or *mens rea*.

**Issues relating to Environment Protection and Right to Development – Application of Precautionary Principle in the context of Large Dams – Sustainable Development – Disaster Management**

N.D. JAYAL AND ANOTHER v. UNION OF INDIA AND OTHERS

**Supreme Court of India, 9 September 2003  
AIR 2004 Supreme Court 867**

Facts

The petitioners were seeking the intervention of the court concerning the safety<sup>12</sup> and environmental aspects of the Tehri Dam,<sup>13</sup> a dam being built in a seismic-prone zone in the Himalayan region. The proposal to build a dam was conceived in the 1960s; several Committees of Experts on various technical issues investigated environmental, seismic and rehabilitation issues. At one stage, the Government of India had stayed the operation of the dam on environmental considerations. Finally, while granting a conditional clearance to the project in 1990, the Government had sought: (a) environmental safeguard measures planned and implemented *pari passu* with progress of work on the project; (b) the detailed surveys and studies to be carried out according to the proposed schedule and details made available to the Department for assessment; (c) the catchment area treatment programme and the rehabilitation plans be so drawn up as to be completed ahead of the filling of the reservoir, and (d) the Department should be kept informed of progress on various works periodically.<sup>14</sup>

The Judgment

The Court, while refusing to re-open discussion on the safety aspects of the dam, dealt with matters pertaining to the preservation of the ecology and development. The Court referring to its earlier cases<sup>15</sup> observed:

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<sup>12</sup> Petitioners had sought to conduct a Three-Dimensional (3D) Non-Linear Test to evaluate the earthquake susceptibility of the dam against the Maximum Credible Earthquake. However, the Court refused to go into this question as the safety aspects had been considered in an earlier case by the Supreme Court in 1992, namely, *Tehri Bandh Virodhi Sangarsh Samiti v. State of Uttar Pradesh*.

<sup>13</sup> The Tehri Dam, located in the Himalayan region, was constructed at the confluence of the Bhagirathi and Bhailangana rivers in the neighbourhood of the Garhwal town in the State of Uttaranchal, resulting in the relocation of an entire town.

<sup>14</sup> These four conditions had been laid down by the Supreme Court in *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 3751. Specifically on this project, the following conditions related to the completion or compilation of data and an action plan relating to: (a) catchment area treatment; (b) command area development; (c) flora and fauna; (d) water quality maintenance; (e) Bhagirathi Basin Management Authority; (f) Disaster Management, and (g) rehabilitation.

<sup>15</sup> *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715 and *M.C. Mehta v. Union of India*, AIR 2002 SC 1696.

[T]he balance between environmental protection and developmental activities could only be maintained by strictly following the principle of 'sustainable development'. This is a development strategy that caters to the needs of the present without negotiating the ability of upcoming generations to satisfy their needs. The strict observance of sustainable development will put us on a path that ensures development while protecting the environment, a path that works for all peoples and for all generations. It is a guarantee to the present and a [bequest] to the future that all environmental related developmental activities should benefit more people while maintaining the environmental balance. This could be ensured only by the strict adherence to sustainable development without which life of coming generations will be in jeopardy.

The Court, while recognizing the right to a clean environment as a fundamental right under Article 21 of the Indian Constitution, addressed the question of placing the right to development within the same legal reasoning. Thus, the Court observed:

The right to development cannot be treated as a mere right to economic betterment or cannot be limited to a misnomer for simple construction activities. The right to development encompasses much more than economic well-being and includes within its definition the guarantee of fundamental human rights. The 'development' is not related only to the growth of GNP. In the classic work 'Development As Freedom', the Nobel prize winner Amartya Sen pointed out that 'the issue of development cannot be separated from the conceptual framework of human rights'. This idea is also part of the UN Declaration on the Right to Development. The right to development includes the whole spectrum of civil, cultural, economic, political and social process[es], for the improvement of peoples' well-being and realization of their full potential. It is an integral part of human rights. Of course, construction of a dam or a mega project is definitely an attempt to achieve the goal of wholesome development. Such works could very well be treated as an integral component for development.

The Court examined each of the components of the conditional clearance such as (a) catchment area treatment; (b) command area development; (c) flora and fauna; (d) water quality maintenance; (e) Bhagirathi Basin Management Authority; (f) Disaster Management, and (g) rehabilitation. After examining these aspects, the majority decision of the Court pointed out that the petitioners had disputed "the extent of compliance only and not that there is no compliance at all". The majority decision found that there was compliance, although with certain lapses. According to the Court, these lapses in compliance could be prevented by the setting up of monitoring agencies. Dharmadhikari, J., while dissenting with these conclusions, particularly on the safety aspects of the dam, observed:

On the safety aspect of the Dam, particularly when the location of the Dam is in a highly earthquake-prone zone in the valleys of Himalayas, all additional safeguards are required to be undertaken on the 'precautionary principle' as contained in the Rio Declaration on Environment and Development taken in the United Nations Conference held in January 1992 to which India is a party. The precautionary principle in the Rio Declaration reads:

“In order to protect the environment, the precautionary approach shall be widely applied by States accordingly to their capabilities. Where there are threats of a series of reversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environment degradation.”

Dharmadhikari, J. further observed:

The precautionary principle accepted by India being a party and signatory to international agreement and understandings in the field of environment has become part of domestic law, i.e., the Environmental Protection Act. The Governmental authorities in India cannot be permitted to set up a plea of scientific uncertainty of [the] 3-D Non-Linear Analysis of the Dam. On the safety aspect, the pleas like *res judicata* based on [an] earlier decision of this Court cannot be allowed to be raised when further developments and events in the course of the Project require further precautions to be taken before filling the Dam to the optimum capacity. It is not the case of the respondents that [the] 3-D Non-Linear Analysis of the Dam cannot be undertaken with the assistance of foreign Experts on the subject. To take care of all eventualities of damage to [the] Dam by earthquake [the] 3-D Non-Linear Analysis of the Dam suggested by four Experts as a matter of abundant caution must be undertaken. It is only after [the] 3-D Non-Linear Analysis of the Dam is completed and the opinion of the Experts on the safety aspect is again sought that further impoundment of the Dam should be allowed. In *M.C. Mehta v. Union of India (Trapezium Matter)* (1997 (2) SCC 353), this Court has applied the ‘Polluter pays principle’ and the ‘Precautionary principle’ of international law as the law of the land of this country, India being party to the United Nations Conference and signatory to International Declarations and Agreements.

While dealing with issues of protection of environment, natural resources and rehabilitation, Dharmadhikari, J. concluded:

The Rio Declaration on Environment and Development in the United Nations Conference held in June 1992 to which India was a party and signatory and on which the Environment Protection Act, its Rules and Policies are modelled obligates the Authorities of India by the norms fixed in International and Domestic Law that the environmental and natural resources of people under operation, domination and occupation shall be protected.

**Scope and Application of Bilateral Double Taxation Avoidance Convention between India and Mauritius – In the event of Conflict Provisions of Bilateral Tax Treaty to prevail over Income-tax Act (section 90) – Treaty-making power of the State**

UNION OF INDIA v. AZADI BACHAO ANDOLAN

**Supreme Court of India, 10 October 2003**

**AIR 2004 Supreme Court 1107**

Facts

The Petitioners challenged two Circulars<sup>16</sup> issued by the Government of India pursuant to which certain instructions were issued to income-tax authorities concerning assessment of income-tax cases pertaining to Foreign Institutional Investors (FIIs) based in Mauritius, involving the interpretation of the Indo-Mauritius Double Taxation Avoidance Convention, 1983 (hereinafter ‘DTAC’). These FIIs, relying on these Circulars, invested large amounts of capital in shares in Indian companies with the expectation of making profits through the sale of such shares without being subjected to tax in India.<sup>17</sup> In 2000, Indian income-tax authorities issued Show Cause notices to some FIIs functioning in India yet registered in Mauritius, calling upon them to show cause as to why they should not be taxed for profits and for dividends accrued to them in India. These companies were registered or incorporated in Mauritius and their main purpose was to invest in the Indian share market without being liable to be taxed. The Petitioners, *inter alia*, argued that these companies were controlled and managed from countries other than India or Mauritius and as such they were not “residents”<sup>18</sup> of Mauritius so as to derive the benefits of the DTAC.<sup>19</sup> The

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<sup>16</sup> Circular No. 682 dated 30 March 1994 clarifying that the capital gains of any resident of Mauritius acquired by the alienation of shares of an Indian company shall be taxable only in Mauritius according to Mauritius taxation laws and will not be liable to tax in India. The other Circular was No. 789 dated 13 April 2000 further clarifying the legal position of the taxability of capital gains and dividends in India.

<sup>17</sup> Section 90 of the Indian Income-Tax Act dealt with the relationship between DTAC and the Income Tax Act. In other words, it, *inter alia*, covered the Agreements concluded by the Government of India with the Government of any country outside India (a) for the granting of relief in respect of income tax payable in the other country; (b) for the avoidance of double taxation of income; (c) for exchange of information for prevention of the evasion or avoidance of income tax; (d) for recovery of income tax as per the laws of either country; and to make necessary provisions as may be necessary for implementing the agreement. The other important feature of section 90 was that DTAC provisions prevailed over the provisions of the Income Tax Act for granting relief of tax or as the case may be avoidance of double taxation to the extent they were more beneficial to the assessee.

<sup>18</sup> According to Article 4 of the DTAC, a “resident” of one State should be any person who, under the laws of that State, was liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature.



Court had to consider the scope and application of Section 90 of the Indian Income-Tax Act in relation to the DTAC with Mauritius.

### The Judgment

The Court dealt with the issue of exercise of fiscal jurisdiction by States and the complexities involved in moderating such a jurisdiction through bilateral tax treaties. The Court, in fact, outlined the *rationale* behind concluding tax treaties. The Court stated:

Every country seeks to tax the income generated within its territory on the basis of one or more connecting factors such as the location of the source, residence of the taxable entity, maintenance of a permanent establishment and so on. A country might choose to emphasise one or the other of the aforesaid factors for exercising fiscal jurisdiction to tax the entity. Depending on which of the factors is considered to be the connecting factor in different countries, the same income of the same entity might become liable to taxation in different countries. This would give rise to harsh consequences and impair economic development. In order to avoid such an anomalous and incongruous situation, the Governments of different countries enter into bilateral treaties, conventions or agreements for granting relief against double taxation. Such treaties, conventions or agreements are called double taxation avoidance treaties, conventions or agreements.

The Court first dealt with the Constitutional sources of executive authority in concluding a treaty. While noting that the power of entering into a treaty is an inherent part of the sovereign power of the State, in the Indian context, the Court stated:

Our Constitution makes no provision making legislation a condition for entry into an international treaty in time either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The Executive is *qua* the State competent to represent the State in all matters international and may by agreement, convention or treaty incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties

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<sup>19</sup> The Delhi High Court had concurred with the arguments of the petitioners and accordingly had quashed the Circulars. Briefly, the findings of the High Court were, *inter alia*, (a) certificate of residence issued by authorities of Mauritius as insufficient evidence as regards the status of the resident and beneficial ownership; (b) the income-tax officer, in his quasi-judicial function, be entitled to lift the corporate veil in order to see whether the company is actually a resident of Mauritius or not and whether the company was paying income tax in Mauritius or not; (c) conclusiveness of a certificate of residence issued by the Mauritius Tax Authorities contemplated neither under the DTAC nor under the Indian Income Tax Act; (d) "Treaty-shopping" by which the resident of a third country took advantage of the provisions of the Agreement was illegal and thus necessarily forbidden; (e) avoidance of double taxation had been a term of art and meant accordingly as that a person had to pay tax in at least one country; avoidance of double taxation would not mean that a person did not have to pay tax in any country whatsoever.

are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the law of the State. If the rights of the citizens or others which are justifiable are not affected, no legislative measure is needed to give effect to the agreement or treaty.<sup>20</sup>

On the issue of implementation of tax treaties and section 90 of the Indian Income-Tax Act, the Court, while providing justification for such a provision in Income-Tax law, noted:

When it comes to fiscal treaties dealing with double taxation avoidance, different countries have varying procedures. In the United States, such a treaty becomes a part of municipal law upon ratification by the Senate. In the United Kingdom, such a treaty would have to be endorsed by an order made by the Queen in Council. Since in India such a treaty would have to be translated into an Act of Parliament, a procedure which would be time-consuming and cumbersome, a special procedure was evolved by enacting Section 90 of the Act.

Considering the legislative history of Section 90, the Court further noted that “Since tax treaties are intended to grant tax relief and not put residents of a contracting country at a disadvantage *vis-à-vis* other taxpayers, Section 90 of the Income-tax Act has been amended to clarify that any beneficial provision in the law will not be denied to a resident of a contracting country merely because the corresponding provision in the tax treaty is less beneficial”. Surveying the case laws of various High Courts within India, the Court concluded that the judicial consensus in India had been that Section 90 was specifically intended to enable and empower the Central Government to issue a notification for the implementation of the terms of a double taxation avoidance agreement. When that happens, the Court further concluded, the provisions of such an agreement, with respect to cases where they apply, would operate even if inconsistent with the provisions of the Income-tax Act. The Court, while referring to the contention of the respondents that according to Article 265 of the Constitution no tax could be levied or collected except by authority of law, pointed out that Section 90 was brought onto the Statute book precisely to enable the executive to negotiate a DTAC and quickly implement it.<sup>21</sup>

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<sup>20</sup> See in this connection *Maganbhai Ishwarbhai Patel and Others v. Union of India and another* (1970) 3. SCC 400 (as cited by the Court)

<sup>21</sup> While on this issue, the Court considered in detail the whole matter of delegated power of legislation and as to why a delegatee of legislative power in all cases should have no power to grant exemption. The Court also dealt with the issue of enabling powers of the tax authorities to issue notifications, circulars, etc. under Section 119.

**Implementation of Certain Provisions of The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW 78) – Interpretation of Amendments to the Merchant Shipping Act, 1958 specifically relating to the obtaining of Certificate of Service in consonance with the STCW 78**

NARESH KUMAR v. UNION OF INDIA

**Supreme Court of India, 5 April 2004  
AIR 2004 Supreme Court 2026**

Facts

The issue involved the recognition of Certificates of Service (CoS) and Certificates of Competence (CoC) obtained by the officers of the Indian Navy while they were in service, without examination, for the purposes of the Merchant Navy according to the requirements of the Merchant Shipping Act, 1958. Section 80 of the Merchant Shipping Act, 1958 which provided this recognition was repealed in 1986 to give effect to the standards of Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) 1978. This Certificate was a requirement under the STCW 1978. The STCW 1978 was amended in 1995 to become known as STCW 1995. The STCW 1995 provided that existing holders of the certificate should complete approved training assessment and obtain a fresh Certificate of Competence. Pursuant to this, the Government of India issued necessary notifications implementing the requirements of STCW 1995. The short question that arose before the Court concerned whether the Certificate of Service issued under Section 80 of the Merchant Shipping Act (now repealed) could continue to be treated as a Certificate under the Convention after the 1978 Convention, as amended by STCW 1995 which subsequently came into force.

The Judgment

The Court, while looking at the setting of the STCW 1978, noted the current status of the Convention *vis-à-vis* India. It stated:

The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (STCW 78) came into force globally. India was one of the signatories to the Convention and ratified the Convention on 16 February, 1986. The object of the Convention is to have uniform standards of training and certification. Thus, Article VI of the 1978 Convention enjoins that Certificates be issued for masters, officers or ratings. It provides that these shall be issued to those candidates who meet the requirements for service, age, medical fitness, training, qualification and examinations in accordance with the appropriate provisions. The 1978 Convention was amended in 1995 and is known as STCW 1995. This 1995 Convention extensively amended the 1978 Convention, but Article I to XVII of the 1978 Convention remained unamended. Consequently, the

Merchant Shipping (STCW) Rules, 1998 were also framed. Rule 11, *inter alia*, requires that existing CoS holders who intend to become holders of the CoC shall be required to complete approved training assessment. Similarly, Rule 15 requires that every Master on a seagoing of 500 gross tonnage or more shall hold an appropriate Certificate of Competency in Form 3.

The Court did not agree with the contention of the Petitioners that Section 5 of the amended Merchant Navy Act, 1958 saved some of the effects of the repealed Section 80 (which recognized the Navy officers' Certificate of Service) of the Merchant Shipping Act, 1958. The Court, examining the status of Section 80, stated,

No doubt Section 80 of the Act was holding the field before it was amended but it has been eclipsed with the emergence of the 1978 Convention as amended by the 1995 Convention. With the emergence of the 1995 Convention there is no provision for indefinite continuance of CoS in respect of the officers of the Merchant Ships. As already noticed, the petitioners are now serving in [the] Merchant Navy. India, being a signatory to the 1995 Convention, has to ensure uniform standards, as prescribed by the Convention.

On an Undertaking by the Director-General of Shipping, the Government of India, on working out the procedural details of the implementation mechanism consistent with the STCW, the Court disposed of the petition.

**Definition of 'Terrorism'- Relationship between Terrorist Activity and Crime – Surveying of the Attempts made by the United Nations and Other Bodies to Define 'terrorism'**

MADAN SINGH v. STATE OF BIHAR

**Supreme Court of India, 2 April 2004  
AIR 2004 Supreme Court 3317**

Facts

Twenty persons faced trial for the alleged commission of various offences punishable under the Indian Penal Code, Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and the Arms Act. One of the main contentions of the Appellants was that there was no evidence to show that the accused persons were terrorists or extremists or that the activities or actions alleged were encompassed by the provisions of the TADA Act to be described as terrorist acts.

The Judgment

The Court, after dealing with the factual scenario in the case, considered the definitional issues concerning 'terrorism' and 'terrorist activity'. The Court, *inter alia*, noted that "A 'terrorist' activity does not merely arise by causing disturbance

of law and order or of public order. The fallout of the intended activity is to be one that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law. It is in essence a deliberate and systematic use of coercive intimidation". Further, the Court, while distinguishing between criminal activity and terrorism, stated:

Finding a definition of "terrorism" has haunted countries for decades. A first attempt to arrive at an internationally acceptable definition was made under the League of Nations, but the one which the convention drafted in 1937 never came into existence. The UN member States still have not agreed upon a definition apparently on account of what at times [is] reveal[ed] to be State sponsored terrorism, both at national and international levels. Terminology consensus would, however, be necessary for a single comprehensive convention on terrorism which some countries favour in place of the present 12 piecemeal conventions and protocols. The lack of agreement on a definition of terrorism has been a major obstacle to meaningful international counter-measures. Cynics have often commented at national and international levels that one State's "terrorist" is another State's "freedom fighter" and that too with the blessings of those in power. Crime became a highly politicised affair; greed compounded by corruption and violence enabled unscrupulousness, and hypocrisy reigns supreme supported by duplicity and deceitful behaviour in public life to amass and usurp public power to perpetuate personal aggrandizement, pretending to be for the common good. If terrorism is defined strictly in terms of attacks on non-military installations and soldiers residences could not be included in the statistics. In order to cut through the Gordian definitional knot, terrorism expert A. Schmid suggested in 1992 in a report for the then UN Crime Branch that it might be a good idea to take the existing consensus on what constitutes a "war crime" as a point of departure. If the core of war crimes – deliberate attacks on civilians, hostage-taking and the killing of prisoners – is extended to peacetime, we could simply define acts of terrorism veritably as "peacetime equivalents of war crimes".

The Court, *inter alia*, while referring to various definitions of 'terrorism', specifically to United Nations General Assembly Resolution 51/210 on Measures to Eliminate International Terrorism, concluded:

Terrorism is one of the manifestations of increased lawlessness and the cult of violence. Violence and crime constitute a threat to an established order and are a revolt against a civilized and orderly society. "Terrorism", though, has not been separately defined under TADA, but there is sufficient indication in Section 3 itself to identify what it is by an all inclusive and comprehensive phraseology adopted in engrafting the said provision, which serves the double purpose as a definition and punishing provision; nor is it possible to give a precise definition of "terrorism" or lay down what constitutes "terrorism". It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process, but the extent and reach of the intended terrorist activity travels beyond the

effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb the harmony of the society or “terrorise” people and the society and not only those directly assaulted, with a view to disturb the even tempo, peace and tranquillity of the society and create a sense of fear and insecurity.

The Court concluded that the appeals were *sans* merit and deserved dismissal.

**Scope of Application of Internet Domain Names and Passing off Action in Trademark Law – International Regime on Internet Domain Names – Internet Corporation for Assigned Names and Numbers (ICANN) and World Intellectual Property Organization (WIPO)**

SATYAM INFOWAY LTD v. SIFYNET SOLUTIONS PVT. LTD

**Supreme Court of India, 6 May 2004  
AIR 2004 Supreme Court 3541**

Facts

The principal question, as noted by the Court, was whether Internet domain names were subject to the legal norms applicable to other Intellectual Property Rights such as trademarks. The Appellant, incorporated in 1995, had registered several domain names with the word ‘sify’ in June 1999 with the Internet Corporation for Assigned Names and Numbers (ICANN) and the WIPO. According to the Appellant, the word ‘sify’ was invented by using elements of its corporate name Satyam Infoway, accordingly claiming a wide reputation and goodwill. The Respondent, on the other hand, used the word ‘siffynet’ for his Internet marketing business in 2001. The Respondent, the Court noted, claimed itself to have obtained registration of this name with ICANN in 2001.

The Appellant filed a suit in the civil court on the basis that the Respondent was passing off its business and services by using the Appellant’s business name and domain name. The civil court, upon an application by the Appellant, granted a temporary injunction on the grounds that the Appellant was the prior user of the trade name ‘sify’ and that confusion would be caused in the mind of the general public by such deceptive similarity. The balance of convenience, the civil court found, was in favour of the Appellant. The Respondent preferred an appeal to the High Court and the same was allowed by the High Court after reconsidering the issue of ‘balance of convenience’. The High Court also referred to the business carried out by the Respondent and noted that it was different from the one carried out by the Appellant; accordingly there was no question of customers being misled or confused. The impugned order by the High Court, as noted by the Supreme Court, primarily proceeded on the basis that the principles relating to passing off actions in connection with trademarks are applicable to domain names. It was contended that a domain

name could not be confused with “property names” such as Trademarks. Domain names, it was argued, constituted merely an address on the Internet. It was also submitted that registration of a domain name with ICANN did not confer any intellectual property right, that it was a contract with a registration authority allowing communication to reach the owner’s computer via Internet links channelled through the registration authority’s server and that it was akin to the registration of company name which was a unique identification of a company, but of itself conferred no intellectual property rights.

### The Judgment

The Court, after examining the definitional aspects of ‘trade mark’, ‘mark’, ‘goods’ and ‘services’, sought to place the aspects of ‘domain name’ as a ‘property right’. The Court noted that:

With the increase of commercial activity on the Internet, a domain name is also used as a business identifier. Therefore, the domain name not only serves as an address for Internet communication but also identifies the specific Internet site. In the commercial field, such domain name owner provides information/services which are associated with such domain name ... Consequently, a domain name as an address must, of necessity, be peculiar and unique and where a domain name is used in connection with a business, the value of maintaining an exclusive identity becomes critical.

The Court further examined the relationship between passing off, i.e., to pass off to the public the goods and services of others as that of his own, and trademark law. While passing off claims were made in a given case, the important question, according to Court, was: Who invented the mark first? The prior user, the Court further noted, would succeed depending upon the fact that (a) it would not be essential to prove ‘long user’ to establish reputation in a passing off action; and (b) it would, rather, be important to prove the volume of sales and extent of advertisement. The other element that must be established in a passing off action would be the factor of ‘misrepresentation to the public’. The Court, while noting that the ‘intention’ to misrepresent was important, stated that the relevant factor which needed to be established was the likelihood of confusion in the minds of the public (the term ‘public’ to mean actual or potential customers or users).

On the question of a passing off action resulting in loss or the likelihood of it, the Court stated:

The use of the same or similar domain name may lead to a diversion of users which could result from such users['] mistakenly accessing one domain name instead of another. This may occur in e-commerce with its rapid progress and instant (and theoretically limitless) accessibility to users and potential customers and particularly so in areas of specific overlap. Ordinary consumers/users seeking to locate the functions available under one domain name may be confused if they accidentally arrived at a different but similar web

site which offers no such services. Such users could well conclude that the first domain name owner had misrepresented its goods or services through its promotional activities and the first domain owner should thereby lose their customer. It is apparent therefore that a domain name may have all the characteristics of a trademark and could found an action for passing off.

The Court further noted that there was an operational distinction between a trademark and a domain name at the international level. The Court stated:

A trademark is protected by the laws of a country where such trademark may be registered. Consequently, a trade mark may have multiple registrations in many countries throughout the world. On the other hand, since the Internet allows for access without any geographical limitation, a domain name is potentially accessible irrespective of the geographical location of the consumers. The outcome of this potential for universal connectivity is not only that a domain name would require world wide exclusivity but also that national laws might be inadequate to effectively protect a domain name. The lacuna necessitated international regulation of the domain name system (DNS). This international regulation was effected through WIPO and ICANN. India is one of the 171 States of the world which are members of WIPO. WIPO was established as a vehicle for promoting the protection, dissemination and use of intellectual property throughout the world. Services provided by WIPO to its member States include the provision of a forum for the development and implementation of intellectual property policies internationally through treaties and other policy instruments.

Referring to Uniform Domain Name Disputes Resolution Policy (UDNDR Policy) by ICANN (established in October 1999), the Court noted that this dispute resolution mechanism did not have same consequences under the Indian Trade Marks Act, 1999, although it at least evidenced the recognized user of the mark. The Court further noted that the UDNDR policy was instructive as to the kind of rights which a domain name owner might have upon registration with ICANN accredited Registrars. While outlining the main contours of ICANN dispute resolution mechanism, the Court noted:

As far as India is concerned, there is no legislation which explicitly refers to dispute resolution in connection with domain names. But although the operation of the Trade Marks Act, 1999 itself is not extra-territorial and may not allow for adequate protection of domain names, this does not mean that names are not to be legally protected to the extent possible under the laws relating to passing off.

The Court, in the final analysis, coming to the merits of the case and basing its reasoning with regard to the passing off action on the goodwill, commercial loss and similarity (both visual and phonetic) that a trader had in his name as being similar to in an action for infringement of a trade mark, decided the matter in favour of the Appellant.



**Scope and application Environment Protection Act, 1986 – Stockholm Declaration of 1972 and the Development of Indian Laws on Environment – Balancing of Environment Protection and the Socio-economic Needs**

ESSAR OIL LTD. v. HALAR UTKARSH SAMITI AND OTHERS

**Supreme Court of India, 19 January 2004  
AIR 2004 Supreme Court 1834**

Facts

The issue related to the laying down of pipelines to pump crude oil from a single buoy mooring in the Gulf across a portion of the Jamnagar Marine National Park and Marine Sanctuary located along the lower lip of the Gulf of Katchch in the State of Gujarat. The Court had to decide the legality, as challenged through several public interest petitions, of the laying of the pipelines in accordance with the provisions of the Wildlife Protection Act, 1972, the Forest (Conservation) Act, 1980 and the Environment (Protection) Act, 1986. While interpreting the provisions of these enactments, the Court, in its *obiter*, referred to the effect of the Stockholm Declaration of 1972 and other related international environmental legal provisions in shaping the Indian law on the subject, in particular Section 29 of the Wildlife (Protection) Act, 1972 which *inter alia*, provided that:

No person shall destroy, exploit or remove any wildlife from a sanctuary or destroy or damage the habitat of any wild animal or deprive any wild animal of its habitat within such sanctuary except under and in accordance with permit granted by the Chief Wildlife Warden and no such permit shall be granted unless the State Government, being satisfied that such destruction, exploitation or removal of wildlife from the sanctuary is necessary for the improvement and better management of wildlife therein, authorizes the issue of such permit

The Judgment

The Court, while interpreting Section 29 of the Wildlife (Protection) Act, 1972, noted that this interpretation must be done keeping in mind the Stockholm Declaration of 1972. The Court observed:

Indeed, in the wake of the Stockholm Declaration in 1972, as far as this country is concerned, provisions to protect the environment were incorporated in the Constitution by an amendment in 1976. Article 48A of the Constitution now provides that the “State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country”. It is also one of the fundamental duties of every citizen of the country under Art. 51A (g) “to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures”.

The Court outlined various Principles of the Stockholm Declaration to sustain humanity and its environment. While emphasizing the need to balance economic and social needs, on the one hand, with environment considerations, on the other, the Court stated:

Indeed, the very existence of humanity and the rapid increase in the population together with consequential demands to sustain the population has resulted in the concreting of open lands, cutting down of forests, the filling up of lakes and pollution of water resources and the very air which we breathe. However, there need not necessarily be a deadlock between development on the one hand and the environment on the other. The objective of all laws on environment should be to create harmony between the two since neither one can be sacrificed at the altar of the other.

The Court interpreted Section 29 of the Wildlife (Protection) Act, 1972 and sought to answer the question as to whether it could be stated that the laying of pipelines through a sanctuary necessarily results in the destruction of wildlife. The Court, considering the legal position in England and other countries, noted that it would ultimately be a question of fact to be determined by experts in each case and accordingly asked the State Government to obtain an environmental impact report from expert bodies. It also sought an environmental management plan. The Court also laid emphasis on transparency and the sharing of information with those who were affected by this decision.

**Interpretation of Section 45 and Section 8 of the Indian Arbitration and Conciliation Act, 1996 – Extent of Judicial Intervention to refer the matter to Arbitration – Legality of Arbitration Agreement – Whether Courts should take a *prima facie* view while deciding the Legality – Application and Interpretation of UNCITRAL Model Law on International Commercial Arbitration**

SHIN-ETSU CHEMICAL CO. LTD. v. M/S AKSH OPTIFIBRE LTD.

**Supreme Court of India, 12 August 2005  
AIR 2005 Supreme Court 3767**

**Facts**

The parties concluded an agreement in November 2000 with an arbitration clause which, *inter alia*, provided that the governing law would be Japanese Law and the arbitration would be held in Tokyo, Japan in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. It was also agreed that the award of arbitration should be final and binding on both of the parties. The Appellant terminated the agreement in December 2002. The Respondent, thereafter, instituted a suit claiming a decree of declaration and injunction against the Appellant for cancellation of the agreement and a declaration that the long-term sale and purchase agreement of November 2000 including the arbitration clause were un-

conscionable, unfair and unreasonable and against the public policy; the same was entered into under undue influence and was, therefore, void *ab initio*, inoperative, incapable of performance and could not be given effect. The Appellant, invoking Section 8<sup>22</sup> of the Indian Arbitration and Conciliation Act, 1996 pleaded before the court that the Respondent should be directed to submit before the arbitration proceedings in Tokyo. The Trial Court concurred with the Appellant and remitted the parties to arbitration. The High Court, on an appeal, took a different view and pointed out that the matter should have been examined under Section 45<sup>23</sup> as well, and remitted the matter back to the trial court for reconsideration. The legal question before the Court was with regard to the nature of adjudication contemplated by Section 45 when the objection about the agreement being “null and void, inoperative or incapable of being performed”, that is, whether the judicial authority while exercising power under Section 45 should decide the objection on a *prima facie* view of the matter and render a *prima facie* finding or a final finding on merits on affording parties such opportunity as the justice of the case may demand having regard to the facts of the case.

### The Judgment

According to the Court, the entire issue arose on account of the nature of legislative consolidation under the Indian law on the subject which now dealt, in a single text, with domestic arbitration, international commercial arbitration, and enforcement of foreign arbitral awards. The Court noted that

Before enactment of the Act there were separate statutes governing international arbitration and domestic arbitration, namely, the Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), The Arbitration Act, 1940 (10 of 1940) and The Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961). These statutes have been repealed as provided in Section 85 of the Act.

The Court further noted that “The 1996 Act was enacted considering the international scenario as is evident from its Preamble”. Quoting the Preamble of the Indian Arbitration and Conciliation Act, 1996 which, *inter alia*, referred to UNCITRAL Model Law on International Commercial Arbitration, 1985, UNCITRAL Conciliation Rules,

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<sup>22</sup> Section 8 is essentially a provision to desist parties from going to the court on any pretext. It read, *inter alia*: “A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration”.

<sup>23</sup> Section 45 fell within the ambit of ‘enforcement of arbitral awards’; the ‘agreement’ referred to in this section is in relation to enforcement. Section 45 reads: “Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed”.

1980, and the “desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice”, the Court noted the entire enforcement scheme in the context of present case. It stated:

The enforcement of foreign awards has been dealt with in Part II of the Act which has two Chapters, Chapter I dealing with New York Convention Awards and Chapter II dealing with Geneva Convention Awards. In this matter we are concerned with Chapter I which comprises of Sections 44 to 52. Section 44 defines foreign award. It is not in dispute that the present case falls under the ambit of Section 44. Section 45 has already been extracted above. Conditions for enforcement of foreign awards are stipulated in Section 48 under which enforcement may be refused at the request of the party against whom it is invoked only if that party furnishes to the court proof as postulated in Clauses (a) and (e). In addition, the enforcement of the award may also be refused on the grounds stipulated in Section 48 (2) of the Act. Section 49 provides that where the court is satisfied that the foreign award is enforceable under Chapter I, the award shall be deemed to be a decree of the court. Section 50 provides as to against which orders an appeal shall lie.

The Court, noting that the judicial interference had been limited to a narrower circumference than under the old arbitration laws, continued with the examination of standard of review in relation to Section 45 – a *prima facie* finding or a final finding? The Court noted the similarity of language between Section 45 and other international conventions on the subject, such as the Geneva Protocol on Arbitration Clauses in Commercial Matters (1923) (Art. IV, Para. 1), the New York Convention (Art. II, Para. 3) as well as UNCITRAL Model Law (Art. VIII). The Court, while referring to cases in other national jurisdictions, further noted that:

Apart from the fact that the Arbitration and Conciliation Act, 1996 is not a complete adaptation of the UNCITRAL Model Law, the scheme/provisions of the Hong Kong Arbitration Ordinance are different from the Arbitration and Conciliation Act, 1996. Therefore, it may not be appropriate to follow the decisions interpreting the provisions of the UNCITRAL Model Law or the Hong Kong Arbitration Ordinance.

The Court confirmed the decision of the High Court in remanding the application under Section 45 of the Arbitration and Conciliation Act, 1996 for a fresh decision by the trial court.

**Influx of Illegal Migrants in large numbers – Does the Influx of a Large Population amount to ‘aggression’ under International Law? – Definition of ‘Aggression’ and its Historical Overview in the Indian Context – Treatment of Aliens under International Law**

SARBANANDA SONOWAL v. UNION OF INDIA AND ANOTHER

**Supreme Court of India, 12 July 2005  
AIR 2005 Supreme Court 2920**

Facts

The Writ Petition filed before the Supreme Court by way of public interest litigation was for declaring certain provisions of the Illegal Migrants (Determination by Tribunals) Act, (Act No. 39 of 1983),<sup>24</sup> 1983 (hereinafter, the ‘IMDT Act’) as *ultra vires* the Constitution of India, null and void; and the consequent declaration that the Foreigners Act, 1946 and the Rules made thereunder should apply to the State of Assam.

The Judgment

The Court considered various status reports on the influx of migrants into the State of Assam and also the status reports on the implementation of the IMDT Act. The consequences of such influx were also considered by the Court. The Court, taking into account the entire issue in its historical context, considered the implementation of various accords concluded between, on one side, the Government of India and the Government of Assam, and on the other the agitating/affected parties. The legal effects of such accords and their implications on the demography of Assam were also considered by the Court. The Court also considered the plea that the foremost duty of the Central Government was to defend the borders of the country, prevent any trespass and make the life of the citizens safe and secure.<sup>25</sup> Referring to various international legal scholars, the Charter of the United Nations, the Work of the International Law Commission, and the UN Special Committee on Aggression, the Court noted that “a consensus was arrived at and an agreed definition was approved

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<sup>24</sup> The IMDT Act was passed by the Indian Parliament in 1983. It was made applicable only to the State of Assam. The scope of this enactment was to determine whether a person who entered India after 25 March 1971, without valid passport or travel documents, was or was not an illegal migrant. The Foreigners Act of 1946 which actually governed such cases of the entry of illegal migrants was not made applicable to the State of Assam.

<sup>25</sup> The Court is referring to Article 355 of the Constitution of India which, *inter alia*, states: “[The] duty of the Union to protect States against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution”.

by the United Nations General Assembly on 12 April, 1974 *vide* Resolution No. 3314 (XXIX)". The Court further noted:

The Soviet Union pressed for inclusion of "ideological aggression" and also "the promotion of the propaganda of Fascist-Nazi views, racial and national exclusiveness, hatred and contempt for other peoples". Iran pressed for inclusion of "indirect aggression, of intervention in another State's internal or foreign affairs", including "direct or indirect incitement to civil war, threats to internal security, and incitement to revolt by the supply of arms or by other means". Many States wanted the definition to include "economic aggression". Shri M. Jaipal of India advocated that in view of "modern techniques of coercion" the definition of aggression should have included "economic pressures" and "interventionary and subversive operations".

The Court also referred to the Statement of India's Representative to the Sixth Committee on the definition of Aggression which emphasized the need for a comprehensive definition. This Statement, the Court noted, also referred to the "unique type of bloodless aggression from a vast and incessant flow of millions of human beings forced to flee into another State" impairing thereby the economic and political well-being of the receiving victim State and threatening its very existence.

On the issue of the deportation of aliens, the Court noted that they also possessed several rights, and that the procedure for their identification and deportation should be detailed and elaborate in order to ensure fairness to them. The Court further noted:

The power to refuse admission is regarded as an incident of the State's territorial sovereignty. International Law does not prohibit the expulsion *en masse* of aliens. Reference has also been made to Article 13 of the International Covenant of 1966 on Civil and Political Rights which provides that an alien lawfully in the territory of a State party to the Covenant may be expelled only pursuant to a decision reached by law, and except where compelling reasons of national security otherwise require, is to be allowed to submit the reasons against his expulsion and to have his case reviewed by and to be represented for the purpose before the competent authority. It is important to note that this Covenant of 1966 would apply provided an alien is lawfully in India, namely, with a valid passport, visa, etc. and not to those who have entered illegally or unlawfully.

The Court held, *inter alia*, that the provisions of the IMDT Act were *ultra vires* the Constitution of India.

## **OTHER RELEVANT STATE PRACTICE**

### **Measures to Eliminate International Terrorism<sup>26</sup>**

#### **Indian Statement in the Sixth Committee of the 60<sup>th</sup> Session of the United Nations General Assembly Resolution on Agenda Item 108: Measures to Eliminate International Terrorism on 6 October 2005**

India noted that it attached highest importance to this agenda item. It also noted with satisfaction the report of the UN Secretary General on this item, which contained information submitted by States, and international organizations describing their activities relating to the prevention and suppression of international terrorism.

India further noted that the Declaration on Measures to Eliminate International Terrorism, adopted by the General Assembly Resolution 49/60 in 1994, was the first significant step taken by the United Nations in the fight against terrorism. It was the first comprehensive standard-setting instrument at the international level unequivocally to condemn all acts, methods and practices of terrorism as criminal and unjustifiable whenever and by whomever committed. It obliged States to refrain from organizing, instigating, assisting or participating in terrorist acts in the territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts.

The Declaration, India pointed out, made clear that no considerations of political philosophical, ideological, racial, ethnic, religious or any other nature could justify criminal acts intended or calculated to promote a state of terror in the general public. Unfortunately, according to India, the Declaration continued to be flouted by some States that provided moral, material, financial and logistical sponsorship and support as well as provided arms to terrorists. It was of paramount importance to ensure that the Declaration was implemented sincerely by all States and that the standards it had set were effectively put into operation.

Referring to steps taken by India in strengthening international cooperation to combat terrorism, the Indian Statement further noted:

We have entered into several bilateral treaties in the areas of combating organized crime, narcotic drug offences, extradition and treaties of mutual assistance in criminal matters. These treaties facilitate the exchange of operational information and development of joint programmes to combat organized crime and terrorism. They also facilitate the transfer of fugitive offenders, suspected terrorists, etc., so that they can stand trial in the State in which the offence is committed. The mutual legal assistance treaties facilitate prosecution of offences, location of fugitives, and the transfer of witnesses and exhibits, all

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<sup>26</sup> For the Indian Statements generally *see* <http://meaindia.nic.in> and <http://www.un.int/India/>

of which play a vital role in the punishment of crime and prosecution of offenders. India is a party to twelve international sectoral conventions on terrorism that have been concluded under the aegis of the United Nations. We are also studying carefully the Convention for the suppression of Acts of Nuclear Terrorism with a view to consider becoming party to the Convention.

While emphasizing the need to conclude the negotiations on a Comprehensive Convention on International Terrorism during this Session, India stated:

Since the draft Convention under consideration does not raise any legal problems and the delay in its conclusion and adoption is by and large associated with the lack of political will of the few, demonstration of the political will is the need of the hour. As we are all aware, the question of the definition of an offence is a matter of precise legal language and is already reflected in the text of the draft Comprehensive Convention on International Terrorism now under consideration by this Committee. The objective of the Convention is to provide legal provisions which can be adopted in the criminal law instrument that would facilitate judicial cooperation, mutual assistance and extradition. The General Assembly has the central role in this process. If it abdicates its role, the Security Council, as in the past, will continue to deal with this issue in a partial piecemeal manner, governed by the political imperatives of the moment. That is not good for the development of law which needs to be broad-based and transparent. We all know the existence of a broadest possible agreement on all the draft provisions of the Comprehensive Convention on International Terrorism. However, the inclusion and exclusion of certain elements in Article 18 of the draft Convention remains a major outstanding issue. The Secretary-General's Report on the present agenda item indicates that, so far, the terrorism issue has been covered by 27 legal instruments. Making legal instruments to enrich a legal field is an ongoing process, be it in terrorism, human rights or in humanitarian law. It is impractical and inefficient to address an issue as complex as terrorism in one document. What is important is the timeliness. When the whole world waits for this Convention, we have to show flexibility and demonstrate political will. The August 2005 informal consultations gave a hope that we are near a compromise solution, which would enable agreement on the important Article 18 of the Convention. However, the issues which do not fit into the configuration of the present Convention, while important, are required to be handled separately in an appropriate format.

### **Indian Statement in Explanation of Vote on Declaration on Human Cloning<sup>27</sup>**

#### **Agenda item 150: International Convention Against the Reproductive Cloning of Human Beings on 8 March 2005**

India, while expressing its regrets that the Sixth Committee had been unable to recommend to the plenary a text that was acceptable to all member States on a matter

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<sup>27</sup> See for the Indian Statement <http://meaindia.nic.in> or <http://www.un.int/india/>



of paramount importance such as “The International Convention Against the Reproductive Cloning of Human Beings”, pointed out that it had voted against the political declaration as some of the provisions of the Declaration could be interpreted as a call for a total ban on all forms of human cloning. India noted that it was:

[T]otally opposed to reproductive cloning owing to the doubtful nature of its safety, success, utility and ethical acceptability. However, we consider the merits of therapeutic cloning on a case by case basis within the bioethical guidelines laid down with the approval of the National Bioethical Committee. The Declaration voted upon today is non-binding and does not reflect agreement among the wider membership of the General Assembly. Our approach to therapeutic cloning, thus, remains unchanged.

### **Children and Armed Conflict<sup>28</sup>**

#### **Indian Statement on Children and Armed Conflict at the United Nations Security Council on 23 February 2005**

India noted that children had become increasingly involved, both as targets of violence and as combatants, in conflicts. During the last few years, it further noted, more than 500,000 children, recruited in 87 countries, with around 300,000 actively participating in combat, had been involved in conflict in some form or another.

Terming this as one of the “soft” challenges to international peace and security, India further noted the proposed action that could be initiated:

However, the Council can impose sanctions under Article 41 only if it has established, under Article 39, that there is a sufficient danger to international peace and security to justify them. Only States are Parties to Conventions, non-state actors are not bound by them. More important, most armed groups obey no laws, national or international. In some cases of internal conflict, non-state actors or rival political groupings may make offers of adhering to such instruments precisely to gain legitimacy or a political *locus standi*. Further, can a violation by a State of the provisions of the Convention on the Rights of the Child be construed as a threat to international peace and security? A body of standards for monitoring, including instruments which do not command universal acceptance, cannot be imposed on Member States. A Member State while otherwise committed to the norms and commitments on the promotion and protection of rights of children would be right in maintaining that it would not be bound by any instrument to which it is not a Party. The use of children in armed conflict has been aggravated by the proliferation of small arms and light weapons worldwide. These weapons are inexpensive, durable, small, lightweight, easy to maintain and small enough for them to handle. Illegal arms trafficking and poor monitoring of the legal trade make it easy for them to access such weapons. We are disappointed to note that the report does not call for the adoption of more legally

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<sup>28</sup> *Ibid.*

binding commitments by Member States such as those on Marking and Tracing of Small Arms and Light Weapons and preventing the sale of arms to non-State groups.

While according national authorities primacy in gathering, vetting and compiling information at the country level as well as in the actions undertaken by UN field teams, India pointed out that it had:

[S]upported the concept of child protection advisors in UN peace-keeping operations as a means to complement the important work of the Special Representative of the Secretary General (SRSG) himself. We would, however, be deeply hesitant to involve the development agencies in developing countries from divesting or diluting their responsibilities in promoting and enhancing development cooperation and technical support. We have taken note of the proposal to constitute a Task Force on Monitoring and Reporting (TFMR) in countries where children and armed conflict is an issue. It has been proposed that the Task Force would involve “key members of the Child Protection Networks,” including “UN and NGO actors who have the experience and are most directly concerned with monitoring and reporting.” Who would select this ‘cohesive group’ from among the key members of the Child Protection Networks? It is also not clear to us why this Task Force would be more useful than the existing Child Protection Networks. In our view, the Task Force would only be effective if it can garner the trust and cooperation of all the main stakeholders who are involved in bridging the gulf between initiatives and implementation. We are surprised to note that even after four years of its existence, the Task Force on the subject at UN headquarters has not been able to formulate and compile guidelines on monitoring and reporting. The absence of such guidelines has, no doubt, led to the uneven quality of reporting on compliance and progress in the different situations where children are victims of armed conflict. Efforts towards ending the recruitment and use of children in armed conflict can only be effectively addressed when the guidelines – i.e. what the stakeholders have to monitor and report on – are clearly outlined to them. Precise guidelines would not only help gather relevant information but also provide the necessary basis for formulation of policy. We remain wary about the efficacy of establishing “Neighbourhood Initiatives” to address children and armed conflict concerns at cross-border and sub-regional levels. While lessons learnt in one country may be useful in understanding some of the underlying factors behind the phenomenon, contextualising the problem of children in armed conflict is as important as addressing the problem itself. The specific political, social, historical and cultural contexts are unique to each conflict and the reasons why children are recruited or lured to join armed groups in one country may be entirely different from those in another.

## **Sustainable Development<sup>29</sup>**

### **Indian Statement on Agenda Item 52: Sustainable Development at the Second Committee of the 60<sup>th</sup> Session of the UN General Assembly on 2 November 2005**

India noted that the World Summit on Sustainable Development held at Johannesburg, while re-affirming the Rio Principles and the continued relevance of Agenda 21, focused on concrete action for the implementation of Agenda 21 and achieving sustainable development. The Summit also re-affirmed that addressing poverty was central to the efforts of developing countries in achieving sustainable development.

Noting that Climate Change was a global phenomenon and that developing countries had hardly contributed to the problem, India stated that it was committed:

[T]o the international regime represented by the UN Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol as the most appropriate tools to guide international efforts to protect global climate systems by reversing climate change in accordance with the principle of common but differentiated responsibilities. The main responsibility for climate change does not lie with developing countries. Yet, it has severe adverse impacts on precipitation patterns, ecosystems, agricultural potential, forests, water resources, and coastal and marine resources, besides increasing the range of several disease vectors in the developing countries.

Linking Intellectual Property Rights (IPRs) to Sustainable Development, India further stated:

One of the major constraints faced by developing countries in the implementation of the Johannesburg Plan of Implementation (JPOI) targets is the availability of necessary technologies. We need to look at this aspect if developing countries are to meet the targets. The IPR issue was successfully addressed with regard to HIV/AIDS. There is similar need for it to be addressed with regard to technologies for energy efficiency and for clean energy as well as for other areas of interest to developing countries. A network of R&D institutes from developed and developing countries could also be established to engage in research in new technologies, particularly those that would be of interest to developing countries. All collaborative R&D work done through the network could be made available to developing countries free of charge. Bio-diversity, the variety of life forms, is the foundation for maintaining the life-sustaining systems of this planet and fundamental to the fulfilment of human needs. At the Johannesburg Summit, we collectively agreed to significantly reduce by 2010 the current loss of biological diversity. There was also an acknowledgement that the achievement of this target would require the provision of new and additional financial, technological and technical resources to developing countries. Sharing benefits arising from the utilization of genetic resources is another area that

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<sup>29</sup> For the Indian Statement see <http://meaindia.nic.in> and <http://www.un.int/India/>

requires attention. In this context, we welcome the decision of the Johannesburg Summit to negotiate, within the framework of the Convention on Biological Diversity, an international regime to promote and safeguard the fair and equitable sharing of benefits arising from the utilisation of genetic resources. We welcome the decision taken at the seventh meeting of the Conference of the Parties to the Convention on Biological Diversity to mandate the *Ad hoc* Open-ended Working Group on Access and Benefit Sharing to negotiate an international regime in implementation of this decision. We hope that, as a practical modality for benefit sharing, this regime will be able to include provisions for mandatory disclosure of the country of origin of genetic resources and prior informed consent in the IPR applications. India strongly supports *sui generis* systems for the protection of traditional knowledge that have been developed over millennia and ensure that the holders of traditional knowledge fully share in the benefits arising from the commercial utilization of this knowledge.

On desertification, India stated:

In the context of the UN Convention to Combat Desertification, we welcome the inclusion of land-degradation, desertification and deforestation as a focal area for financing by the Global Environment Facility. The effectiveness of these arrangements, however, would depend largely on allocation of additional resources to this focal area for financing the needs of affected countries.

### **Comprehensive Convention on International Terrorism<sup>30</sup>**

#### **Indian Statement at Informal Consultations of the Sixth Committee on the Draft Comprehensive Convention on International Terrorism on 25 July 2005**

India welcomed the adoption of the International Convention for the Suppression of Acts of Nuclear Terrorism, initiated by the Russian Federation, and looked forward to its early entry into force. India noted that a vast majority of Member States had supported the adoption of the comprehensive Convention at the earliest. We urge all member States to capitalize on the new momentum at the UN and conclude swiftly the draft comprehensive Convention on international terrorism. This will complement the broad legal framework set out in Security Council resolutions and the thirteen UN counter-terrorism Conventions.

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<sup>30</sup> For the Indian Statement generally see <http://meaindia.nic.in>

## **International Trade and Development<sup>31</sup>**

### **Indian Statement on Agenda Item 50: International Trade and Development at the Second Committee of the 60<sup>th</sup> UN General Assembly on 31 October 2005**

Referring to the Report of the Secretary-General, India noted:

[D]eveloping countries are often denied a level playing field to compete in global trade because developed countries use a variety of tariffs, quotas and subsidies to restrict access to their own markets and shelter their products. The international trading system is full of inequities – developing countries face non-tariff barriers and higher tariffs to their exports; tariffs escalate as the level of processing increases discouraging industrialisation in the developing countries. Besides, it is estimated that non-tariff barriers cost developing countries over USD 100 billion, almost twice the current level of Official Development Assistance. What is needed is to ‘un-level’ the playing fields in favour of developing countries, which has hitherto been favourable to developed economies, in order to make the multilateral trading system equitable. This would be in line with the call made as early as 1964 at the UNCTAD that “any definition must provide for elimination of all forms of discrimination, even those arising from so-called equal treatment. Treatment must be fair and fairness is not equality; fairness is the inequality needed to enable exploited peoples to attain an acceptable standard of living”. The Secretary-General has also reminded us of the need for appropriate balance between national policy space and international disciplines and commitments, enshrined in the Sao Paulo Consensus. For defending livelihoods, sovereignty of the state is important and disciplines that erode the autonomy of policy space need to be reformed. The realisation of the development dimensions of the Doha Work Programme, especially a strong special and differential treatment component in the outcomes of negotiations in all areas – agriculture, NAMA and services – is a categorical imperative.

Referring to Multilateral Trade Negotiations in preparation for the WTO Hong Kong Ministerial, India stated:

Progress in the trade negotiations has been disappointing, considering the hopes raised after the July Framework Agreement. Time-lines have not been met for advancing technical work substantially, most notably to achieve a “first approximation” of the results targeted for the Hong Kong Ministerial – full modalities in agriculture and non-agricultural market access by end July 2005. A ‘First Approximation’ proved elusive; the attempts did not even approximate to an approximation. It is widely accepted that agriculture holds the key for unlocking progress in other areas of negotiations. The key issues of the formula for tariff reduction, flexibility for developing countries and the treatment of unbound tariffs remain unsettled in NAMA. There has been no significant movement in the post summer negotiations. Hence a clear political direction to break the current impasse is a categorical

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<sup>31</sup> For the Indian Statement generally see <http://meaindia.nic.in> and <http://www.un.int/india/>

imperative. As pointed out by the Secretary-General, ambitious steps forward in delivering on the promises made at Doha are needed, especially by developed countries.

India further stated:

The anticipated gains from agricultural reform and trade liberalisation by developed countries have till now eluded the developing countries. Out of the estimated contribution of USD 165 billion annually to global welfare gains by completely removing trade barriers in agriculture, the developing countries would only receive about a quarter. Moreover, agriculture is not only about trade – it has vital development ramifications. Food security and rural livelihood are of immense economic relevance and have a socio-political dimension in many developing countries. Demands for reduction of *de minimis* payments by countries go back on the July Framework Agreement and is unacceptable to developing countries with subsistence farming and predominantly resource poor farmers. Countries that demand such reductions should be aware of the perilous impact it would have on the food and livelihood security of millions of subsistence farmers in developing countries and in terms of the opportunities for development they would deny to developing countries. The operationalisation of proportionality and progressivity, the issue of flexibilities including the treatment of special products and the special safeguard mechanism for developing countries are, therefore, crucial. The Secretary-General has stressed the need for more equitable and fair conditions and for providing adequate development flexibility for nurturing the vital agriculture sector in developing countries, for agriculture trade to contribute to the achievement of MDGs, and for operationally effective and meaningful special and differential treatment for developing countries. We agree with the Secretary-General. The fundamental objective of any Government is to defend the livelihood of ordinary people and a multilateral system that impinges adversely on it cannot long endure. Earlier this month, over 100,000 farmers rallied in India demanding that agriculture be taken out of the WTO.

On Services negotiations, India pointed out:

Significant results in the services negotiations remain essential to achieve a balanced outcome of the Doha Round. The Secretary-General notes that effective and commercially meaningful access in Mode 4 for developing countries' services suppliers is the area where the largest gain is expected and would contribute to the achievement of MDGs. It could be a win-win situation; restricting the movement of professionals across the world is unnatural and, ultimately, to the detriment of developed countries themselves. In order to protect the interests of developing countries, it is crucial that the basic GATS architecture and the agreed negotiating modalities and procedures are respected in the negotiations. It is equally important to provide for global horizontal disciplines which can protect negotiated gains in market access from arbitrary restrictions.

Referring to TRIPS, India stated:

An important development issue concerns the amendment in the TRIPS Agreement to give effect to the General Council decision of August 2003 on ‘TRIPS and Public Health’ meant to address the problems faced by countries in accessing medicines at affordable prices when combating serious public health problems. The deadline set for devising a permanent solution by amending Article 31(f) has been extended several times. Developing countries, in order to receive a fair recompense for their biogenetic resources, have also been seeking amendments to the TRIPS Agreement to fully align it with the Convention on Biological Diversity and, in this context, to have the requirements of disclosure, prior informed consent and equitable benefit sharing incorporated in the TRIPS provisions on patents. On the issue of preference erosion, India believes that the main responsibility lies with the developed economies through implementation of their commitment to lower preferential rates to zero and, more importantly, through enhancing the utilization of GSP schemes by rationalizing the rules of origin. Notwithstanding the constraints of being a developing country, India would soon be finalising a bilateral package of preferential market access for LDCs into the Indian market. We welcome the ‘Aid for Trade’ initiative of the World Bank, which, we hope, will help loosen the supply side constraints in many developing countries.

## IRAN<sup>32</sup>

### JUDICIAL DECISIONS

#### **Hæmophilia – Civil liability of State – Moral damages – Material damages**

SABERI v. MINISTRY OF HEALTH, TREATMENT AND MEDICAL TRAINING, IRAN’S BLOOD TRANSFUSION ORGANIZATION AND IRAN’S BLOOD RESEARCH AND ANALYSIS COMPANY

#### **Judgment of Branch 1060 of the Tehran Court, 15 July 2004**

##### Facts

In 1983, two consignments of blood products were bought from a French company. Consumers of these products were infected with HIV and Hepatitis C because the products were contaminated with these diseases. On 2 November 2003, Counsel for Claimants (974 hæmophilia patients or their heirs) sued the Ministry of Health, Treatment and Medical Training, Iran’s Blood Transfusion Organization and Iran’s Blood Research Analysis Company under the Civil Liability Act, 1960 (hereinafter referred to as “CLA”) and claimed both moral and material damages incurred by

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<sup>32</sup> Contributed by Jamal Seifi and Alireza Ebrahim-Gol, Shahid Beheshti University, Tehran.

the victims. The Court ordered the defendants to pay both moral and material damages. An appeal was sought from this decision, but it was rejected. Appeal to the Supreme Court was also unsuccessful.

### The Judgment

The judgment of the court is comprised of three parts, as follows:

- A. Principle of civil liability of the defendant;
- B. Amount of material damages and the mode of assessment of material damages, and
- C. Moral damages and the criteria for moral damages.

Concerning the first, the Court based its judgment on the decision in the parallel criminal proceedings in this case and the reports of the General Inspectorate Organization and the Forensic Medicine Organization. The court also took into account the active role played by the Government and its affiliated organizations in the different social, economic and health concerns of its citizens in the present era and the various measures adopted by the Government in this regard. This active role carried the associated risk of Government actions resulting in damage to the citizens. Therefore, ethics, justice and legal logic require citizens to be compensated by the Government when its actions result in damages to the citizens, especially when the damage is highly burdensome.

The Ministry of Health had failed to declare the source of contamination and had subsequently rejected the factum of omission despite its confirmation by the accused in the related criminal case. Furthermore, the Blood Transfusion Organization, as a Governmental body, had the exclusive responsibility for the gathering and production of blood products, the distribution of the blood products, and the supervision of their quality. However, it had not obtained the licence for the production of the blood products; thus, it violated the law relating to their production.

These omissions and violations of law by Governmental bodies resulted in the irreparable moral and material damages incurred by claimants and, therefore, the Court found the defendants liable under Articles 1, 8, 11, and 14 of the CLA.

Regarding the second issue, the Court made a comparative study of precedents in cases involving infected persons demanding damages. The Court examined precedents from various countries such as Canada, Denmark, Brazil, Belgium, Italy, Bulgaria, India, Spain, Finland, Japan, Ireland, England, Sweden, Germany, France, South Africa, and Australia. The Court then classified the Claimants into four groups and awarded separate amounts of compensation for each group. The groups were:

- 1. Deceased patients infected with HIV;
- 2. Patients infected with HIV;
- 3. Patients infected with Hepatitis C, and
- 4. Persons who had become patients as a result of contact with hæmophilia and other consumers of these products.



In respect of the final issue, the Court held that the Claimants' becoming infected with hazardous viruses such as HIV and Hepatitis C had led to their suffering from undefined fears, phobia, permanent anxiety, and feelings of insecurity. These, in turn, had affected their mentality and social interaction with other individuals and even members of their family, thus impairing their social reputation, and leading to the deprivation of their social rights such as the right to marriage, education and medical treatment. In these circumstances, any legal and social protection for these persons could lead to increasing their life expectancy and nourishing a positive spirit in them.

In determining the moral damages, the Court took into account factors such as age, gender, social status, especially professional status, marital status, parental status, education, divorce as a consequence of the infection, loss of marriage opportunities, depression, social pressures, length of illness and possibility of its recurrence, loss of job as a result of the infection, death of patients, and simultaneous infection with both viruses.

In awarding the moral damages, the Court considered obligations under Articles 164, 167, and 40 of Iran's Constitution and Articles 1, 2, 3, 5, and the latter part of Article 11 of the CLA and paragraph 3 of Article 2 of the International Covenant on Civil and Political Rights which was ratified by Iran in 1975 and considered as law under Article 9 of Iran's Civil Code.

Article 11 of the CLA provides:

In case Government officials, municipalities and their affiliated institutions in performance of their duties deliberately or recklessly cause damage to other person, they are themselves responsible. But in case the damages incurred are not attributable to them and [are] related to their negligence, the Government branches and affiliated institutions concerned will be liable.

The Court concluded that since the role of the Government in this case should be categorized as *jure gestionis* and not *jure imperii*; based on the general principle of law that no damage must remain uncompensated for, the Claimants were entitled to moral damages. The Court categorized the Claimants as those who were infected with Hepatitis C and those who were infected with HIV; it awarded separate amounts of compensation for each. Moreover, the Court, based on Articles 3-6 of the CLA and the latter part of Article 11, obliged the defendants to issue a formal apology in two widely circulated newspapers and correspondence with each of the Claimants.

## NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

### **Elimination of Child Labour**

#### **Council of Ministers Bye-Law in the Execution of the Prohibition and Prompt Action for Eliminating the Worst Form of Child Labour Act (PEWFCL)**

In accordance with its international obligations under the ILO Convention for the Prohibition and Prompt Action for Eliminating the Worst Form of Child Labour, the Iranian Parliament passed an Act called the PEWFCL on 17 May 2004. Subsequently, the Iranian Council of Ministers issued a bye-law for the execution of this Act.

In its first Article, it enumerates the worst form of child labour in 36 items. Article 2 provides that those who violate this bye-law will be sentenced to imprisonment from 91 days to one year, and will be subjected to the payment of compensation and cancellation of their work permit.

### **Combating human traffic**

#### **Human Traffic Combat Act (HTCA)**

The Iranian Parliament, in pursuance of Iran's international obligations regarding combating human trafficking, passed a law called the HTCA on 19 July 2004. In its first Article, this Act gives a definition of "human trafficking"; in the second article, it defines acts which are constructive human trafficking. Article 3 provides that in the event that the act of the offender is amongst those that are enumerated in Iran's Islamic Penal Code, s/he will be convicted according to that law. Otherwise, s/he will be convicted to imprisonment for two to ten years and make payment of compensation.

### **Respect for legitimate freedoms and citizens' rights**

#### **Respect for Legitimate Freedoms and Observance of Citizens' Rights Act**

In pursuance of Iran's international obligations under the human rights instruments, the Iranian Parliament passed an Act on 5 May 2004 named the Respect for Legitimate Freedoms and Observance of Citizens' Rights Act.

Article 1 of this Act provides that the discovery, investigation, and prosecution of crimes must be based on laws and with judicial orders, and it prohibits unnecessary detentions. Other Articles referring to the general principle of law that each person is presumed innocent unless the contrary is proved provide for the observance of the rights of an accused and the complainant. Article 5 provides that the case must be referred to a competent court within the due legal time limit.

During the process of investigation and interrogation, the eyes of the accused must not be closed and officers responsible for the inquiry must not cover their faces

or sit behind the accused, and must refrain from other acts which may humiliate the accused. Article 9 expressly condemns torture and provides that violators must be seriously punished.

## JAPAN

### JUDICIAL DECISIONS<sup>33</sup>

#### **Diplomatic Privileges of the Staff who is National of the Receiving State Vienna Convention on Diplomatic Relations**

X v. STATE OF JAPAN

#### **Tokyo District Court, Decision, 10 November 2004 1893 Hanrei Jihou [Judicial Reports] 160 [2005]**

X is a Japanese citizen working at the Embassy of Sri Lanka in Tokyo. X was employed by the Embassy as a staff clerk-typist in August 2002. X's major responsibilities are to serve as an interpreter, to work on translations, or to provide help for arrangements to welcome leading figures when they come from Sri Lanka. Driving a car is not part of X's original work profile. One day, in compliance with the visiting Minister of Land of Sri Lanka, and after obtaining the authorization of the Embassy of Sri Lanka, X took the Minister and his family in X's own car, showed them around Tokyo city for shopping, and deposited them at the hotel where they were staying. After that, on his way home from the hotel X caused a traffic accident in which a motorcycle rider suffered severe cuts that took two months to heal completely. X, who was prosecuted because of this traffic accident, claimed that, being on the staff of a foreign Embassy, he should enjoy the privileges and immunities on the basis of Article 38(2) of the Vienna Convention on Diplomatic Relations, and therefore, the public action in the case must be dismissed.

The Tokyo District Court dismissed the claim of the plaintiff and ordered him to pay one hundred and fifty thousand yen as a fine to the plaintiff. Its reasoning is as stated below.

Firstly, Article 38(2) of the Vienna Convention provides that "other members of the staff of the mission and private servants who are nationals of or are permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State". X is apparently "other members of the staff of the mission" and "nationals of ... the receiving State". However, a problem remains as regards the wording "the extent admitted by the receiving State". In other words, it is important to determine whether the Japanese Government, as the receiving State, has indeed authorized privileges and immunities to other members of the staff of

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<sup>33</sup> Contributed by Tanaka Norio, Professor of International Law, Ryukoku University, Kyoto, Japan.

the mission and nationals of the receiving State, or it has not. The Court found that there were no such laws and regulations in Japan which authorize privileges and immunities as mentioned above.

Secondly, according to the defence attorney, other members of the staff of the mission and nationals of the receiving State shall enjoy immunities from criminal jurisdiction concerning their acts performed in the course of their duties under custom in conformity with customary international law. However, it is not only obscure as to what is meant by “custom in conformity with customary international law”, but there is also no evidence to show the establishment of such customary international law.

On the contrary: according to international lawyers before the Court, the drafting process of Article 38(2) of the Vienna Convention shows that there was no agreement on the extent of privileges and immunities authorized to “other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State”. Therefore, the Court found that the contention submitted by the defence attorney cannot be accepted.

**Nationality Clause of National Pension Law – Non-application of National Pension Law to Korean Residents not having Japanese Nationality – Direct Applicability of Article 2 (2) of International Covenant on Economic, Social and Cultural Rights as a self-executing treaty – Article 26 of International Covenant on Civil and Political Rights**

*X et al. v. STATE OF JAPAN*

**Osaka District Court, Decision, 25 May 2005**

**1898 Hanrei Jihou [Judicial Reports] 75 [2005], 1188 Hanrei Taimu [Law Times Reports] 254 [2005]**

All of the plaintiffs are foreigners who have Korean nationality and reside in Japan. The National Pension Act was not made applicable to foreigners who do not have Japanese nationality. After Japan ratified the 1951 Convention on the Status of Refugees, the nationality clause of the National Pension Act was abolished through its amendment. However, Korean people were still excluded from the application of the modified National Pension Law. They claimed that they are victims of discrimination because of the nationality clause of the National Pension Act and this is in violation of Article 14 of the Japanese Constitution, Article 2(1), (2) and Article 9 of the International Covenant on Economic, Social and Cultural Rights, and Article 26 of International Covenant on Civil and Political Rights.

Firstly, the Osaka District Court dismissed the claim of the plaintiffs as regards Article 14 of Japanese Constitution, which stipulates equality of all peoples under law, by stating as follows:

Deciding applicable personal scope or contents of the National Pension Act, the legislative body has discretionary power to some extent. Therefore, the use of power by that is not

appropriate for judicial judgment, except as it lacks reasonableness and apparently seems to be an egregious deviation or abuse of the discretionary power. Exclusion of Korean people from application of National Pension Act is not necessarily discrimination which is prohibited under [the] Japanese Constitution.

Secondly, the Court considered whether the National Pension Act including the nationality clause is contrary to Article 9 of the International Covenant on Economic, Social and Cultural Rights, and Article 26 of the International Covenant on Civil and Political Rights, or not. On this point, the Court at first noted as follows:

Article 9 of International Covenant on Economic, Social and Cultural Rights does not give a concrete right to individuals without any domestic law based on Article 9, for demanding any particular benefits in social security. As far as Article 2 (1) of the Covenant is concerned, the State Party shall not be immediately obliged to enact domestic law implementing any provisions of the Covenant, but she has the discretionary power for deciding when or what laws and regulations should be enacted.

However, if a domestic law has been enacted to put the Covenant's provisions into effect, any discrimination shall be prohibited under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights in all aspects of the application of its domestic law. Article 2(2) is a self-executing provision regardless of one of the provisions of the Covenant, and can be directly applied in a domestic court, just as can Article 26 of the International Covenant on Civil and Political Rights.

As shown above, the Court found that the International Covenant on Economic, Social and Cultural Rights can be applied directly in a domestic court of Japan, and if a domestic law has been enacted for the purpose of implementing the Covenant, any discrimination on the basis of nationality shall be prohibited in the stage of application of the law concerned. However, the Court dismissed the claim of the plaintiffs.

#### NATIONAL LAWS ON INTERNATIONAL LAW MATTERS<sup>34</sup>

##### **Entry into force of the Law to implement the Geneva Conventions and Additional Protocols**

On 28 February 2005 the Law concerning the Punishment of the Grave Violations of International Humanitarian Law (Law No.115, 2004) entered into force some ten months after its promulgation. This Law was enacted at the same Diet session in 2004 as the accession to the 1977 Geneva Protocols I and II Additional to the Geneva

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<sup>34</sup> Contributed by Aoki Takashi, Faculty of Law, Seiwa University, Chiba, Japan.

Conventions of 1949 was approved.<sup>35</sup> An additional clause of the Law provides that it comes into effect on the date of the entry into force of the Geneva Protocol I for Japan.

Articles 3 to 6 of the Law lay down the following four criminal acts and the corresponding penalties for them:

(a) A person who during his act of hostilities destroys such important cultural property as specified by a Government ordinance is liable to imprisonment with hard labour for seven years or less;

(b) A person who, with power of repatriation of prisoners of war, delays such repatriation without good reason is liable to imprisonment with hard labour for seven years or less;

(c) A person who transports nationals or residents of the occupied State for their settlement in its occupied area is liable to imprisonment with hard labour for five years or less;

(d) A person who, with powers to manage emigration, interferes without good reason in civilians emigrating from the occupied area is liable to imprisonment with hard labour for three years or less.

In accordance with Article 7, all these crimes are made punishable even when they are committed outside Japan under Article 4bis of the Penal Code which provides that “[i]n addition to those provided for in Articles 2 to 4, this Code shall also apply to every person who has committed the crimes provided in Part 2 for which Japan is under a treaty obligation to punish even when they are committed outside Japan” [*unofficial translation*]. This clause was added in 1987 to implement the Hostage Convention and the Convention for Protection of Internationally Protected Persons to which Japan was about to become party. In the Diet deliberations, an additional effect of the new article was referred to as the facilitation of the prompt participation of Japan to the conventions which stipulate the obligation to punish the extraterritorial crimes, by making it possible that any crime specified in Part 2 be punished by applying the conventions to the acts committed outside Japan as requested by such conventions.<sup>36</sup>

As to the Four Geneva Conventions of 1949, Japan acceded to them in 1953 in conformity with its declaration at the San Francisco Peace Conference of 1951, yet no legislative action was found to be required to bring them into effect. However,

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<sup>35</sup> For the outline of the legislation and comment, see <http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr22/Legi.pdf>, pp.155-7. The statement of the Foreign Ministry on the legislation can be found at <http://www.mofa.go.jp/policy/security/legislation.html>.

<sup>36</sup> *Minutes of the Diet, the House of the Representatives, Committee on Judicial Affairs, No.3, 15 May 1987, the 108th Session of National Diet, at 29*

now extraterritorial crimes to be punished under the Geneva Conventions have been added to the application of Article 4bis of the Penal Code.<sup>37</sup>

#### OTHER RELEVANT STATE PRACTICE<sup>38</sup>

##### Bilateral Talks with China concerning the Seabed Development in the East China Sea

In May 2004, it was reported in the press that China had commenced construction of installations for the commercial production of natural gas from the offshore field *Chunxiao* located a few miles west of the Japanese-claimed median line in the East China Sea. The distance between the baselines of the two countries is less than 400 nautical miles. The Japanese legislation prescribes the limit of maritime areas in relation to neighbouring States as the median line.<sup>39</sup> China has conducted extensive exploration in the waters around the line since the mid-1990s,<sup>40</sup> and reportedly discovered six gas fields, including *Chunxiao* and *Duangqiao*, near the median line. Some of them have already been in the commercial production stage.

In June 2004, the news led the Japanese Government to express its grave concern and to request for information on the geological facts and Chinese activities. The Government stated, *inter alia*, that the sites where commercial drillings were about to begin under the Chinese licence and the gas deposit in the sites might well extend into the Japanese side of the median line. In the next month, Japanese companies conducted a series of physical explorations of the seabed area in the Japanese side of that line under the licence issued by the Japanese Government; the results clarified the probable unity of the deposits. China had, reportedly, protested the Japanese action as a violation of Chinese sovereignty and interest, and mobilized their naval fleet to the waters near the gas fields.

Since October 2004, both Governments have had three rounds of consultations concerning the disagreement on the East China Sea and other matters. The second and the third meetings were held in May and September-October of 2005.

At the first consultation, China only explained the geological features, in general, of the *Chunxiao* structure on which Japan had requested the detailed information, and China stated that production in the structure would not affect the resources in the Japanese waters. Concerning the other licensed sites, China stated that although

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<sup>37</sup> An additional clause to the code amended (Law No. 52, 1987) expressly enlarged the application of the provision of Article 4 *bis* to the crimes to be punished under the Geneva Conventions even when they were committed outside Japan.

<sup>38</sup> Contributed by Aoki Takashi, Faculty of Law, Seiwa University, Chiba, Japan.

<sup>39</sup> Arts. 1 and 2, Law on the EEZ and the Continental Shelf (Law No.74, 1996), <[http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN\\_1996\\_Law74.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_1996_Law74.pdf)>

<sup>40</sup> Japan has lodged a protest against the activities engaged in on the Japanese side of the median line. In 2001, a framework of the mutual prior notification of marine research activities was established for research taking place in the waters near the other country in the East China Sea, and notes exchanged to bring it into effect.

it had the right to place the site in the waters covered by Chinese sovereign rights, it is abstaining from carrying out practical work on site.

The second meeting was reported to contribute to understanding each other. However, the Japanese demand for information and suspension of Chinese development work at *Chunxiao* Gas Field was not accepted by China. As regards the boundary delimitation, it became clear that fundamental differences existed in both sides' respective positions, including in the disputed area. It was agreed that a consultation of legal experts should promptly be held. Whereas China proposed principles on joint development, Japan pointed out its inherent difficulties. It was decided that each country should examine the possibility to resolve the issue through joint development.

The third round results, as announced by the Japanese Foreign Ministry on the web,<sup>41</sup> need briefly to be stated.

(a) As regards the development of natural resources by the Chinese side: although both sides shared the common recognition that this was a matter to be resolved urgently, the Japanese side demanded that the Chinese side provide information and discontinue the development work. However, the Chinese side responded that the development had been conducted in the undisputed waters and that it could consider the provision of information after an agreement in principle had been reached on the joint development.

(b) To the Japanese proposal regarding the joint development and the demand for suspension of Chinese development work, China replied that they would seriously study the proposals and present their views at the next consultations.

(c) On the debate over the joint development, both sides shared the view that any joint development to be carried out as an interim arrangement should not affect future negotiations over maritime demarcation, and should be mutually beneficial.

(d) The legal experts exchanged their interpretations of international law applicable to the case in the East China Sea. Although opinions differed, both sides deepened their understanding of the other's stance.

Although the issues between the parties are being identified gradually through negotiations, even more intensive consultations seem to be required for them to reach an equitable solution. For the legally justified resolution of this matter, additionally, the political ramifications between the two countries have to be ameliorated, including the increasing frictions over the 'past history',<sup>42</sup> and the rivalry on the economic and naval balance in the East Asia. Continuing observation is called upon on this case.

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<sup>41</sup> See Japan-China Consultations on the East China Sea and Other Matters (30 September to 1 October, Tokyo), <<http://www.mofa.go.jp/region/asia-paci/china/consult0509.html>>

<sup>42</sup> For the Prime Minister's statement on the point, see <<http://www.mofa.go.jp/announce/announce/2005/8/0815.html>>



**KOREA**<sup>43</sup>

## JUDICIAL DECISIONS

**Trade Agreement – Right to Property – Right to Freedom of Information**

## AGREEMENT FOR TRADE OF GARLIC BETWEEN THE REPUBLIC OF KOREA AND THE PEOPLE'S REPUBLIC OF CHINA

**16-2(B) Korean Constitutional Court 568, 2002Hun-Ma579, 16 December 2004**

## Background

In order to settle the disputes regarding the South Korean measure restricting the import of garlic produced in China and the termination of import by China of South Korean mobile telephones, the Korean Government trade representative, with the Chinese counterpart, signed on 31 July 2000 an agreement concerning the trade of garlic between the Republic of Korea and the People's Republic of China to the effect that the restriction upon the import of garlic produced in China that had already been imposed by South Korea for the previous three years would be maintained. The Government, thereupon, disclosed through a press release that the amount of garlic to be imported from China was practically frozen for the three years to reach the level of the amount imported in 1999, or less. However, in fact, the supplemental document to the above agreement with China contained the additional agreement stating that the "private enterprises of the Republic of Korea may freely import garlic from the date of 1 January, 2003", which the Government did not disclose. The Complainants, who were cultivating garlic, filed the constitutional complaint in this case claiming that their right to know and right to property had been infringed by the above additional agreement and the failure to notify such additional agreement.

## The Judgment

The Constitutional Court, in the opinion of all justices with the exception of the separate concurring opinion of one justice, dismissed the constitutional complaint. The summary of the judgments is stated below.

*1. Summary of the Majority Opinion of Eight Justices*

The measure restricting the import of garlic produced in China is merely to provide a certain amount of extra time for countermeasure by temporarily protecting the agricultural households that have failed to adjust themselves to the concrete economic situation that confronts them, and not to secure a legal situation beneficial

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<sup>43</sup> Contributed by Professor Eric Yong-Joong Lee, at Dongguk University College of Law, Seoul, Korea.

to the agricultural households cultivating garlic by maintaining the import barrier against the garlic produced in China for a long term or without a temporal limit. Therefore, no legally justifiable expectation or interest whatsoever can be endowed to the agricultural households cultivating garlic with respect to the renewal of the above import restriction measure; neither may the property right of the agricultural households cultivating garlic be deemed to be restricted by the Government's decision to not renew the import restriction measure. In addition, the opportunity to cultivate garlic in an economically manageable way with constant profit is not an entity guaranteed as a basic right. Thus, even if they should discontinue the cultivation of garlic due to the exacerbation of the business situation, the freedom to choose an occupation may not be deemed to have been affected thereby. Therefore, as there is no question of an infringement of the basic rights of the Complainants such as their property right, the constitutional complaint challenging the above agreement is unjustified.

The Government's obligation to disclose, which is derived from the right to know, exists only upon the citizen's act of active collection of information and especially the request for disclosure of specific information unless there is an exceptional situation. Therefore, in this case where there was no request for disclosure of information, the Government was under no obligation to disclose in advance the import liberalization measure part of the agreement concerning the trade of garlic between the Republic of Korea and the People's Republic of China.

In addition, although an obligation to disclose corresponding to the right to know may be recognized as an exception in the case of certain categories of treaties for which there exists the obligation to disclose even without request for disclosure, the above agreement with China may not be deemed as the final decision over the renewal of the emergency import restriction measure even pursuant to the supplemental document at issue in this case because such a decision should go through the process of investigation and recommendation of the Trade Committee under the applicable law. Thus, it may not be deemed that the Government as the matter of the Constitution should necessarily give such agreement the effect identical to that of domestic law by way of promulgation.

As such, there is no obligation on the part of the Government to disclose the supplemental agreement with respect to the import of garlic. Therefore, the constitutional complaint challenging the failure to act that is based on the premise of the Government's obligation to disclose is unjustified.

## *2. Summary of the Separate Concurring Opinion of One Justice*

The above agreement concerning the trade of garlic is equivalent to the so-called public notice-type treaty, which under the domestic law has the status equivalent to public notice and does not have the status of a statute. The authority of the executive branch of the Government to enter into such public notice-type treaties accompanies in its own nature a very broad discretion. Such discretion of the executive branch is fundamentally strategic and tactical; further, it may not depart from mutualism. Therefore, the constitutional complaint in this case should be dismissed,

as the exercise of the authority by the Government and the content thereof with respect to the conclusion of the public notice-type treaty may not be the subject matter of review on a constitutional complaint unless there is a clear digression from or abuse of the procedure determined by the Constitution and the statute.

### **Freedom of Renunciation of Nationality – Military Service**

#### **THE UNCONSTITUTIONALITY OF THE NATIONALITY LAW ARTICLE 12, PROVISION 1**

#### **Korean Constitutional Court, 26 August 2004 (No. 2002Hunba3)**

##### **Background**

The Applicant was born in the United States and his parents were both Korean nationals. The Applicant had dual nationality of Korea and America. Having reached the age of 19, the Applicant applied for renunciation of Korean nationality.

The Minister from the Ministry of Justice decided that the Applicant was over 18 and had been inducted into the first national military service by the time he had applied for renunciation; in accordance with Article 12 of the Nationality Law of the Republic of Korea and under paragraphs 3 and 4 of Article 16 of the Regulations for the Implementation of Nationality Law, the Applicant should not apply for renunciation of Korean nationality unless his duty of military service had been fulfilled or exempted lawfully. Therefore, the decision was for the dismissal of the application for renunciation of Korean nationality. The Applicant applied to the Court for retraction of the above-mentioned decision.

In the Court proceedings, the Applicant also requested the Court to decide whether the Proviso in paragraph 1 of Article 1 of the Nationality Law of the Republic of Korea was in violation of the Constitution. The Court rejected the submissions of the Applicant. Then, the Applicant presented a petition to the Constitutional Court.

##### **The Judgment**

It is stipulated in paragraphs 3 and 4 of Article 16 of the President Order on the Implementation of the Nationality Law (hereinafter referred to as the “President’s order”) that male citizens over the age of 18 with dual nationality who have been inducted into the first national military service should not apply for renunciation of Korean nationality unless their duty of military service had been fulfilled or exempted lawfully.

In accordance with paragraph 1 of Article 12 of the Nationality Law of the Republic of Korea, citizens of the age of 20, with dual nationality, shall select one nationality before the age of twenty-two.

As for the duty of military service, the legal provisions provided that citizens with dual nationality and in accordance with the circumstances provided in the President Order shall select one nationality within two years after the removal of

the circumstances. It is implied that some more provisions in relation to selection of nationality shall be added under other specified circumstances. However, if there are so far no relevant provisions applied to such circumstances, it makes a reservation to authorize the concerned department to promulgate the order under the name of the President, that is, if there are some circumstances related to the fulfilment of the duty of the military service, the selection of nationality shall be made within two years after the removal of the circumstances, but the provisions on the circumstances shall be made by the authorized department under the name of the President's order.

In this case, as there is no relevant provision directly applied to restrictions on the selection of nationality for citizens with dual nationality and duty of military service, the reservation has been made to authorize the concerned department to promulgate the order under the name of the President to make the provisions on nationality selection. Therefore, to make a judgment on whether the legal provisions of this case are unconstitutional means to make a judgment as to whether the authorizing procedure is unconstitutional. This would be different from making a judgment on whether the provisions of the President's order on the Implementation of Nationality Law are unconstitutional or not.

Article 75 of the Constitution of Republic of Korea provides that the President shall provide a clearly defined scope in the President's order. This would mean that the basis of enabling legislation has been determined and, at the same time, the authorization is limited in the clearly defined scope.

The Constitution of Republic of Korea clearly provides that National Defense and Military Service are inevitable and intrinsic constitutional values and in accordance with the Military Service Law it is the duty of every male citizen of the Republic of Korea to perform military service. Therefore, any person with dual nationality, one of them being Korean, shall not be exempted from the duty of Military Service.

In this case, it is the premise of the legal provisions that every Korean male citizen, even those with dual nationality, shall fulfil the duty of military service. The legislative purpose is to prevent the usage of the nationality selection system as means of avoiding the obligation of military service. Therefore, the legal provisions in this case do not violate the Constitution.

NEPAL<sup>44</sup>

## JUDICIAL DECISIONS

**Right to equality – Positive discrimination should not be used irrationally**

ADV. SHYAM KRISHNA MASKEY AND OTHERS v. HIS MAJESTY'S GOVERNMENT OF NEPAL, MINISTRY OF LAW, JUSTICE AND PARLIAMENTARY AFFAIRS AND OTHERS

**Special Bench of the Supreme Court of Nepal on 6 December 2005  
13 Supreme Court Bulletin 20**

## Introduction

The Supreme Court of Nepal has emphasized that the State should not discriminate between men and women while giving effect to international law or implementing domestic laws. The writ petitioner had brought a writ petition before the Supreme Court of Nepal asking to declare null and void the eleventh amendment to the National Code, 1963 of Chapter 12 sections 4(a)<sup>45</sup> and 4(c)<sup>46</sup> on Husband and Wife, which allow a married woman to obtain partition out of the property of a husband even after getting divorced. The writ petitioner had claimed that a married woman would gain more property than a man when she divorces and remarries (as many times as she does so). Under such a situation, according to the writ petitioner, the woman could obtain a double right to partition whereas a man would be responsible for sharing his property irrespective of the fact of the divorce. On the other hand, men are responsible for providing alimony to a divorced wife until she remarries or for a period of five years, whereas women having an income are not responsible to provide alimony to a divorced husband even though the husband has no source of income. The amended provisions of the National Code were introduced to give

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<sup>44</sup> Contributed by Surendra Bhandari, Executive Director, Law Associates Nepal, Kathmandu.

<sup>45</sup> Section 4(a) of Husband and Wife provides that, "When a husband and wife get divorced pursuant to Section 1 of this chapter, the court shall decide the divorce only after the property of husband is partitioned between them. If the husband who is getting divorce has not acquired ancestral property, the court shall order a partition between the coparceners and out of the share of the husband, grants partition to the wife who is getting divorced. Until partition is accomplished, the wife should be provided monthly maintenance by the husband. If such woman does not remarry or if she does not bear children after she remarries, the children from her former husband shall be entitled to have a share in the property that she had obtained from her former husband. If there are no children from her former husband, the former husband shall be entitled to her property after her death".

<sup>46</sup> *Id.* Section 4(c) stipulates that if a man divorces who does not have property but does have an income, in such a situation, the court shall provide from her former husband on the basis of his income maintenance to the divorced woman until she remarries.

effect to the Convention on Elimination of All Forms of Discrimination against Women, 1979 (CEDAW). But unlike CEDAW, the amended provisions were discriminatory to men. Therefore, according to the writ petitioner, the discriminatory provisions had to be declared null and void.

The Supreme Court acknowledged that the issues raised by the petitioner were important in terms of law and justice. The Constitution guarantees that no discrimination shall be made against any citizen in the application of general laws on the ground of sex. The tendency of enacting laws which discriminate between men and women is against the rule of law. No son, daughter, husband or wife should be denied an equal share to property. A legal provision which makes a man liable for providing a share of property more than once to a woman or providing alimony to a wife having equal or greater income in the case of divorce cannot be considered as fair, just and reasonable.

The Supreme Court further noted that it is a special duty of the State to respect and give effect to the provisions of the international human rights instruments, including CEDAW to which Nepal is a party, without maintaining any discrimination between men and women. The Court directed the Government to carry out a comprehensive study on the discriminatory provisions in the different Acts relating to family law and property rights and to review their consistency with the Constitution of the Kingdom of Nepal, 1990<sup>47</sup> for ending any form of discrimination between men and women.

The Court noted that the legal provisions in question seem inconsistent with the Constitution and related human rights instruments to which Nepal is a party and also appear discriminatory. However, to declare them *ultra vires* on the basis of their visible inconsistency with the Constitution and related human rights instruments was not a viable remedy to the problem as it could immediately lead to multiple problems in society. It would also be interfering with legislative wisdom and competency. It would also affect the *sub judice* divorce cases in different courts. It would also create discrimination against women since there were no legal provisions that could remove discrimination against women. Therefore, while the Court considered the matter at hand a very serious issue of public concern and importance, it held that it would be unwise to test the constitutionality of the impugned legal provisions. Against this background, the Court issued a directive to the Government to review the relevant provisions through obtaining input from an expert body and to initiate a process of enacting new laws or to amend the existing laws to make them consistent with the Constitution and related international human rights instruments. The Court also ordered the Government to submit a study report prepared by an expert committee before the Inspection and Supervision Division of the Supreme Court of Nepal.

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<sup>47</sup> Recently, in January 2007, the 1990 Constitution has been withdrawn by an Interim Constitution 2007. However, provisions on non-discrimination and equality in the Interim Constitution are similar to those in the 1990 Constitution.

## Gender Justice – International law prevails over domestic law in case of inconsistency between domestic law and international law

LILY THAPA AND OTHERS v. PRIME MINISTER AND OTHERS

Special Bench of the Supreme Court of Nepal on 15 December 2005

In this case, the Supreme Court of Nepal declared Section 2 of the Chapter on Women's Property Rights of the National Code, 1963 *ultra vires* of Articles 11(1)<sup>48</sup> and 17<sup>49</sup> of the Constitution of the Kingdom of Nepal, 1990, Article 26<sup>50</sup> of the International Covenant on Civil and Political Rights (ICCPR) 1966, Articles 2<sup>51</sup> and 3<sup>52</sup> of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, and Article 1,<sup>53</sup> 2,<sup>54</sup> 3,<sup>55</sup> and 15<sup>56</sup> of CEDAW 1979.

The impugned Section 2 provides that unmarried, married or widowed women who live separately from their family can on their own sell or transfer the whole moveable property and half of the immovable property without obtaining the consent

<sup>48</sup> Article 11(1) of the Constitution of the Kingdom of Nepal, 1990 provides, "All citizens shall be equal before the law. No person shall be denied the equal protection of the laws."

<sup>49</sup> *Id.* Art. 17 (1) provides, "All citizens shall, subject to the existing laws, have the right to acquire, own, sell and otherwise dispose of, property."

<sup>50</sup> Art. 26 of the International Covenant on Civil and Political Rights, 1966 provides, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

<sup>51</sup> Art. 2(2) of the International Covenant on Economic, Social and Cultural Rights, 1996 provides, "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

<sup>52</sup> *Id.* Art. 3 provides, "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

<sup>53</sup> Art. 1 of the Convention on the Elimination of All Forms of Discrimination against Women, 1979 provides, "For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

<sup>54</sup> *Id.* Art. 2(a) provides, "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle."

<sup>55</sup> *Id.* Art. 3 provides, "States Parties shall take in all fields, in particular in the political, social, economic, and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

<sup>56</sup> *Id.* Art. 15(1) provides, "States Parties shall accord to women equality with men before the law."

of the family members; they do, however, need to obtain the consent of their family members (from parents in the case of unmarried women, the consent of the husband for married women, and the consent of the adult children for a widow) to sell or transfer the whole immovable property.

The question before the Supreme Court concerned whether or not the impugned provision had acknowledged an independent personality and personhood of women. Further, the writ petitioner had raised an issue: that when women are subjected to the requirement of obtaining the consent of family members to selling or transferring their personal property, this amounts to discrimination against women and violates the provisions of the 1990 Constitution and various provisions of different international instruments including the ICCPR and CEDAW. Therefore, according to the writ petitioner, the impugned provision had to be declared *ultra vires*.

The Court agreed with the submission of the petitioner and delivered a judgment declaring the impugned Section 2 *ultra vires* to the Constitution, ICCPR, ICESCR and CEDAW.

**Policy Matter – Court cannot intervene in policy matter but can test compatibility of domestic law with international law**

ADV. PRAKASH MANI SHARMA AND OTHERS v. PRIME MINISTER AND OTHERS

**Special Bench of the Supreme Court of Nepal on 15 December 2005**

In this case, the Supreme Court of Nepal declined to intervene in the wisdom of legislature, especially on the choice of options in formulation of a law. However, the Court issued a directive order to His Majesty's Government of Nepal to review Section 16 of the Chapter on "Partition" in the National Code, 1963 in the light of CEDAW, ICCPR and ECESCR.

Section 1 of Chapter on "Partition" in the National Code, 1963 provides that each member of a family irrespective of sex and age shall have equal rights to ancestral property. However, the impugned Section 16 provides that the property received by a daughter from partition reverts (restitution *in integrum*) back to the maternal family members when she marries. The writ petitioner had challenged the impugned Section 16 claiming that it discriminated between men and women in the context of the exercise of proprietary rights; for the impugned Section 16 makes the proprietary right of women a contingent right whereas it prescribe no similar conditions to the property rights of men. According to the writ petitioner, this provision of domestic law (National Code, 1963) was inconsistent with Article 11 (equality provision) of the Constitution of the Kingdom of Nepal, 1990 and Articles 1, 2, 3, 15 and 16<sup>57</sup> of CEDAW, Article 26 of ICCPR, and Articles 2 and 3 of ICESCR.

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<sup>57</sup> *Id.* Art. 16 provides, "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women."



Unlike *Lili Thapa's* case (discussed above), the Court declined to declare Section 16 of the Constitution *ultra vires* to international law, but issued a directive to the Government to review the impugned Section 16 in the light of CEDAW, ICCPR and ICESCR. It may be noted that both the decisions in the *Lili Thapa* case and the *Prakash Mani Sharma* case were delivered by the same judges of the Supreme Court of Nepal.

**Abortion – Penalty higher for women than for men in cases of abortion is discriminatory, and therefore, men should be penalized on the same level as women are penalized**

ADV. SAPANA PRADHAN MALLA AND OTHERS v. HIS MAJESTY'S GOVERNMENT, COUNCIL OF MINISTERS AND OTHERS

**Special Bench of the Supreme Court of Nepal on 25 February 2005  
14 Supreme Court Bulletin 4**

In this case, the Supreme Court of Nepal found the existing system of penalty for men and for women in cases of abortion discriminatory and inconsistent with CEDAW, yet it did not order the Government to amend the discriminatory law by bringing down the penalty for women to the level of the penalty for men. Rather, it ordered the Government to penalize men at the higher level of penalty such as that which is given to women. In this way, the Court on the one hand validated the higher level of punishment and on the other denied the reproductive health rights of women.

Section 28 of the Chapter on "Homicide" in the National Code, 1963 provides that if a woman terminates her pregnancy on her own, she may be sentenced to up to five years of imprisonment subject to the period of maturity of the pregnancy. For example, if the pregnancy is of less than twenty-five weeks, she shall be imprisoned for up to three years, and if the pregnancy is of more than twenty-five weeks, she shall be imprisoned for up to five years. However, Sections 28 (A) and 32 of the same law provide up to three months' imprisonment for less than twenty five weeks' pregnancy and up to six months' imprisonment for pregnancy of more than twenty five weeks to any other persons (both men and women) who terminate pregnancy, except where it is terminated by the pregnant woman herself. Therefore, according to the writ petitioner, these provisions were discriminatory not only between men and women, but also among women.

The Court acknowledged that the provisions regarding the punishment of a pregnant woman charged with abortion, on the one hand, and other men and women accused of the same charge, on the other, seem different. However, the Court further said that those provisions were added only later by the eleventh amendment of the National Code. Therefore, they needed wider study, research, discussion, and deliberation before any conclusion could be reached about their impact on inequality between women and men, and on the state of unconstitutionality. In such a situation, the Court had to give proper consideration to the competency and wisdom of the legislature.

A declaration of these provisions as unconstitutional and void as per the demand of the petitioner could therefore create a legal vacuum.

The writ petitioner had two major demands before the Court: first, to end the discrimination between men and women regarding the penalty for abortion; the second was to provide the reproductive health right to women by ending the system of penalty to women for abortion. The Court found the impugned provisions discriminatory yet declined to declare them null and void. On the contrary: the Court denied the reproductive health right of women and also validated the higher level of punishment by directing the Government to make the necessary amendments to the provisions that provide a lower level of punishment for men, in order to increase for men the level of punishment.

**Passport – Executive orders and decisions cannot contravene the Constitution and rules of international law to which Nepal is a party**

PUNYAWATI PATHAK v. HIS MAJESTY’S GOVERNMENT, MINISTRY OF FOREIGN AFFAIRS AND OTHERS

**Division Bench of the Supreme Court of Nepal on 25 November 2005**

The writ petitioners were two widowed women under 35 years of age. Before they approached the Supreme Court of Nepal, they had approached the District Administration Office (DAO), Kathmandu to obtain a passport. The DAO had, however, refused to register their application on the ground that His Majesty’s Government had already on 25 December 1995 made a mandatory decision which required a woman below 35 years of age to submit a written affidavit from their guardians permitting them to obtain a passport. After being denied, the petitioners had approached the Supreme Court of Nepal asking it to declare the Cabinet decision null and void.

Under no circumstances did the Passport Act prohibit men and women from obtaining a passport except when they were under age (i.e., below sixteen years of age). However, the Passport Regulations, 2002 required for minor and mentally retarded persons an affidavit from their guardians. Neither the Act nor the Regulations prohibited any woman from obtaining a passport after coming of age.

The writ petitioners claimed that the decision of His Majesty’s Government not only violated the equality clause of the Constitution of the Kingdom of Nepal, but had also curtailed their personal freedom and liberty, which violated Article 12(2) of the Constitution of the Kingdom of Nepal, 1990; Article 13(2)<sup>58</sup> of the Universal Declaration of Human Rights, 1948, and different provisions of CEDAW. Therefore, the Court was requested to quash the decision of His Majesty’s Government.

The Supreme Court, agreeing with the petitioners, said that Articles 11 and 12 of the 1990 Constitution, Passport Act, and Passport Regulations provide no authority

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<sup>58</sup> Art. 13(2) of the Universal Declaration of Human Rights, 1948 provides that “Everyone has the right to leave any country, including his own, and to return to his country.”

to the Government to impose any restrictions or to lay down conditions discriminatory between men and women regarding the issuance of passports. Therefore, the impugned decision of His Majesty's Government was clearly outwith the ambit of the executive power. The Court also noted that the decision of Government was an executive decision and not a law, but it had superseded the existing laws. Therefore, the Government had gone beyond its authority in curtailing the fundamental rights of citizens, and had also discriminated between men and women. The impugned decision had violated the equality clause of Article 11 and the rights to freedoms of Article 12 of the Constitution as well as the provisions of the International Covenant on Civil and Political Rights, 1966. Against this background, the Court quashed the discriminatory decision of the Government. Further, the Court also issued an order of *mandamus* to the opponents to provide every Nepali woman with a passport without the requirement of the approval of her guardian.

### **Physical Punishment – Inhuman torture to child – Inconsistency with Constitution and rules of international law**

DEVENDRA ALE v. HIS MAJESTY'S GOVERNMENT, COUNCIL OF MINISTERS

#### **Special Bench of the Supreme Court of Nepal on 15 December 2005**

The writ petitioner had challenged Section 7 of the Children Act, 1991 of Nepal that allowed parents, family members, guardians and school teachers to reprimand and mete out normal physical punishment to children as inconsistent with Article 14(4) of the Constitution of the Kingdom of Nepal, 1990; Article 7<sup>59</sup> of the International Covenant on Civil and Political Rights, 1966, and Article 19<sup>60</sup> of the Convention on the Rights of the Child, 1989 (CRC).

Article 14(4) of the Constitution of the Kingdom of Nepal, 1990 states that "No person ... shall be subjected to physical or mental torture, nor shall be given any cruel or inhuman or degrading treatment..." Section 7 of the Children Act, 1991 also protects children from torture. But the proviso to Section 7 of the Children Act provides that reprimand or normal physical punishment from their parents, family members, guardians or teachers to children shall not be considered as torture. The writ petitioner claimed that the impugned proviso would afford impunity to certain people who punish or torture children. The Human Development Report in South

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<sup>59</sup> Art. 7 of the International Covenant on Civil and Political Rights, 1966 provides, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

<sup>60</sup> Art. 19 (1) of the UN Convention on the Rights of Child, 1989 provides, "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."

Asia, 1998 of the United Nations Development Program (UNDP) had found that 14 per cent of the school children in Nepal had dropped out of school due to fear of teachers. The National Report, 2002 submitted by Government of Nepal to the Child Rights Committee of the United Nations had also admitted the fact of the tendency of teachers to punish school children. Various countries including India and Pakistan had banned physical punishment at school; in Nepal, however, the respondents had made no efforts to control the torture or other inhuman treatment of school children. Against the backdrop of these facts, the petitioners had sought the Supreme Court to declare the impugned proviso null and void. Further, the petitioners had sought an order of *mandamus* or other necessary orders to make the Government take effective steps to control all kinds of torture and the inhuman and degrading treatment of school children.

The Supreme Court of Nepal emphasized that the Constitution of the Kingdom of Nepal, 1990 guarantees the right against torture as a fundamental right. Therefore, if any law was found inconsistent with that constitutional guarantee, the law could be declared void to the extent of that inconsistency. In addition, Section 9 of the Treaty Act, 1990 of Nepal provides that the Government give effect to the obligations of Nepal under international law by enacting necessary and appropriate laws. Further, Section 9 of the Treaty Act provides that in case of inconsistency between domestic laws and international treaties to which Nepal is a Party, the provisions of treaty law shall prevail over the domestic laws. Thus, in the context of the restriction on children's being subjected to any type of torture and inhuman or degrading practices under the CRC, the impugned proviso could not be found compatible with the Constitution and the Convention. Therefore, the Court found that the proviso to Section 7 of the Children Act, 1991 was inconsistent with Articles 14(4) and 25 (8) of the Constitution and Article 19 of the CRC.

### **Racial Discrimination – Effective implementation of domestic law – Objectives of the Convention on Elimination of All Forms of Racial Discrimination**

ADV. RATNA BAHADUR BAGCHAND AND OTHERS v. HIS MAJESTY'S GOVERNMENT, COUNCIL OF MINISTERS

#### **Special Bench of the Supreme Court of Nepal on 21 April 2005**

The writ petitioner had asked the Supreme Court of Nepal to order the respondents to take necessary steps to make effective law and penalties for any act of racial discrimination, especially as regards untouchability, which is pervasively prevalent in Nepalese society. Although discrimination in respect of untouchability is prohibited and penalized by law, discrimination based on untouchability is widely rooted in Nepalese society. For example, Article 11(4)<sup>61</sup> of the Constitution of the

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<sup>61</sup> Art. 14(4) of the Constitution of the Kingdom of Nepal provides, "No person shall, on the basis of caste, be discriminated against as untouchable, be denied access to any public place, or be deprived of the use of public utilities. Any contravention of this provision shall be punishable by law."

Kingdom of Nepal, 1990 prohibits all forms of discrimination including those based on untouchability and declares any such activities punishable by law. Further, Section 10(A) of the Chapter on “Social Values” in the National Code, 1963 penalizes untouchability. However, according to the writ petitioner, Section 10(A) did not give effect to the Constitutional provision since the Constitution mandates that “any contravention ... shall be punishable by law” whereas Section 10(A) stipulates that “...untouchability may be punishable”. It was because of this “may” concept incorporated in Section 10(A) that the objectives of the “shall” concept of the Constitution and Articles 1,<sup>62</sup> 2<sup>63</sup> and 4<sup>64</sup> of the International Convention on Elimination of all Forms of Racial Discrimination (ICERD), 1966 to which Nepal was a Party had been defeated. As a consequence, there was not a single case of conviction under the impugned Section 10(A). Based on the provisions of the Constitution, and ICERD, the writ petitioner had asked the Supreme Court of Nepal to order the Government to make penalty for untouchability mandatory and effective.

The Supreme Court of Nepal observed that untouchability is a crime under Section 10(A) of the Chapter on “Social Values” in the National Code, 1963. Nevertheless, it gives discretionary power to the Court while penalizing the offender according to the seriousness of the crime. If the crime is serious, the Court can administer a higher penalty and when the crime is less serious, the Court can administer a lesser degree of penalty. It is because the nature of a crime is not always the same, thus it is wrong to award the same punishment to all offenders. This provision provides merely the flexibility to the Court to use judicial wisdom on the basis of the nature and seriousness of the crime. It does not provide to the Court any authority to provide immunity to an offender. The Court said that the petitioners had not mentioned any examples in the past of such immunity and impunity provided by the court. Therefore,

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<sup>62</sup> Art. 1(1) of the International Convention on the Elimination of All forms of Racial Discrimination, 1966 provides, “In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

<sup>63</sup> *Id.* Art. 2.1(d) provides, “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (d) each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discriminations by any persons, group or organization.”

<sup>64</sup> *Id.* Art. 4(b) provides, “States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, *inter alia*: (b) shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.”

it was not logical and fair to term the impugned Section 10(A) erroneous on a subjective basis.

The Supreme Court further observed that discriminatory practices of untouchability cannot be controlled only by making a provision that would provide higher and stricter punishment to the offender. Nonetheless, to eliminate such practices, punishment is necessary. It is, nevertheless, equally necessary to develop a social mindset and opinion against untouchability and firmly establish the value in society that every individual is equal as a birthright. Therefore, untouchability is a concept wrongly and immorally practised in the Nepalese society, one that needs to be uprooted by society itself. The Court said that the degree of punishment is a policy matter of the Legislature and therefore the Court could not interfere in it. However, the Court issued a directive order to the Ministry of Law, Justice and Parliamentary Affairs, His Majesty's Government to make necessary laws and other arrangements consistent with Article 11(4) and Articles 1, 2 and 4 of the International Covenant on Elimination of all kinds of Racial Discrimination, 1965 after carrying out a study and consultation with key stakeholders including national-level civil society organizations.

## PHILIPPINES<sup>65</sup>

### JUDICIAL DECISIONS

#### **Legality of service contracts with foreign companies involving national mineral resources – Obligations under bilateral investment agreements**

LA BUGAL-B'LAAN TRIBAL ASSOCIATION, INC. *et al.* v. VICTOR RAMOS, SECRETARY, DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES *et al.*

**[G.R. No. 127882. 27 January 2004]**

The Supreme Court struck down as unconstitutional certain portions of the Republic Act No. 7942 (otherwise known as the Philippine Mining Act of 1995) providing for Financial and Technical Assistance Agreements (FTAAs) between the Government and foreign-owned corporations. In this case, the Mining Act, its Implementing Rules and Regulations, and the FTAA between the Republic of the Philippines and WMC Philippines, Inc. (WMCP) were assailed by an association of ethnic and indigenous communities.

In holding that the Philippine Mining Act was invalid insofar as the said Act authorizes FTAAs, the Court declared that although the statute employs the phrase “financial and technical assistance agreements” in accordance with the 1987 Constitu-

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<sup>65</sup> Contributed by Harry Roque Jr., Faculty Member, College of Law, University of Philippines, Diliman, Quezon City.

tion,<sup>66</sup> it actually treats these agreements as ‘service contracts’ that grant beneficial ownership to foreign contractors in contravention of the fundamental law. Private respondent WMCP, which is owned by WMC Resources International Pvt., Ltd., is a wholly owned subsidiary of Western Mining Corporation Holdings Limited, a publicly listed major Australian mining and exploration company. According to information provided by WMCP, it is a 100 per cent owned subsidiary of WMC Limited and is, therefore, disqualified from undertaking any “exploration, development, and utilization of natural resources” of Philippines.

Moreover, the Court found that the WMCP FTAA is indeed a service contract, as it grants WMCP “the exclusive right to explore, exploit, utilize, process and dispose of all mineral products and by-products that may be produced in the contract area.” Its contractual stipulations, taken together, grant WMCP beneficial ownership over natural resources that properly belong to the state under the Constitution and are intended for the sole benefit of its citizens. Consequently, the Court struck down the WMCP FTAA.

In arguing against the annulment of the FTAA, WMCP invoked the Agreement on the Promotion and Protection of Investments between the Philippines and Australia, which was signed in Manila on 25 January 1995 and which entered into force on 8 December 1995. Article 3(1) of the Agreement provides that “[e]ach Party shall encourage and promote investments in its area by investors of the other Party and shall admit such investments in accordance with its Constitution, Laws, regulations and investment policies.” The Agreement, in Article 3(2), also provides that “[e]ach Party shall ensure that investments are accorded fair and equitable treatment.”

WMCP argued that under the said Agreement, Philippines could not rely upon the inadequacies of its own laws to deprive an Australian investor of fair and equitable treatment through the invalidation of WMCP’s FTAA without similarly nullifying the other service contracts entered into before the enactment of the Mining Act. An invalidation of the FTAA would constitute a breach of Philippines’ obligations under the Agreement, which would in turn amount to a violation of the generally accepted principle of *pacta sunt servanda*, which requires states to perform their treaty obligations in good faith.

The Court ruled against WMCP’s assertion by declaring that assuming *arguendo* that WMCP was indeed correct in its interpretation of the treaty, the annulment of the FTAA would not constitute a breach of the treaty invoked. According to the Court, judicial decisions – including the decision herein invalidating the subject FTAA – form part of the legal system of Philippines. The equal protection clause of the Constitution would then require that the decision apply to all contracts belonging

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<sup>66</sup> Art. XII, § 2 reads: “...The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources...”

to the same class. The decision would then uphold, and not violate, the fair and equitable treatment stipulation contained in the agreement.

**Effect of Treaty of Paris (ceding Spanish sovereignty over Philippines to the United States of America) on citizenship**

MARIA JEANETTE C. TECSON and FELIX B. DESIDERIO, JR. v. The COMMISSION ON ELECTIONS, RONALD ALLAN KELLY POE (a.k.a. FERNANDO POE, JR.) and VICTORINO X. FORNIER

**[G.R. No. 161434. 3 March 2004]**

ZOILO ANTONIO VELEZ v. RONALD ALLAN KELLY POE (a.k.a. FERNANDO POE, JR.)

**[G.R. No. 161634. 3 March 2004]**

VICTORINO X. FORNIER v. HON. COMMISSION ON ELECTIONS and RONALD ALLAN KELLY POE (a.k.a. FERNANDO POE JR.)

**[G.R. No. 161824. 3 March 2004]**

In this case, the citizenship of Presidential candidate Ronald Allan Poe, also known as Fernando Poe, Jr., or FPJ, was questioned before the Supreme Court in several petitions. The petitioners alleged that FPJ made a material misrepresentation in his certificate of candidacy by claiming to be a natural-born Filipino citizen in spite of both his parents' being foreigners. They, therefore, argued that his certificate of candidacy should be denied due course or cancelled under Section 78 of the Omnibus Election Code, and that he be disqualified from the 2004 presidential elections.

In order to resolve the issue of Poe's citizenship, the Court looked into the history of the concept of citizenship under Philippine law.

On 10 December 1898, Spain and the United States entered into the Treaty of Paris. Article IX of the treaty provides:

Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have a right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to foreigners. In case they remain in the territory they may preserve their allegiance to the crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration



they shall be held to have renounced it and to have adopted the nationality of the territory in which they reside.

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

According to the Court, the Treaty had the effect of depriving native inhabitants of Philippines of their status as Spanish subjects upon ratification of the treaty. Although they did not become American citizens, they, however, also ceased to be "aliens" under American laws and were issued passports describing them to be citizens of Philippines entitled to the protection of the United States.

The first comprehensive legislation by the US Congress on Philippines was the Philippine Bill of 1902, which was also referred to as the Philippine Organic Act of 1902. Under the Organic Act, a citizen of Philippines was one who was an inhabitant of Philippines, and a Spanish subject on the eleventh day of April, 1899.

In 1916, the Philippine Autonomy Act of the Jones Law virtually restated the provisions of the Philippine Bill of 1902. Under the former law, a native-born inhabitant of Philippines was deemed to be a citizen of Philippines as of 11 April 1899 if he was a subject of Spain on 11 April 1899, was residing in Philippines on the said date, and has since that date not become a citizen of another country.

The Supreme Court held that under the aforementioned laws, FPJ's paternal grandfather Lorenzo Pou must be deemed a Filipino citizen. As Pou's death certificate indicated that he died on 11 September 1954 at the age of 84 years in San Carlos, Pangasinan, it could, thus, be assumed that he was born sometime in the year 1870 when Philippines was still a colony of Spain. The Court also made use of the presumption that in the absence of evidence to the contrary; the place of residence of a person at the time of his death was also his residence before his death. Pou was, thus, a Filipino citizen, as he remained a Spanish subject on 11 April 1899, residing in Philippines on the said date, and since that date has not become a citizen of another country.

Pou consequently transmitted his Filipino citizenship to FPJ's father, Allan F. Poe. FPJ then is a Filipino citizen himself since, under the 1935 Constitution, which was in effect at the time FPJ was born, all persons whose fathers are Filipino citizens, regardless of whether such children are legitimate or illegitimate, are Filipino citizens. The Court disposed of the petitions by holding that FPJ therefore could not be deemed guilty of making a material misrepresentation in his certificate of candidacy.

**Primacy of municipal law over international agreements – Protection of trademarks and trade names**

MIGHTY CORPORATION and LA CAMPANA FABRICA DE TABACO, INC. v. E. & J. GALLO WINERY and THE ANDRESONS GROUP, INC.

**[G.R. No. 154342. 14 July 2004]**

The Respondents Gallo Winery, a foreign Corporation not doing business in Philippines, and Andresons Group, Inc. – Gallo Winery’s exclusive wine importer and distributor in the Philippines – sued the Petitioners Mighty Corporation and their sister company, Tobacco Industries, for damages, trademark infringement and unfair competition. The Respondents alleged that the Petitioners violated Article 6 of the Paris Convention for the Protection of Industrial Property and specific sections of Republic Act 166 (otherwise known as the Trademark Law) on trademark infringement, unfair competition and false designation of origin. They claimed that petitioners adopted the GALLO trademark to benefit from Gallo Winery’s GALLO and ERNEST & JULIA GALLO trademarks’ established reputation and popularity, thus causing confusion, deception, and mistake on the part of the purchasing public.

Taking exception to the rulings of the Trial Court and the Court of Appeals, the Supreme Court held that the applicable laws were the Paris Convention and the Trademark Law, and not the Intellectual Property Code, as Respondents had filed the suit on 12 March 1993, at which time only the Convention and the Trademark Law were in effect. The Intellectual Property Code took effect only on 1 January 1998, about five years after the filing of the complaint.

The Paris Convention is an international agreement binding on the Philippines and the United States. Article 6 of the Convention prohibits “the registration or use of a trademark which constitutes a reproduction, imitation or translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well-known in that country as being already the mark of a person entitled to the benefits of the Paris Convention and used for identical or similar goods.” The Convention provides the following elements of trademark infringement:

- a) registration or use by another person of a trademark which is a reproduction, imitation or translation liable to create confusion,
- b) of a mark considered competent by the country of registration or well-known in that country as being already the mark of a person entitled to the benefits of the Paris Convention, and
- c) such trademark is used for identical or similar goods.

The Supreme Court concluded that the Paris Convention protects well-known trademarks only (which are to be determined by domestic authorities), while the Trademark Law protects all trademarks, whether well known or not, provided that they are in actual commercial use in the Philippines. The Court declared that following universal

acquiescence and comity, a municipal law would prevail in case of domestic legal disputes involving any conflicting provisions between an international agreement and a municipal law. Between the Paris Convention (an international agreement) and the Trademark law (a municipal law), therefore, the latter will prevail.

Furthermore, under both the Paris Convention and the Trademark Law, the protection of a registered trademark is limited only to goods identical or similar to those in respect of which such trademark is registered and only when there is likelihood of confusion. Under both, estoppel or laches may defeat the registrant's otherwise valid cause of action, and the time element in commencing infringement cases is material in ascertaining the registrant's express or implied consent to another's use of its trademark or a colourable imitation thereof.

The Court found that the *actual commercial use* of the GALLO wine trademark by the Respondents was *subsequent* to its registration in 1971 as well as to Tobacco Industries' commercial use of the GALLO cigarette trademark in 1973. It ruled that respondents never enjoyed the exclusive right to use the GALLO wine trademark to the prejudice of Tobacco Industries and its successors-in-interest, either under the Paris Convention or the Trademark Law.

It was also noted that the GALLO trademark registration certificates in the Philippines and in other countries expressly state that they cover *wines only*, without any evidence or indication that registrant Gallo Winery expanded or intended to expand its business to cigarettes. By strict application of Section 20 of the Trademark Law, therefore, Gallo Winery's exclusive right to use the GALLO trademark should be limited to wines, such being the only product indicated in its registration certificates.

The Court concluded that the Petitioners were not liable for trademark infringement, unfair competition or damages. The court also found no likelihood of confusion, mistake or deceit as to the identity or source of Petitioners' and Respondents' respective goods and businesses. The word "GALLO" was used as a family surname for the Gallo Winery's wines, while "GALLO" for Petitioners' cigarettes referred to the Spanish word for rooster. The various different features – such as colour schemes, art works and other markings – of both products also preclude any similarity between them. Lastly, wines and cigarettes do not belong to the same class of goods, nor are they identical or competing products.

**Principle of equality under human rights – Existence of a positive obligation of states parties to eradicate discrimination**

CENTRAL BANK (now Bangko Sentral ng Pilipinas) EMPLOYEES ASSOCIATION, INC. v. BANGKO SENTRAL NG PILIPINAS and the EXECUTIVE SECRETARY

**[G.R. No. 148208. 15 December 2004]**

Almost eight years after the Republic Act No. 7653<sup>67</sup> abolishing the old Central Bank of the Philippines and creating the new *Bangko Sentral ng Pilipinas* (BSP), the Petitioner Central Bank Employees Association, Inc., assailed the constitutionality of the last *proviso* in Section 15(c), Article II of which Act provides:

Section 15. *Exercise of Authority* – In the exercise of its authority, the Monetary Board shall:

(c) establish a human resource management system which shall govern the selection, hiring, appointment, transfer, promotion, or dismissal of all personnel. Such system shall aim to establish professionalism and excellence at all levels of the *Bangko Sentral* in accordance with sound principles of management.

A compensation structure, based on job evaluation studies and wage surveys and subject to the Board's approval, shall be instituted as an integral component of the *Bangko Sentral's* human resource development program: *Provided*, that the Monetary Board shall make its own system conform as closely as possible with the principles provided for under Republic Act No. 6758 [Salary Standardization Act]. *Provided, however*, that compensation and wage structure of employees whose positions fall under salary grade 19 and below shall be in accordance with the rates prescribed under Republic Act No. 6758.

The Petitioner alleged that the *proviso* establishes an unconstitutional classification of the employees of the BSP. The *proviso* divides BSP employees into two classes, namely: the BSP officers or those exempted from the coverage of the Salary Standardization Law (SSL);<sup>68</sup> and the rank-and-file not exempted from the coverage of the SSL.

The *proviso* was assailed as not being based on substantial distinctions which make real differences, but solely on the salary grade of the BSP personnel's position. It was also questioned as not being germane to the purposes of Section 15(c), Article II of R.A. No. 7653, the most important of which is to establish professionalism and excellence at all levels in the BSP. The classification was, therefore, unreasonable, arbitrary, and in contravention of the equal protection clause of the Constitution.

The Supreme Court found that under present standards of equal protection the questioned *proviso* is valid. The exemption of certain officers from the SSL was intended to address the BSP's lack of competitiveness in terms of attracting competent

<sup>67</sup> Republic Act No. 7653, The New Central Bank Act, 14 June 1993.

<sup>68</sup> Republic Act no. 6758, An Act prescribing a Revised Compensation and Position Classification System in the Government and for Other Purposes. 1 August 1989.

officers and executives. It was not intended to discriminate against the rank-and-file. If the application of the *proviso* did in fact lead to a disparity of treatment between the officers and the rank-and-file in terms of salaries and benefits, the discrimination or distinction has a rational basis and is not arbitrary in the legislative sense. A statute valid at one time may, however, become void at another time because of altered circumstances.

The Court took judicial notice of the fact that after the enactment of the new BSP charter in 1993, Congress also undertook the amendment of the charters of the Government Service Insurance System (GSIS), the Land Bank of the Philippines (LBP), the development Bank of the Philippines (DBP) and the Social Security System (SSS), as well as those of other Government financial institutions (GFIs), from 1995 to 2004. The amended charters of the GSIS, LBP, DBP and SSS exempted all the personnel of the latter GFIs from the coverage of the SSL. The rank-and-file employees of seven other GFIs were granted the exemption that was specifically denied to their rank-and-file counterparts in the BSP. Within the class of rank-and-file personnel of GFIs, therefore, the BSP rank-and-file employees were discriminated against.

The Court concluded that the disparate treatment of the BSP rank-and-file employees from their counterparts in the other GFIs cannot stand judicial scrutiny, as no substantial distinctions exist between the two to justify denying the exemption to the BSP rank-and-file. Philippine legal history further shows that GFIs have long been recognized as comprising one distinct class, separate from other Governmental entities.

The Court also drew on the principle of equality under International Law, which has long been recognized and embodied in numerous regional and international instruments and conventions.<sup>69</sup> Article 1 of the Universal Declaration of Human Rights<sup>70</sup> proclaims that all human beings are born free and equal in dignity and rights. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes basic principles in the protection of human rights.

The Court also noted that the equality provisions in these instruments do not merely function as traditional “first generation” rights commonly viewed as concerned

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<sup>69</sup> The decision cites the following international human rights instruments that contain general international provisions pertinent to discrimination and/or equality: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); and the Convention on the Rights of the Child (CRC). The regional instruments looked into by the Court were the American Convention on Human Rights; the African Charter on Human and People’s Rights; the European Convention on Human Rights; the European Social Charter of 1961 and revised Social Charter of 1996; and the European Union Charter of Rights and the Arab Charter on Human Rights of 1994.

<sup>70</sup> Universal Declaration of Human Rights Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. Available at: <http://www.un.org/Overview/rights.html>. Last visited 30 May 2006.

only with constraining rather than requiring State action; rather, they impose a positive obligation on States parties to take steps to eradicate discrimination. Article 26 of the International Covenant on Civil and Political Rights requires “guarantee[s]” of “equal and effective protection against discrimination” while Articles 1 and 14 of the American and European Conventions oblige States Parties “to ensure ... the full and free exercise of [the rights guaranteed] ... without any discrimination” and to “secure without discrimination” the enjoyment of the rights guaranteed. With regard to employment, basic detailed minimum standards ensuring equality and prevention of discrimination are laid down in the International Covenant on Economic Social and Cultural Rights and in very large number of Conventions administered by the International Labour Organization, a United Nations body. Many other international and regional human rights instruments also have specific provisions relating to employment.

The Court held that a classification may be struck down if it has the purpose or effect of violating the right to equal protection and adopted the international law consensus on the principle that discrimination may occur indirectly,<sup>71</sup> and pronounced that the two-tier analysis made in this case of the challenged provision, and its resulting conclusion of unconstitutionality by subsequent operation, are in consonance with the progressive trend of law in other jurisdictions and in international law.

**Treaty-making process – Ratification and signature – Duty of executive department to submit treaties to legislature for ratification**

SENATOR AQUILINO PIMENTEL, JR., *et al.* v. OFFICE OF THE EXECUTIVE SECRETARY represented by HON. ALBERTO ROMULO, and the DEPARTMENT OF FOREIGN AFFAIRS, represented by HON. BLAS OPLE

**[G.R. No. 158088, 6 July 2005]**

In this case, the Supreme Court resolved the question of whether the Executive Secretary and the Department of Foreign Affairs have a ministerial duty to transmit to the Senate the copy of the Rome Statute signed by a member of the Philippine Mission to the United Nations even without the signature of the President. The petition, which was filed by a Senator of the Philippines (Pimentel), a member of the House of Representatives, and a number of human rights advocacy groups and law students, was denied and the issue ruled in the negative.

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<sup>71</sup> The decision cites the Human Rights Committee’s declaration, inspired by the definitions of discrimination adopted by the CERD and the CEDAW, that:

“... ‘discrimination’ as used in the [ICCPR] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”

The Petitioners argued that the executive department was duty bound to transmit the signed copy of the Rome Statute to the Senate to allow it to exercise its discretion with respect to ratification of treaties. Invoking the Vienna Convention on the Law of Treaties, they also submit that Philippines has a ministerial duty to ratify the Rome Statute under treaty law and customary international law, and should refrain from acts which would defeat the object and purpose of signing the Rome Statute unless they have made their intention clear not to become a party to the treaty.

In interpreting Article 7, § 21 of the 1987 Constitution,<sup>72</sup> the Supreme Court held that contrary to the Petitioners' submission, ratification is a function of the President as the head of state and not of the Senate. Citing Executive Order No. 459 (EO 459) issued by President Fidel V. Ramos on 25 November 1997, the Court also pronounced guidelines for the negotiation and ratification of international agreements. EO 459 mandates that after the treaty has been signed by the Philippine representative, the same shall be transmitted to the Department of Foreign Affairs. The Department then prepares the ratification papers and forwards the signed copy of the treaty to the President for ratification. Only after the President has ratified the treaty does the Department submit the same to the Senate for concurrence. Upon receipt of the concurrence of the Senate, the Department of Foreign Affairs complies with the provisions of the treaty to render it effective.

The Court underscored the distinction between the signing of the treaty and the ratification as two separate and distinct steps in the treaty-making process. The signature, which is usually performed by the state's authorized representative in the diplomatic mission, is primarily intended as a means of authenticating the instrument and as a symbol of the good faith of the parties. Ratification, on the other hand, is the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representative. It is generally held to be an executive act, undertaken by the head of the state or of the Government.

The Court ruled against the Petitioners' submission that Philippines is bound under treaty law and international law to ratify the treaty which it has signed. The signature neither binds the state nor signifies its final consent to the treaty. The President, being accountable to the people, has the responsibility and the duty carefully to study the contents of any treaty signed by the state's authorized representatives and ensure that it is not inimical to the interests of the state and its people. The President retains the discretion on whether or not to ratify the treaty even after its signing by the Philippine representative. The Court declared that the Vienna Convention on the Law of Treaties does not contemplate the defeat or even restraint of this power of the head of states, as to rule otherwise would be to render the requirement of ratification of treaties pointless and futile. The pronouncement that Philippines is under no legal obligation to ratify a treaty, however, was accompanied by the *caveat* that the refusal must be based on substantial grounds and not on superficial or whimsical reasons.

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<sup>72</sup> "... [N]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate..."

## NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

**Violence against Women and Children****An Act defining Violence against Women and their Children (VACW), providing for Protective Measures for Victims, prescribing Penalties thereof, and for Other Purposes****Republic Act No. 9262**

Signed into law on 8 March 2004, Republic Act No. 9262 (also referred to as the Anti-VAWC law) addresses the realities of Philippine domestic life and recognizes the need to protect the family and its members, particularly women and children, from violence and threats to their personal safety and security. Under this Act, the Philippine Government binds itself to undertake efforts to address violence committed against women and children in keeping with the fundamental freedoms guaranteed under the Constitution and the provisions of the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, and the various other international human rights instruments to which the Philippines is a party.

The Act criminalizes “violence against women and their children,” which it defines as “any act or a series of acts committed by any person against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate, within or without the family abode, which results in or is likely to result in physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, assault, coercion, harassment or arbitrary deprivation of liberty.”

Section 5 of the Act contains an extensive enumeration of the various acts through which violence against women and children is committed, namely:

- (a) Causing physical harm to the woman or her child;
- (b) Threatening to cause the woman or her child physical harm;
- (c) Attempting to cause the woman or her child physical harm;
- (d) Placing the woman or her child in fear of imminent physical harm;
- (e) Attempting to compel or compelling the woman or her child to engage in conduct which the woman or her child has the right to desist from or to desist from conduct which the woman or her child has the right to engage in, or attempting to restrict or restricting the woman’s or her child’s freedom of movement or conduct by force or threat of force, physical or other harm or threat of physical or other harm, or intimidation directed against the woman or child. This shall include, but is not limited to, the following acts committed with the purpose or effect of controlling or restricting the woman’s or her child’s movement or conduct:



- (1) Threatening to deprive or actually depriving the woman or her child of custody or access to her/his family;
- (2) Depriving or threatening to deprive the woman or her children of financial support legally due to her or her family, or deliberately providing the woman's children insufficient financial support;
- (3) Depriving or threatening to deprive the woman or her child of a legal right;
- (4) Preventing the woman from engaging in any legitimate profession, occupation, business or activity or controlling the victim's own money or properties, or solely controlling the conjugal or common money, or properties;
- (f) Inflicting or threatening to inflict physical harm on oneself for the purpose of controlling her actions or decisions;
- (g) Causing or attempting to cause the woman or her child to engage in any sexual activity which does not constitute rape, by force or threat of force, physical harm, or through intimidation directed against the woman or her child or her/his immediate family;
- (h) Engaging in purposeful, knowing, or reckless conduct, personally or through another that alarms or causes substantial emotional or psychological distress to the woman or her child. This shall include, but not be limited to, the following acts:
  - (1) Stalking or following the woman or her child in public or private places;
  - (2) Peering in the window or lingering outside the residence of the woman or her child;
  - (3) Entering or remaining in the dwelling or on the property of the woman or her child against her/his will;
  - (4) Destroying the property and personal belongings or inflicting harm to animals or pets of the woman or her child; and
  - (5) Engaging in any form of harassment or violence;
- (i) Causing mental or emotional anguish, public ridicule or humiliation to the woman or her child, including, but not limited to, repeated verbal and emotional abuse, and denial of financial support or custody of minor children or denial of access to the woman's child/children.

The Anti-VAWC Law also covers a wide range of offensive acts that have historically been committed against women and children, but have evaded effective prosecution and punishment. Among its provisions include definitions of physical, sexual, and psychological violence, battery, as well as economic abuse and deprivation, and a recognition of battered women's syndrome "scientifically defined pattern of psychological and behavioural symptoms found in women living in battering relationships" as a defence. Its protection extends not only to women in relationships formalized by marriage, but also to those in "dating relationships".

The Anti-VAWC law also provides for the issuance of protection orders, which may be filed by the offended parties, their relatives, as well as concerned public and social welfare officers, and enforced by law enforcement agencies, for the purpose of preventing further acts of violence against women and their children who have become victims of the criminalized acts. The protection order also provides for other necessary measures which serve the purpose of safeguarding the victim from further

harm, of minimizing any disruption in the victim's daily life, and facilitating the opportunity and ability of the victim independently to regain control over her life.

The law also empowers the various local law enforcement and social welfare authorities to deal with instances of violence against women and children, and provides for comprehensive training, information, education programmes, and other institutional assistance and support programmes.

## **Quarantine and International Health Surveillance**

### **An Act Strengthening the Regulatory Capacity of the Department of Health in Quarantine and International Health Surveillance Repealing for the Purpose Republic Act No. 123 of 1947, As Amended Republic Act No. 9271**

The Quarantine Act of 2004, signed on 19 March 2004, grants the Bureau of Quarantine under the Department of Health (DOH), a nationwide scope of function and international commitment in accord with the International Health Regulations (IHR) of the World Health Organization (WHO). The Act imposes upon the Bureau the responsibility for conducting examinations of incoming and outgoing vessels and aircraft, their cargoes, passengers, crews, and all personal effects, and the issuance of quarantine certificates, bills of health or other equivalent documents at ports of entry and exit in Philippines, as well as for conducting the necessary surveillance over their sanitary conditions. The Bureau also has authority over both domestic and foreign incoming and outgoing vessels and, including those of the army and navy, their anchorage, and over aircraft and airports, insofar as necessary for the proper enforcement of the provisions of the Act.

The Act emerged as a response to various international epidemics that affected a number of Southeast Asian states, and grants the bureau broad powers to prevent the introduction, transmission or spread of "public health emergencies of international concern" from foreign countries into the Philippines or from one of its domestic seaports and airports to another.

The law authorizes the authorities to undertake necessary intervention strategies, such as health education and advisories, inspections, fumigation, disinfection, pest extermination, vaccination for international travel, medical examination of aliens/foreigners for immigration purposes, and the destruction of animals or articles found to be infected or contaminated as sources of infection to human beings in coordination with other concerned quarantine agencies, such as veterinary and plant quarantine, and other measures as adjudged to be necessary.

Some of the law's core prevention measures include the imposition of mandatory immunization and preventive treatment for all persons arriving at Philippine ports of entry, and the isolation of persons examined to have been infected or exposed to infection aboard vessels or in hospitals and quarantine stations. The law also authorizes the Director of the Bureau, in cooperation with the Bureau of Customs, to prohibit the entry of cargo into the Philippines in the event of any public health

emergency of international concern in a foreign country where there is imminent danger of the introduction of hazardous cargoes or materials into the Philippines.

**An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes**

**Republic Act No. 9285**

Signed into law on 2 April 2004, the Alternative Dispute Resolution Act of 2004 binds the Philippine Government to actively promote the freedom of parties to a dispute to make their own arrangements and resolve their disputes. The Act encourages and actively promotes the use of Alternative Dispute Resolution (ADR) as an alternative procedure for the resolution of appropriate cases and an important means to achieve speedy and impartial justice and to reduce court dockets. That private sector participation plays an active role in the settlement of disputes through ADR is recognized in the Act, which is without prejudice to the introduction by the Supreme Court of any ADR system, such as mediation, conciliation, arbitration, in the near future.

The Act imposes strict principles and guidelines of confidentiality on the handling of information obtained from mediation proceedings which it outlines in Section 9:

- (a) Information obtained through mediation shall be privileged and confidential.
- (b) A party, a mediator, or a non-party participant may refuse to disclose and may prevent any other person from disclosing a mediation communication.
- (c) Confidential information shall not be subject to discovery and shall be inadmissible in any adversarial proceeding, whether judicial or quasi-judicial. However, evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use in mediation.
- (d) In such an adversarial proceeding, the following persons involved or previously involved in a mediation may not be compelled to disclose confidential information obtained during the mediation: (1) the parties to the dispute; (2) the mediator or mediators; (3) the counsel for the parties; (4) the non-party participants, (5) any persons hired or engaged in connection with the mediation as secretary, stenographer, clerk, or assistant; and (6) any other person who obtains or possesses confidential information by reason of his/her profession.
- (e) The protections of this Act shall continue to apply even if a mediator is found to have failed to act impartially.
- (f) A mediator may not be called to testify to provide information gathered in mediation. A mediator who is wrongfully subpoenaed shall be reimbursed the full cost of his/her attorney's fees and related expenses.

Chapter 4 of the Act on International Commercial Arbitration defines commercial arbitration as arbitration covering matters arising from all relationships of a commercial nature, whether contractual or not.<sup>73</sup> It also adopts the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law<sup>74</sup> to govern international commercial arbitration in the country. Significantly, the Act provides for the interpretation of the Model Law by stating that resort be made to the *travaux préparatoires* and the report of the Secretary General of the United Nations Commission on International Trade Law.<sup>75</sup>

Chapter 5 of the Act deals with Domestic Arbitration and Republic Act No. 876,<sup>76</sup> otherwise known as “The Arbitration Law” as the governing law applicable to all domestic arbitrations – arbitrations not considered international in the sense of Article 1(3) of the Model Law.

The Act similarly provides that the Arbitration of Construction Disputes shall continue to be governed by Executive Order No. 1008,<sup>77</sup> otherwise known as the Construction Industry Arbitration Law. The Construction Industry Arbitration Commission (the “Commission”) created by the said Executive Order shall continue to exercise its original and exclusive jurisdiction over arbitrations of construction disputes in spite of the arbitration being “commercial” pursuant to Section 21 of the Act. The construction disputes which also fall within the original and exclusive jurisdiction of the Commission include those between or among parties to, or who are otherwise bound by, an arbitration agreement, directly or by reference whether such parties are project owner, contractor, subcontractor, fabricator, project manager, design professional, consultant, quantity surveyor, bondsman or issuer of an insurance policy in a construction project.<sup>78</sup> The Commission shall continue to exercise original and exclusive jurisdiction.

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<sup>73</sup> Under §21 of the Act, relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreements; construction of works; commercial representation or agency; factoring; leasing; consulting; engineering; licensing; investment; financing; banking; insurance; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

<sup>74</sup> Adopted on 21 June 1985 (United Nations Document A/40/17), the Model Law was also recommended for enactment by the General Assembly in Resolution No. 40/72 (approved on 11 December 1985).

<sup>75</sup> “International Commercial Arbitration: Analytical Commentary on Draft Text.” Ref. No.a/CN.9/264, 25 March 1985.

<sup>76</sup> “An Act To Authorize The Making Of Arbitration And Submission Agreements, To Provide For The Appointment Of Arbitrators And The Procedure For Arbitration In Civil Controversies, And For Other Purposes,” 19 June 1953.

<sup>77</sup> “Creating An Arbitration Machinery In The Construction Industry Of The Philippines,” 4 February 1985.

<sup>78</sup> Chapter 6, § 35.

## OTHER RELEVANT STATE PRACTICE

**Opinion of the Secretary of Justice**

**Opinion no. 045, s. 2004, 5 May 2004, “On whether the records custodians of the Philippine telecommunications entities should comply with the subpoenas *duces tecum* issued by the United States District Court of Hawaii, requiring such records custodians to appear and bring with them documents and records, in connection with the Grand Jury proceedings in Honolulu, Hawaii, initiated by the US Department of Justice for alleged violations of the US Antitrust Laws.”**

Commissioner Ronald Olivar Solis of the National Telecommunications Commission requested advice on the issue of whether the records custodians of Philippine telecommunications entities should comply with the subpoena *duces tecum* issued by the United States District Court of Hawaii, in connection with Grand Jury proceedings for alleged violations of US Anti-Trust Laws.

Acting Justice Secretary Ma. Merciditas Gutierrez stated that the RP-US Mutual Legal Assistance Treaty (MLAT) in Criminal Matters remains in force. The Treaty obligates the contracting parties to provide mutual assistance, in accordance with the provisions of the treaty, in connection with the prevention, investigation and prosecution of criminal offences, and in proceedings related to criminal matters. It provides that assistance shall include, *inter alia*, providing documents, records and items of evidence.

It was noted that the principal incentive for many Governments to negotiate MLATs with the United States was the desire to curtail US prosecutors, police agents, and courts from having to resort to unilateral and extraterritorial means of collecting evidence from abroad. This incentive would be rendered useless if procurement of evidence through a subpoena *duces tecum* would be allowed.

The Secretary concluded that the procurement of documents, records and pieces of evidence should, therefore, be done through the existing MLAT, subject to the conditions and limitations spelled out in Article 39 thereof – which require due consideration and the application of pertinent provisions of our Constitution and existing municipal laws such as Presidential Decree no. 1718.<sup>79</sup>

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## **Mutual Legal Assistance in Criminal Matters**

### **RP-Hong Kong Agreement Concerning Mutual Legal Assistance in Criminal Matters**

#### **Philippine Senate Resolution No. 342**

**2 February 2004**

The Philippine Senate expressed its concurrence with the RP-HONG KONG Agreement on Mutual Assistance on Legal and Criminal Matters, signed in 2001, in a 2004 Senate Resolution. The treaty, which governs matters of judicial cooperation between the two parties, covers a wide range of matters including the service of documents, the obtaining of evidence, the conduct of searches and seizures and the effecting of witness testimonies. It excludes extradition, however, and merely allows cooperation between the two countries in the tasks of “identifying and locating persons” and “effecting the temporary transfer of persons in custody to appear as witnesses”.

The Agreement carries safeguards such as the political offence exception (Article IV, *Limitations on Compliance*, paragraphs 1.b, 1.c, and 1.d) and the double criminality requirement (*id.*, paragraph 1.g). It also expressly designates the Department of Justice as the executing authority in Philippines.

Negotiated by both parties from as early as 1998, the agreement allows the two Governments to cooperate and provide mutual assistance in the investigation and prosecution of criminal offences and in proceedings related to criminal matters.

The Governments of the two countries pledge to help each other in identifying and locating persons, serving documents, obtaining evidence, articles or documents, executing requests for search and seizure, and facilitating the appearance of witnesses. The agreement also enables the two parties to effect the temporary transfer of persons in custody to appear as witnesses; to obtain judicial or official records; to trace, restrain, forfeit and confiscate the proceeds and instruments of criminal activities; to recover pecuniary penalties for offences; and to deliver property as well as provide information, documents and records.

## **Extradition**

### **RP-China Extradition Treaty**

#### **Philippine Senate Resolution No. 343**

**2 February 2004**

The Senate expressed its concurrence with the new extradition treaty the Philippines signed with the People’s Republic of China in 2001. The treaty enshrines

the double criminality principle – which requires offences to be “punishable under the laws of both parties” for them to be extraditable – under Article 2, paragraph 1. The article similarly carries a list of the crimes for which a person can be extradited.

Article 4 of the treaty, however, acknowledges the political offence exception, which prevents a state from using extradition as a weapon to bring back political rebels and dissenters within its coercive power. The treaty also incorporates a Rule of Specialty under Article 16. Under this article, a person extradited by the Philippines to China for a specified offence can be tried by China only for that offence and for no other. This rule ensures that the requesting state will not be able to defeat the “political offence exception” by requesting extradition for a common crime, and subsequently turning around and charging the extraditee for a different offence.

The treaty also provides for the non-extradition of a party’s own nationals under Article 3, paragraph 1, and includes a surrender provision obligating the two parties to arrest and surrender fugitives from the requesting state.

## **Organic Pollutants**

### **Stockholm Convention on Persistent Organic Pollutants Philippine Senate Resolution No. 676**

#### **2 February 2004**

The Stockholm Convention on persistent organic pollutants (POPs) forms a framework – based on the precautionary principle<sup>80</sup> – which seeks to guarantee the safe reduction and elimination of the production and use of POPs. The Convention initially covers twelve priority POPs, formed intentionally or unintentionally through industry and waste combustion, with the intent to cover other substances in the long run as well. It defines the substances in question, while leaving open the possibility of adding new ones, and also defines the rules governing the production, importing and exporting of those substances.

The twelve priority POPs covered by the Convention are aldrin, chlordane, dichlorodiphenyltrichlorethane (DDT), dieldrin, endrin, heptachlor, mirex, toxaphene, polychlorobiphenyls (PCBs), hexachlorobenzene, dioxins and furanes.

Initially, the Convention aims at prohibiting the production and use of nine POPs and minimizing the production and use of a tenth substance. In the case of the last

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<sup>80</sup> The precautionary principle states that “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Preamble to the Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, Princs. 15, 7, 3, U.N. Doc. A/ Conf.151/26/Rev.1 (Vol.1) (1992), available at <<http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163>>.

two POPs, the objective is to minimize the occurrences of their unintentional production and release into the environment. The rules laid down in the Convention do not apply to quantities of a chemical to be used for laboratory-scale research. The Convention also allows for certain exemptions from the provisions on the elimination or minimization of production or use of these substances and, consequently, from the rules on imports and exports. Such exemptions are specific to each POP and are defined, case by case, in the Annexes to the Convention.

The Convention provides for ending imports and exports of banned POPs. However, chemicals classified as POPs may be imported for environmentally sound disposal of existing POPs (destruction of waste, etc.) or in the case of a grant of an exemption authorizing production and use of the substances in question. Exports are similarly authorized for the environmentally sound disposal of existing POPs (destruction of waste, etc.), in the case of a grant of an exemption authorizing production and use of the substances in question, and in exports to States which have not signed the Convention but provide annual certification to the exporting party in expressing compliance with the objectives of the Convention.

The Parties to the Convention are also required to develop a national, regional or sub-regional action plan for implementing the Convention which they must submit to the Conference of parties, the principal body assigned the task of implementing the Convention. The plan must include an evaluation of releases and an evaluation of the efficacy of the existing laws and policies on management of such releases, as well as strategies for meeting the objectives of the Convention. The Convention includes general guidelines on best available techniques and best environmental practices for preventing or minimizing releases, and provides for measures to reduce or eliminate releases containing POPs from stockpiles and wastes.

The Convention was adopted by 150 Governments during a conference held in Stockholm from 22 to 23 May 2001. The Convention entered into force soon after the Philippine Senate's concurrence on 17 May 2004.

### **Mutual Legal Assistance in Criminal Matters**

#### **RP-Swiss Confederation Treaty on Mutual Legal Assistance in Criminal Matters Philippine Senate Resolution No. 743**

**2 February 2004**

The Senate concurred with a Treaty on Mutual Legal Assistance in Criminal Matters between the Philippines and the Swiss Confederation signed on 9 July 2002, similar to that entered into with Hong Kong SAR.



### **Other Agreements Concurred by the Philippine Senate in 2004**

The Philippine Senate has also concurred with various health and agricultural-related agreements in 2004, namely: the Agreement Between the Philippines and the International Plant Genetic Resources Institute Acting in Administration of the International Network for the Improvement of Banana and Plantain (INIBAP) Relating to the INIBAP Office for Asia and the Pacific,<sup>81</sup> the Agreement on the Establishment of the International Vaccine Institute,<sup>82</sup> and the Agreement on the Establishment of the International Network for Bamboo and Rattan.<sup>83</sup>

### **Tobacco Control**

#### **Framework Convention on Tobacco Control (FCTC)<sup>84</sup> Philippine Senate Resolution No. 195**

**25 April 2005**

The Philippine Senate expressed its concurrence with the WHO Framework Convention on Tobacco Control (WHO FCTC), the first treaty negotiated under the auspices of the World Health Organization. The WHO FCTC has been widely hailed as marking a paradigm shift in developing a regulatory strategy to address addictive substances. In contrast to previous drug control treaties, the WHO FCTC now asserts the importance of demand reduction strategies as well as supply issues.

The WHO FCTC developed as a response to the globalization of the tobacco epidemic, which was facilitated through a variety of complex factors with cross-border effects, including trade liberalization, direct foreign investment, global marketing, transnational tobacco advertising, promotion and sponsorship, and the international movement of contraband and counterfeit cigarettes.

The Convention employs both price and tax related mechanisms, as well as non-price measures, to reduce the supply and demand of tobacco in national markets. The non-price measures imposed by the Convention<sup>85</sup> to reduce the demand for tobacco include measures to ensure protection from exposure to tobacco smoke; regulation of the contents of tobacco products; regulation of tobacco product disclosures; packaging and labelling of tobacco products; education, communication, training and public awareness; tobacco advertising, promotion and sponsorship; and demand-reduction measures concerning tobacco dependence and cessation. The core

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<sup>81</sup> P.S. Res. No. 739 – 2 February 2004.

<sup>82</sup> P.S. Res. No. 740 – 2 February 2004.

<sup>83</sup> P.S. Res. No. 741 – 2 February 2004.

<sup>84</sup> Available at: [http://www.who.int/tobacco/framework/WHO\\_FCTC\\_english.pdf](http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf). Last visited 30 May 2006.

<sup>85</sup> Arts. 6 to 14.

supply reduction measures include regulations against illicit trade in tobacco products and sales to and by minors and provision of support for economically viable alternative activities.

The Convention includes provisions that address liability and outline mechanisms for scientific and technical cooperation and information exchange.<sup>86</sup>

## **Conservation and Management of Highly Migratory Fish Stocks**

### **Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean<sup>87</sup> Philippine Senate Resolution No. 242**

**17 May 2005**

After four years of complex negotiations between the coastal States of the Western and Central Pacific and other States fishing in that region, the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean was opened for signature in Honolulu on 5 September 2000. The Convention is one of the first regional fisheries agreements to be adopted since the conclusion of the UN Fish Stocks Agreement in 1995. The Philippines, which was among the states that participated in the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, expressed its concurrence with the Convention in 2005.

The Convention aims to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the 1982 United Nations Convention on the Law of the Sea and the 1995 UN Fish Stocks Agreement. For this purpose, the Convention establishes a Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean – with the Contracting Parties being designated as *ipso facto* members of the Commission. In accordance with the provisions of Article 36, the Convention entered into force on 19 June 2004, six months after the deposit of the thirteenth instrument of ratification, acceptance, approval or accession.

Convention applies to all species of highly migratory fish stocks (all fish stocks of the species listed in Annex I of the 1982 Convention occurring in the Convention Area<sup>88</sup> and such other species of fish as the Commission may determine), with the

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<sup>86</sup> Arts. 20 to 22.

<sup>87</sup> Available at <http://www.oceanlaw.net/texts/westpac.htm>. Last visited 30 May 2006.

<sup>88</sup> The Convention Area, as defined in article 3 of the Convention, comprises all waters of the Pacific Ocean bounded to the south and to the east by a line drawn from the south coast of Australia due south along the 141° meridian of east longitude to its intersection with the 55° parallel of south latitude; thence due east along the 55° parallel of south latitude to its intersection with the 150° meridian of east longitude; thence due south along the 150° meridian of east longitude to its

exception of *sauries*, within the Convention area. The conservation and management measures under the Convention are to be applied throughout the range of the stocks, or to specific areas within the Convention Area, as determined by the Commission.

The Convention remains open for accession<sup>89</sup> by the States referred to in Article 34, paragraph 1, and by any entity referred to in Article 305, Paragraph 1(c), (d) and (e) of the United Nations Convention on the Law of the Sea situated in the Convention Area. The Contracting Parties may also, by consensus, invite other States and regional economic integration organizations whose nationals and fishing vessels wish to conduct fishing for highly migratory fish stocks within the Convention Area to accede to the Convention.

### **Forced or Compulsory Labour**

#### **ILO Convention Concerning Forced or Compulsory Labour (Forced Labour Convention)<sup>90</sup>**

#### **Philippine Senate Resolution No. 195**

**17 May 2005**

The Forced Labour Convention, 1930 (N. 29) requires the suppression of forced or compulsory labour in all its forms. The Convention defines forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. “Forced labour”, however, does not include such obligations as military service; work or service which is part of normal civic obligations; work or service exacted as a consequence of a conviction in a court of law, under certain conditions; work exacted in cases of emergencies such as wars, fires, earthquakes, etc.; and minor communal services as defined. The Convention requires the Contracting Parties to impose and strictly enforce “really adequate” penal sanctions in cases of illegal exaction of forced or compulsory labour that take place within their territories.<sup>91</sup>

Countries that have ratified the Forced Labour Convention undertake “to suppress the use of forced or compulsory labour in all its forms within the shortest possible period”.<sup>92</sup> The Convention has been the most widely ratified of all the Fundamental ILO Conventions, since it was adopted in Geneva on 28 June 1930. It entered into

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intersection with the 60° parallel of south latitude; thence due east along the 60° parallel of south latitude to its intersection with the 130° meridian of west longitude; thence due north along the 130° meridian of west longitude to its intersection with the 4° parallel of south latitude; thence due west along the 4° parallel of south latitude to its intersection with the 150° meridian of west longitude; thence due north along the 150° meridian of west longitude.

<sup>89</sup> In accordance with paragraph 1 of Article 35,

<sup>90</sup> Available at <http://www1.umn.edu/humanrts/instree/n0ilo29.htm>. Last visited 30 May 2006.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

force generally on 1 May 1932, and entered into force within Philippines on 15 July 2005, upon registration of its ratification with the International Labour Office. Out of the 178 ILO Member States, Philippines became the 168th Member State to have ratified the instrument as of 2005.

## SRI LANKA<sup>93</sup>

### JUDICIAL DECISIONS

#### **Fundamental Rights – Death of *détenué* in Police custody in consequence of alleged torture – Acquired right to enforcement – *Locus standi* of the widow to prosecute such right – Time bar – Interpretation of statutes**

SRIYANI SILVA (WIFE OF JAGATH KUMARA-DECEASED) v. IDDALMA-GODA, OFFICER-IN-CHARGE, POLICE STATION, PAYAGALA AND OTHERS

**Supreme Court, 10 December 2002**

**S N Silva, CJ., Bandaranayake, J. and Edussuriya, J.**

**[2003] 1 Sri Lanka Law Reports 14**

This case was an application filed by the wife of a deceased detainee pleading for a declaration that her husband's fundamental rights guaranteed under Articles 11,<sup>94</sup> 13(1)<sup>95</sup> and 13(2)<sup>96</sup> of the Constitution had been violated. The question before the Court was "whether the wife or a third party of a deceased person has a right to institute proceedings in this Court in terms of the provisions of the Constitution, seeking relief for the alleged infringement of a deceased person's fundamental rights."

The Respondents argued that under the provisions of the Constitution,<sup>97</sup> only a person whose rights have been infringed can make an application to vindicate those rights. "Therefore a relative of a person, whose death was caused by torture, would be able to obtain redress through the fundamental rights jurisdiction enshrined

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<sup>93</sup> Contributed by Camena Guneratne, Senior Lecturer, Department of Legal Studies, Open University of Sri Lanka.

<sup>94</sup> No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

<sup>95</sup> "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

<sup>96</sup> "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established bylaw, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

<sup>97</sup> The relevant provision is Article 126 (2) of the Constitution which reads "Where any person alleges that any such fundamental right or language right relating to such person has been infringed

in our Constitution.” The Court, by a majority of two to one rejected this argument based on the principle “there is no right without a remedy.” Bandaranayake, J., pointed out that the Constitution guaranteed a person, *inter alia*, protection from torture, and from arbitrary arrest and detention. Consequently, the deceased detainee who was arrested, detained and allegedly tortured and who subsequently died had acquired a right to seek redress from the Court for the alleged violation of his rights. She went on to say

It could never be contended that the right ceased and would become ineffective due to the intervention of the death of the person, especially in circumstances where the death is itself the consequence of injuries that constitute the infringement. If such an interpretation is not given it would result in a preposterous situation in which a person who is tortured and survives could vindicate his rights in proceedings before this Court, but if the torture is so intensive that it results in death, the rights cannot be [so vindicated]. In my view a strict literal construction should not be resorted to where it produces such an absurd result. ... Hence, when there is causal link between the death of a person and the process, which constitutes the infringement of such person’s fundamental rights, anyone having a legitimate interest could prosecute that right in a proceeding instituted in terms of Article 126(2) of the Constitution.

However, in a dissenting judgement, Edussuriya J., while referring to the International Convention on Torture, held that it could not have retrospective application in Sri Lanka. He stated that Article 126(2) is unambiguous and does not permit anyone other than the person whose rights have been infringed from seeking redress. He noted that Counsel for the Petitioner had drawn the attention of the Court to the fact that Sri Lanka had ratified the International Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and is obliged to grant redress to victims of torture, and had argued that in the event of the death of such a victim the dependants are entitled to compensation, and Article 126 should be construed accordingly.

Edussuriya, J. took the view that the Convention had been ratified in 1994, while the Constitution had been promulgated in 1978. He stated “[i]t certainly cannot be said that one can read into Article 126(2) of the Constitution of 1978 a legislative intention in 1978 to grant relief to a widow of a person whose fundamental rights have been infringed because Sri Lanka ratified the International Convention Against Torture sixteen years later in 1994, containing a provision to grant relief to dependants of victims of torture in the event of the death of the victim as a result of torture.”<sup>98</sup>

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or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only [when] leave to proceed first had [been] obtained from the Supreme Court, which leave may be granted or refused, as the case may be by not less than two Judges.”

## **Right to Housing – International Covenant of Economic, Social and Cultural Rights**

INTER-RELIGIOUS PEACE FOUNDATION AND CENTRE FOR SOCIETY AND RELIGION v. DIRECTOR GENERAL, URBAN DEVELOPMENT AUTHORITY AND OFFICER-IN-CHARGE, POLICE STATION WATTALA

### **Human Rights Commission of Sri Lanka**

**23 February 2004**

**HRC/803/01/7(i)**

The Petitioners in this case were a group of people occupying small houses or tenements given to them or to their predecessor in title by the then Member of Parliament for the Wattala area.<sup>99</sup> They claimed that the Member of Parliament gave them an assurance that their ownership would be regularised in due course. However, they further claimed that at the present time, due to political reasons, they faced eviction from the land. The petition was based on three grounds: that the relevant procedure laid down in the law<sup>100</sup> had not been followed; that they had rights to the land under the doctrine of legitimate expectation, and that the principles of natural justice had been violated in that they had not been given an opportunity to be heard.

While the Commission addressed these issues under Sri Lankan law, it also referred to Sri Lanka's obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), in the context of the right to housing. The Commission pointed out that as a Party to the Covenant, Sri Lanka undertook to "take steps, to the maximum of its available resources, to achieve progressively the full realisation of the rights recognised in the Covenant." It noted that General Comment 3 of the Committee on Economic, Social and Cultural Rights (CESCR), while acknowledging the constraints to realization due to the availability of resources also imposed obligations which are of immediate effect. Furthermore, General Comment 9 of CESCR required Parties to use all means at their disposal to give effects to the rights. General Comment 3 also requires States to provide the "minimum essential levels of each right." The Commission also cited General Comment 4 of CESCR on the right to housing. Therefore, the Sri Lankan Government is bound to take active steps to the maximum of its available resources to achieve the full realization of the rights.

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<sup>98</sup> In a subsequent decision (*Sriyani Silva v. Iddalmagoda, Officer-in-Charge, Police Station, Payagala and Others* [2003] 2 Sri L R 63), in which the substantive issues were considered, the Court held that the rights of the deceased had been infringed and that such rights had devolved upon or accrued upon the Petitioner and their minor child, who were awarded damages.

<sup>99</sup> *Locus standi* before the Commission is more liberal than before the courts. Under Section 14 of the Act any person may bring a motion or complaint before the Commission on behalf of any other aggrieved person or persons.

<sup>100</sup> The Urban Development Authority (Special Provisions) Act No. 44 of 1984.

The Commission went on to hold:

As illustrated above, the recognition of the existence of minimum essential levels of each right means State parties cannot use the lack of adequate resources as justification for the realisation of Covenant rights. In this particular instance, by forcibly evicting the resident of Oliyamulla, the Sri Lankan State has violated its obligations under the ICESCR. It is, therefore, imperative that the Sri Lankan State recognise the right to housing and the need to recognise minimum essential levels of each right including the right to housing.

The Commission held that the Urban Development Authority had violated Sri Lanka's obligations under the ICESCR.

## NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

### **Citizenship (Amendment) Act No. 16 of 2003**

The Citizenship Act of 1948 was discriminatory of women in that it did not permit a Sri Lankan woman married to a non-Sri Lankan man to pass on her nationality to her children, while permitting a Sri Lankan man married to a non-Sri Lankan woman to do so. Effectively, Sri Lankan nationality could be passed down only through the father.

Women's rights activists had campaigned for many years for this law to be amended, and the issue was also raised by the Committee on the Convention for the Elimination of All Forms of Discrimination Against Women in 2002 when Sri Lanka presented its combined Third and Fourth Report. In its Concluding Comments, the Committee expressed its concern at "the nationality law which precludes Sri Lankan women from passing nationality to their children on an equal footing with men."<sup>101</sup> The Committee urged the State party "to review all existing laws and amend discriminatory provisions so that they are compatible with the Convention and the Constitution."<sup>102</sup>

In 2003, the provisions regarding citizenship by descent were amended to eliminate the discrimination against women. Part II of the original Act entitled "Citizenship by descent" provided that a person born in or outside Ceylon (as it then was) could acquire citizenship if at the time of his/her birth, his/her father was a citizen of Ceylon. The amending law has amended that provision so that he/she may obtain citizenship "if either of his parents is or was a citizen of Sri Lanka."

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<sup>101</sup> Office of the High Commissioner for Human Rights – Concluding Observations of the Committee on the Elimination of Discrimination against Women: Sri Lanka – 07/05/2002 – A/57/38 (Part I) – Paragraph 274.

<sup>102</sup> *Ibid.*, Paragraph 275.

Acquisition of citizenship through the mother has also been given retrospective application. A new provision, Section 5A, provides that a person born after the appointed date (15 November 1948) but before the date of commencement of the amending Act, and (1) whose mother only was a citizen of Sri Lanka or (2) neither of whose parents was a citizen at the time of his/her birth but one of them subsequently acquired citizenship, may apply for citizenship.

In other provisions of the Act too, the word “father” wherever it occurs has been substituted with the word “parents” or the words “father or mother”.

## TAJKISTAN<sup>103</sup>

### NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

#### **State Guarantees – Equal Rights for Men and Women – Equal Opportunities in the Exercise of Such Rights**

#### **Law on State Guarantees of Equal Rights for Men and Women and Equal Opportunities in the Exercise of Such Rights Adopted 1 March 2005**

The Law on State Guarantees of Equal Rights for Men and Women and Equal Opportunities in the Exercise of Such Rights was enacted in Tajikistan to comply with its obligations following the ratification of the Convention on the Elimination of All Forms of Discrimination against Women. The preamble of the law stipulates that the legislation primarily focuses on securing constitutional guarantees for men and women in the social, political, cultural, and any other area, and is directed to prevent discrimination on the basis of gender.

General provisions provide terminological definitions of categories such as gender, gender policy, equality, gender equality, equal opportunities, and discrimination. The law defines equality as equality in the rights, obligations and accountability of both men and women before the law. As for the equality of opportunities: the law under this term entails the guarantee of conditions for the exercise of rights by men and women in accordance with the Constitution and laws of Tajikistan and international standards adhered to by Tajikistan. Discrimination is any distinction, exclusion or limitation on the basis of gender that is aimed at the abatement or nullification of the equality of men and women in the political, economic, social, cultural or any other spheres. Discrimination of men and women is prohibited.<sup>104</sup> Violation of this

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<sup>103</sup> Contributed by Tahmina Karimova, Intern, International Criminal Court, The Hague.

<sup>104</sup> Article 3 of the Law on State Guarantees of Equal Rights for Men and Women and Equal Opportunities in the Exercise of Such Rights accessed at legal database “Pravo i consultant”.



principle which is laid down as the foundation of gender equality, e.g., violation through enforcing state policy and other actions that place men and women in unequal positions, is considered discrimination and shall be eliminated in accordance with the provisions set by the law.<sup>105</sup> The provisions of the law further spell out that special measures envisaged to protect the health of both men and women, and special protection afforded to women in relation to pregnancy and childbirth as well as other measures to implement the law, shall not constitute discrimination.

State authorities are obligated within their competence to ensure equal opportunities for both men and women in the following areas:<sup>106</sup>

- execute gender education of state officials by means of human resources training;
- promote and facilitate the exercise of equal opportunities by both men and women *inter alia* through adoption of legal instruments, and establishment of procedures and other specific measures including the elimination of causes and conditions preventing men and women from exercising the right to equality;
- develop and implement special programmes directed at the elimination of discrimination based on gender;
- introduce into state programmes measures aiming at ensuring constitutional rights and guarantees and reinforcing the stability of society, and measures to ensure gender equality.

The state guarantees equal participation of men and women in state governance. The state ensures equal representation of men and women in the legislature, executive, and judiciary through legal, administrative, and other mechanisms.<sup>107</sup>

The law, in addition to the general guarantees formulated in the form of principles, provides additional sets of guarantees under different sets of rights. Article 6, in particular, regulates equal opportunities rights in the area of education. All educational and academic institutions are obligated to:

- ensure equal conditions for men and women to pursue general, vocational and professional education, all types of professional training and refresher courses;
- incorporate special gender courses to promote research in the area of gender equality, and assist citizens in their gender education;
- employ educational programmes and materials that exclude discrimination on the basis of gender;

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<sup>105</sup> *Ibid.*

<sup>106</sup> *Supra* n. 99, Article 4.

<sup>107</sup> *Supra* n. 99, Article 5.

- set up preferential conditions of admission to secondary and higher professional education institutions for girls from mountainous regions and rural areas.

Chapter II of the law sets out provisions in Articles 8 and 9 on state guarantees of the equal opportunities of men and women in the exercise of their electoral rights. The provision of law in this regard states that the “electoral system of Tajikistan ensures equal electoral rights and guarantees and equal participation of both men and women in the political process”. Equal opportunities guarantees for men and women in the formation of electoral commissions are set out in Article 9.

Chapter III standardizes state guarantees in the area of state civil service. The law provides that no direct and indirect restrictions or privileges on the basis of gender shall be permitted for entry into the state civil service system and for the length of such service.<sup>108</sup> Furthermore, Article 10 stipulates that heads of state bodies and relevant state officials shall ensure equal access for all citizens to the state civil service in accordance with their abilities and professional qualification notwithstanding the gender of the candidate for the position. Vacancies shall be taken up following recruitment on equal conditions of participation for men and women. The provision concludes that vacancy announcements shall not be made solely for persons of either sex.

State guarantees on equal opportunities of men and women in social and economic spheres are laid down in Chapter IV. State agencies, municipalities, and heads of organizations of all forms of property are obliged to ensure that men and women have equal access to economic resources including immovable and movable properties, land, financial assets, and credits, and guarantee freedom of entrepreneurship and other types of activities in accordance with the laws of Tajikistan.<sup>109</sup>

In order to promote gender equality in labour relations, employers (head of a state agency or head of an organization) shall ensure

- equal opportunities for men and women regarding labour contracts;
- equal access of men and women to vacancies;
- equal remuneration for men and women having the same position or equal remuneration for men and women who perform work of equal value;
- safe labour conditions.<sup>110</sup>

Article 14 provides that in the case of a legal action on the ground of alleged sex discrimination against an employer by an employee, trade union or other public association, the burden of proof regarding the absence of malice (intention) lies with

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<sup>108</sup> *Supra* n.99, Article 10.

<sup>109</sup> *Supra* n. 99, Article 12.

<sup>110</sup> *Supra* n. 99, Article 13.

the employer. In the case of a massive employee redundancy, the number of suspended employees of one gender shall be proportional to the general number of the staff involved in the specific object in question.<sup>111</sup> Collective labour contracts should include measures providing equal rights and opportunities for men and women and should contribute towards improving conditions for men and women to combine their professional and family lives.<sup>112</sup> The monitoring mechanisms in this regard are vested in trade unions, other representatives of employees, union of employers, and relevant state authorities.

Admittance to work, promotion, re-training, the setting-up of the work schedule, and dismissal shall be carried out in accordance with the requirements of the law on equal rights and opportunities for men and women and with due consideration of their family situation. Employers are obligated to have a system of retraining for employees of both genders related to vacations permitted by laws, the birth and bringing up of a child, military service, and other state service-related assignments.<sup>113</sup>

Article 17 stipulates the implementation of the monitoring of equal rights and opportunities in the area of economic and social life. In accordance with the provision of this article, an authorized body shall organize continuous monitoring of the implementation of equal rights and opportunities for men and women. The monitoring shall be organized, *inter alia*, for the purposes of the systematic analysis of the exercise of equal rights and opportunities for men and women in social and labour areas, the forecasting of changes to the current situation in order to evaluate whether measures are needed to prevent and impede facts of gender-based discrimination, and for the purpose of the development of proposals on state social programmes in the area of concern. Results of the monitoring shall be reflected in the mass media.<sup>114</sup>

Chapter V provides for a general monitoring mechanism to ensure the implementation of equal rights and opportunities for both men and women. The Government defines the following measures within its mandate to ensure the exercise of equal rights and opportunities:

- the establishment of a state body on gender development in Tajikistan;
- the development of a unified state policy aimed at the achievement of the social equality of men and women in all areas of state and public lives, and to ensure the implementation of such a policy;
- the development of target (subject area) programmes and their implementation to promote the equality of men and women;

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<sup>111</sup> *Supra* n. 99, Article 15.

<sup>112</sup> *Supra* n. 99, Article 16.

<sup>113</sup> *Supra* n. 99, Article 7.

<sup>114</sup> *Supra* n. 99, Article 17.

- the direction and control of executive bodies and municipalities on the protection and exercise of equal rights of men and women, the appointment of women in authoritative positions, and the education of the young generation of key staff from among women.<sup>115</sup>

The participation of trade unions and public associations in the implementation of equal rights and opportunities is confined to the process of decision making in economic and social spheres, and to the representation and protection of the rights of men and women in accordance with Article 20 of the law. The general monitoring of precise and unified implementation of laws and other normative instruments ensuring equal rights and opportunities for men and women in exercise of such rights is vested in the Office of General Prosecution of Tajikistan.<sup>116</sup>

## **Fight against Corruption**

### **Law on the Fight against Corruption Adopted 25 July 2005**

The introductory part of the Law on the Fight against Corruption lays down that the law sets out a legal framework aimed at the protection of human rights and freedoms, ensuring public interest, national security, good governance, integrity, and impartiality in the state and public service; it also sets out the legal and administrative framework for preventing, investigating, and reducing the consequences of violations related to corruption. In addition, the law envisages the types of violations and punitive measures related to corruption. This is the second anti-corruption law adopted by Tajikistan. The previous legal instrument failed to incorporate some important principles set by international standards in the fight against corruption.

Under the new law, corruption is defined as the (in)actions of persons authorized to fulfil Governmental functions or equivalent persons using their position and related opportunities to gain material and non-material benefits and advantages not envisaged by law, and other advantages for himself or herself or another person, as well as promising, offering or giving the aforementioned persons (public officials or equivalent persons) advantages in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining an advantage for individuals or legal entities.<sup>117</sup> The new definition of corruption has attempted to integrate practically all international standards concerning the definition of “corruption”. Furthermore, under the new law, the definition of corruption includes, in addition to “material gains” (as stipulated by the previous law), “non-material gains” and “benefits”, “promises and offers”, thus introducing the concept of “trade of

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<sup>115</sup> *Supra* n. 99, Article 18.

<sup>116</sup> *Supra* n. 99, Article 21.

<sup>117</sup> Article 1 of the Law on the Fight against Corruption, accessed at legal database “Pravo i Consultant”.

influence” as opposed to the previous legal standards in the area. The law also provides a comprehensive definition of a “state official”.<sup>118</sup> The new law also criminalizes the bribery of legal entities and of foreign or international public officials.<sup>119</sup>

Under the new law, state authorities predominantly involved in the fight against corruption are the office of prosecution, internal affairs, security, military service, border control, drug control, and tax and customs agencies. The Office of the Prosecutor has the coordinating role among the state authorities.<sup>120</sup> Furthermore, the Prosecution is mandated with the implementation of analytical activities and statistical monitoring of anti-corruption activities in Tajikistan.

Article 6 provides for the protection of those who cooperate with state agencies in the detection of corruption. While international standards in this area specifically mention two categories of witnesses and whistleblowers, Tajik legislation in this regard provides for the concept of “persons cooperating” as an addition.

The Law on the Fight against Corruption imposes special requirements and restrictions on those who hold a state office as a measure to prevent abuse of official status or use of influence for personal, group or other unrelated purposes deriving from an official status.<sup>121</sup> Therefore, in accordance with the law, state officials declare their income to tax authorities on an annual basis. A person may not be selected, appointed or hold a state office if:

- he or she is sentenced for a deliberate crime (unless such a crime has been expunged or cancelled in accordance with the law);
- he or she is declared incapable or limitedly capable by decision of a court;
- he or she is declared incapable due to lack of education, professional skills and necessary experience if such criteria be deemed necessary by the laws of Tajikistan;
- he or she is in direct subordination to or reporting to posts held by close relatives;
- he or she is a citizen of a foreign country unless such an arrangement is provided by an international agreement adhered to by Tajikistan.<sup>122</sup>

A person holding a state or public office must follow additional restrictions. He or she may not:

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<sup>118</sup> *Ibid.*

<sup>119</sup> *Supra* n. 112, Article 3.

<sup>120</sup> *Supra* n. 112, Article 5.

<sup>121</sup> *Supra* n. 112, Article 7.

<sup>122</sup> *Supra* n. 112, Article 9.

- occupy another paid post apart from those related to academic, artistic and teaching jobs;
- participate in entrepreneurial activities personally or through third parties;
- make use of financial, technical, material and other state or public means and resources, as well as corporate information, for purposes not related to the occupying post;
- accept rewards for services provided within functional duties, gifts and the provision of out-of-office services to senior staff with the exception of symbolic presents and souvenirs provided in the course of an official event;
- undertake tours and health-related travels at the expense of individuals and legal entities both domestic and foreign with the exception of travels supported by close relatives and travels provided for by international treaties and agreements concluded among relevant Tajik and foreign state authorities;
- perform the orders and requests of political parties, public associations, religious organizations and use official position for their interests;
- communicate regionalism or prejudice contrary to the interest of the work or favour organizations, public associations or a specific individual;
- receive honorariums for publications and speeches at official events transmitted by radio and television that are part of the service performed in the official post.<sup>123</sup>

A further provision stipulates that violation of aforementioned restrictions shall be subject to legal responsibility provided in Chapter III which reflects issues of violations related to corruption and accountability for such offences. In this regard, the law distinguishes two types of offences: 1) offences creating conditions for corruption, and 2) administrative offences related to corruption. The offences relevant to the first category and committed by individuals authorized to perform state functions are as follows:<sup>124</sup>

- use of official status to resolve issues related to personal interests, close relatives and third persons;
- impede or illegally interfere in law enforcement or controlling activities in a specific territory in relation to specific objects or persons;
- participation in the capacity of *chargé d'affaires* of individuals and legal entities in relation to cases of an agency he or she is being employed by, or subordinate to or supervised by;
- participation in gambling or games of material character with senior, junior or other work-related staff;
- entrepreneurship, participation in entrepreneurial organizations or in their governing bodies;

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<sup>123</sup> *Supra* n. 112, Article 10.

<sup>124</sup> *Supra* n. 112, Article 11.

- provision of advantages (protectionism) not envisaged by laws in appointment and promotion in state service, in education, academic or any other similar activity;
- violation of public complaint procedure set by the laws of Tajikistan, disregard of advantages, subventions or rotation provided by laws in resolving such complaints;
- delegation of authority in the area of state regulation or control of entrepreneurship to individuals or legal entities engaged in such an activity.

Administrative offences related to corruption are reflected in Article 12 of the law and present a very comprehensive list of actions that do not contain criminal elements and, therefore, are considered violations of an administrative nature. Article 14 of the Law refers to the Criminal Code of Tajikistan as regards the definition of the crimes of corruption and liability for the commission of such crimes.

The last substantive part of the law, Chapter V, deals with the confiscation of property and annulment of normative acts. In accordance with Article 15, the property and value of services received as a result of a violation related to corruption are subject to confiscation in accordance with the relevant laws and rules of Tajikistan. As for normative acts adopted as a result of violation related to corruption, they are required to be annulled by the decision of an official or collegial body authorized, or by court or by the objection of the prosecutor.

## OTHER RELEVANT STATE PRACTICE

### **State Military Policy**

#### **Military Doctrine of Tajikistan Adopted 3 October 2005**

The Military Doctrine of Tajikistan is a compilation of the official views that determine the military, political, strategic and economic bases for military security in Tajikistan.<sup>125</sup> The document spells out that the present doctrine is a transitional outcome, since it determines directions at the stage of democratic state building, transitional economy, re-organization of the military system, and the dynamic transformation of international relations. The Military Doctrine develops and concretizes the concept of the national security of Tajikistan.

The political and military foundations of the Doctrine are set out in Chapter II. This part of the Doctrine acknowledges the danger an armed conflict may pose Tajikistan and the Central Asian region as a whole. Hence, taking into consideration

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<sup>125</sup> Chapter I of the Military Doctrine of the Republic of Tajikistan accessed at legal database "Pravo i Consultant".

this perspective, this part of the Doctrine determines the following fundamental principles:

- It is indispensable to abide by principles of peaceful coexistence, use political means to find solutions to regional and international disputes and conflicts, respect the sovereignty and territorial integrity of other countries, not interfere in internal affairs, and maintain the integrity of state borders;
- It is crucial to avoid wars, and to refrain from usage of armed violence and the threat of use of force for achievement of political, economic and other goals;
- It is important to condemn acts of terrorism, political extremism, separatism, and drug trafficking.

The Doctrine further stipulates that military power remains significant for the protection of the territorial integrity and sovereignty of Tajikistan from international terrorism, political extremism, separatism, and drug smuggling. In addition, military power is a means to prevent interference by other states in the internal affairs of Tajikistan. Therefore, Tajikistan reserves a right to ensure the security of its interests and the right of self-defence and collective defence in the case of the threat or use of force against Tajikistan and its allies in accordance with the Charter of the United Nations.

Section I of the Doctrine provides the political principles and means to ensure state security. In ensuring its security, Tajikistan will give priority to political, diplomatic and other peaceful means. Tajikistan refrains from animosity and the threat or use of force in its policy towards other states, and abstains from territorial claims as regards neighbouring states. According to the Doctrine, Tajikistan promotes further development of the rules of international law, supports the development and adoption of complex means and actions on military and technical issues by all states, and promotes the prevention of armed conflicts in the potential areas of violence outbreak.

Aiming at the preservation of national and international security and the prevention of different types of threats, Tajikistan will strive for:

- de-escalation of the arms race in the region and debarment of its transportation to outer space;
- a ban on the placement and nuclear testing in its territory;
- dismantling of nuclear, chemical, and biological weapons;
- a ban on the export of (transfer) materials and equipment facilitating the creation and proliferation of any type of weapon of mass destruction and means of its delivery;
- the steady reduction of the armed forces to the level necessary for defence by all states, in particular, Central Asian states;
- mutual respect, transparency, and preparedness in military activities and on this basis, create effective measures of trust and control;



- timely information sharing among countries of the Central Asian Region, the Commonwealth of Independent States, the Collective Security Treaty Organization (CSTO), and the Shanghai Security Organization in preventing trans-national conflicts, and fighting with drug criminality, international terrorism, and extremism in all its forms and manifestation;
- the transformation and integration of existing military and political unions into more effective structures of collective security.

The policy of Tajikistan in the area of diminution and restriction of weapons as an element of international security is built upon the following principles:

- Priority is given to ensure the security interests of Tajikistan with due consideration for the security of other countries;
- Support to strategic stability in countries neighbouring Tajikistan and its strategic partners.

Tajikistan cooperates with all countries to strengthen international and national stability and security. It struggles for the prevention of armed conflicts in the region by means of integration into a system of collective security and the coordination of international efforts in this area. Peace and stability shall be achieved by peaceful means. On a regional basis, peace and stability shall be pursued on the level of states members of the Collective Security Treaty Organization, Shanghai Cooperation Organization, and states parties to the Commonwealth of Independent States. On a global level, Tajikistan will strive for peace and security with all those countries which are members of the United Nations Organization. These efforts shall be directed, in particular, at strengthening the world community in its fight against new challenges and threats to security from terrorism, drug dealing, and religious extremism.

Cooperation in the prevention of armed conflicts shall be carried out with all countries of the world community where the policies of cooperating states do not contravene the interests of Tajikistan and do not breach the UN Charter or its principles.

Section III of the Military Doctrine provides a background for the causes of potential and existing conflicts, factors and current challenges to security in relation to the Central Asian Region. The text, *inter alia*, states:

[D]espite the positive changes in the world in some separate regions, in particular, in the Central Asian region, social, political, economic, territorial, regional, and ethnic tensions are increasing; there are cases of international terrorism, religious extremism, proliferation of drugs and illegal migration that are the main causes of military insecurity not only for Tajikistan but also for all countries in general. Accumulation of these contradictions may bring about conflicts and local wars that directly concern the national interests of Tajikistan and its security.

Factors contributing towards military danger include or may include:

- disparate economic development of states in the region in the period of transition to the new market economy relations and the acceleration of the social and economic stratification process of population;
- maintenance and growth of regional, ethnic and religious contradictions destabilizing situations both inside the country and in the Central Asian Region in general;
- internal armed conflicts;
- the growth of the drug business, international terrorism, extremism, and illegal migration;
- the tendencies of separate counties to establish their exceptional military and political influence in the Central Asian region and their inclination to resolve conflict situations by forceful means;
- the creation of massive violent/armed groups and military bases in the countries bordering with Tajikistan;
- territorial claims to Tajikistan.

A separate section is dedicated to the political aims of Tajikistan and provides a set of rules applicable to the use of force in conflict situations.

According to the document, the political aim of Tajikistan is to maintain and safeguard the constitutional rights of its citizens, protect its population, sovereignty, territorial integrity of the country, and the re-establishment and development of peace and friendly relations with all countries of the world.

In the case of violence or an armed conflict between the countries of the Commonwealth of Independent States or internal conflicts in these countries, Tajikistan will strive firsthand to achieve cease-fires and to resolve conflicts by diplomatic or other non-military means. Armed force can be used only in very exceptional cases on the basis of special decisions undertaken by the Council of Head of States of the Commonwealth of Independent States or the Collective Security Council of the Collective Security Treaty in order to support stability and create the conditions for the peaceful resolution of conflicts. Tajikistan recognizes the legality of the use of force for the following objectives:

- collective defence within the framework of bilateral or multilateral treaties with other countries;
- the maintenance and building of peace in accordance with the decisions of the UN Security Council and other structures of collective security, if not in contradiction with the vital interests of Tajikistan.

The use of the armed forces and other military structures of Tajikistan shall be carried out in exceptional cases as defined by the Constitution of Tajikistan and other laws in force or by the decision of the parliament.

Furthermore, the Doctrine defines the characteristics of contemporary armed conflicts, e.g., armed conflicts nowadays are defined by their military and political aims, means of achievement of objectives and scope of military actions. The Doctrine provides that an armed conflict may be in the form of a military incident, armed action or other armed conflicts of limited scope, and may be as a result of an attempt to resolve economic, national, ethnic, religious, or other contradictions by means of armed force. The Doctrine further specifies that a cross-border conflict constitutes a special type of an armed conflict. An armed conflict is characterized by the following:

- the vulnerability of the population;
- the involvement of irregular armed structures;
- the vast usage of sabotage and terrorist methods;
- a complex moral and psychological environment in which armed forces are operating;
- the forced diversion of significant forces, provision of security means for areas and dislocation of armed forces;
- the danger of the transformation of a local armed conflict into an international one.

Moreover, the document sets rules on the dislocation, types, and nature of armed forces of Tajikistan, as well as providing principles by which the armed forces of Tajikistan are ruled.

The Doctrine elaborates the tasks of the State in the area of state defence as well as envisioning the purpose and missions of the armed forces of Tajikistan. These features are reflected in the relevant provisions of chapters dedicated to defence construction, training of armed forces, means and methods of defence, military leadership and cooperation on military issues. The concluding section of the Military Doctrine provides that cooperation of Tajikistan in this area is built upon collaboration with other countries for the prevention of armed conflicts and maintenance of the peace and security as well as the defence of the country, and such cooperation shall be carried out in accordance with the United Nations Charter.

## **Humanitarian Cooperation**

### **Declaration of Commonwealth of Independent States (CIS) countries on Humanitarian Cooperation**

#### **Adopted 8 May 2005**

On 8 May 2005, Tajikistan, Azerbaijan, Moldova, Armenia, the Russian Federation, Byelorussia, Georgia, Turkmenistan, Kazakhstan, Uzbekistan, Kyrgyzstan, and Ukraine signed a joint declaration on humanitarian cooperation in areas including culture,

national traditions, languages, science, education, archives, information, communication, sports, tourism, and youth development. Cooperation and development in the aforementioned areas are deemed by the Declaration as the main component of the integration process in the territory of Commonwealth of Independent States. Humanitarian cooperation shall be organized based on good practice and the principles of relevant international organizations, including UNESCO. The document underlines the determination of CIS countries to further develop modules and mechanisms of cooperation in these areas through the conclusion of a general agreement.



# PARTICIPATION IN MULTILATERAL TREATIES\*

## Editorial introduction

This section records the participation of Asian states in open, multilateral law-making treaties which mostly aim at world-wide adherence. It updates the treaty sections of earlier Volumes until 31 December 2006. For treaties on maritime issues administered by the International Maritime Organization, data were available only as at 31 December 2005.

New data are preceded by a reference to the most recent previous entry in the multilateral treaties section of the *Asian Yearbook of International Law*. In the event that no new data are available, the title of the treaty is listed with a reference to the last Volume containing data on the treaty involved.

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 international organizations that have so kindly made 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*, <http://untreaty.un.org>. The Editors thank the United Nations Treaty Section for the permission to use the on-line United Nations Treaty Collection.
- Reservations and declarations made upon signature or ratification are not included.
- Sig. = Signature; Cons. = Consent to be bound; Eff. date = Effective date; E.i.f. = Entry into force; Ratif. registered = Ratification registered; Min. age spec. = Minimum age specified.

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Commercial arbitration	Dispute settlement
Cultural matters	Environment, fauna and flora
Cultural property	Family matters

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\* Compiled by Dr. Karin Arts, Associate Editor, Associate Professor in International Law and Development, Institute of Social Studies, The Hague.

Finance	Nationality and statelessness
Health	Nuclear material
Human rights, including women and children	Outer space
Humanitarian law in armed conflict	Privileges and immunities
Intellectual property	Refugees
International crimes	Road traffic and transport
International representation	Sea
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#### COMMERCIAL ARBITRATION

##### **Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958**

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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, 1980: *see* Vol. 6 p. 235.

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##### **Agreement on the Importation of Educational, Scientific and Cultural Materials, 1950**

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(Continued from Vol. 11 p. 245)  
(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
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<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		8 Sep 2005	Vietnam		20 Sep 2005

**Convention for the Safeguarding of the Intangible Cultural Heritage  
Paris, 17 October 2003**

Entry into Force: 20 April 2006  
(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bhutan		12 Oct 2005	Korea (Rep)		9 Feb 2005
Cambodia		13 Jun 2006	Kyrgyzstan		6 Nov 2006
China		2 Dec 2004	Mongolia		29 Jun 2005
India		9 Sep 2005	Pakistan		7 Oct 2005
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Japan		15 Jun 2006	Vietnam		20 Sep 2005

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Amendments to the Charter of the Asian and Pacific Development Centre, 1998: *see* Vol. 10 p. 267.

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Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971: *see* Vol. 10 p. 269.

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, as amended: *see* Vol. 7 p. 325.

Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other Than Oil, 1973: *see* Vol. 6 p. 239.

Protocol to the 1969 International Convention on Civil Liability for Oil Pollution Damage, 1976: *see* Vol. 10 p. 269.

Protocol to amend the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1982: *see* Vol. 6 p. 240.

Convention for the Protection of the Ozone Layer, 1985: *see* Vol. 11 p. 246.

Protocol on Substances that Deplete the Ozone Layer, 1987: *see* Vol. 11 p. 246.

Amendments to Articles 6 and 7 of the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1987: *see* Vol. 10 p. 270.

Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989 *see* Vol. 11 p. 247.

UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994: *see* Vol. 11 p. 247.

#### **International Convention on Civil Liability for Oil Pollution Damage, 1969**

(Continued from Vol. 11 p. 246)

(Status as included in IMO doc. J/9193 as at 31 December 2005)

*State*      *Denunciation*    *E.i.f.*

Malaysia    9 Jun 2004    9 Jun 2005

**International Convention on the Establishment of an International Fund for  
Compensation for Oil Pollution Damage, 1971**

(Continued from Vol. 10 p. 269)  
(Status as included in IMO doc. J/9193 as at 31 December 2005)

<i>State</i>	<i>Denunciation</i>	<i>E.i.f.</i>
Brunei	31 Jan 2002	31 Jan 2003

**Protocol Relating to the 1973 International Convention for the Prevention of Pollution  
from Ships, as amended, 1978**

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(Status as included in IMO doc. J/9193 as at 31 December 2005)

<i>State</i>	<i>Cons. (Deposit)</i>	<i>Excepted annexes</i>	<i>State</i>	<i>Cons. (Deposit)</i>	<i>Excepted annexes</i>
India (for Annexes III, IV and V)	11 Jun 2003		Maldives	20 May 2005	
Korea (Rep) (for Annex IV)	28 Nov 2003	III	Mongolia	15 Oct 2003	III and IV

**Amendment to the Montreal Protocol, 1990**

(Continued from Vol. 11 p. 247)

<i>State</i>	<i>Cons.</i>
Laos	28 Jun 2006

**International Convention on Oil Pollution Preparedness, Response, and Cooperation,  
1990**

(Continued from Vol. 9 p. 285)  
(Status as included in IMO doc. J/9193 as at 31 December 2005)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Bangladesh	23 Jul 2004	23 Oct 2004

**Protocol to amend the 1969 International Convention on Civil Liability for Oil Pollution  
Damage, 1992**

(Continued from Vol. 10 p. 271)  
(Status as included in IMO doc. J/9193 as at 31 December 2005)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>	<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Malaysia	9 Jun 2004	9 Jun 2005	Pakistan	2 Mar 2005	2 Mar 2006
Maldives	20 May 2005	20 May 2006	Vietnam	17 Jun 2003	17 Jun 2004

**Convention on Biological Diversity, 1992**

(Continued from Vol. 11 p. 247)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Timor-Leste		10 Oct 2006

**Framework Convention on Climate Change, 1992**

(Continued from Vol. 10 p. 270)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Timor-Leste		10 Oct 2006

**Amendment to the Montreal Protocol, 1992**

(Continued from Vol. 11 p. 247)

<i>State</i>	<i>Cons.</i>
Laos	28 Jun 2006

**Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1995**

(Continued from Vol. 10 p. 271)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia		24 Oct 2005

**Amendment to the Montreal Protocol, 1997**

(Continued from Vol. 11 p. 248)

<i>State</i>	<i>Cons.</i>	<i>State</i>	<i>Cons.</i>
Indonesia	26 Jan 2006	Philippines	23 May 2006
Laos	28 Jun 2006	Uzbekistan	31 Oct 2006
Pakistan	2 Sep 2005		

**Protocol to the Framework Convention on Climate Change, 1997**

(Continued from Vol. 11 p. 248)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Iran		22 Aug 2005	Pakistan		11 Jan 2005
Korea (DPR)		27 Apr 2005	Singapore		12 Apr 2006
Nepal		16 Sep 2005			

**Amendment to the Montreal Protocol, 1999**

(Continued from Vol. 11 p. 248)

<i>State</i>	<i>Cons.</i>	<i>State</i>	<i>Cons.</i>
Indonesia	26 Jan 2006	Philippines	23 May 2006
Kyrgyzstan	5 Oct 2005	Thailand	14 Nov 2006
Laos	28 Jun 2006	Uzbekistan	31 Oct 2006
Pakistan	2 Sep 2005		

**Cartagena Protocol on Biosafety to the Convention on Biological Diversity  
Montreal, 29 January 2000**

(Continued from Vol. 11 p. 248)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
China	8 Aug 2000	8 Jun 2005	Philippines	24 May 2000	5 Oct 2006
Kyrgyzstan		5 Oct 2005	Thailand		10 Nov 2005
Papua New Guinea		14 Oct 2005			

**Rotterdam Convention on the Prior Informed Consent Procedure for Certain  
Hazardous Chemicals and Pesticides in International Trade**

Rotterdam, 10 September 1998

Entry into Force: 24 February 2004

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
China	8 Aug 2000	8 Jun 2005	Maldives		17 Oct 2006
India		22 Mar 2005	Mongolia	11 Sep 1998	8 Mar 2001
Indonesia	11 Sep 1998		Pakistan	9 Sep 1999	14 Jul 2005
Iran	17 Feb 1999	26 Aug 2004	Philippines	11 Sep 1998	31 Jul 2006
Japan	31 Aug 1999	15 Jun 2004	Singapore		24 May 2005
Korea (DPR)		6 Feb 2004	Sri Lanka		19 Jan 2006
Korea (Rep)	7 Sep 1999	31 Jul 2006	Tajikistan	28 Sep 1998	
Kyrgyzstan	11 Aug 1999	25 May 2000	Thailand		19 Feb 2002
Malaysia		4 Sep 2002			

**Stockholm Convention on Persistent Organic Pollutants  
Stockholm, 22 May 2001**

Entry into Force: 17 May 2004

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh	23 May 2001		Korea (DPR)		26 Aug 2002
Brunei	21 May 2002		Korea (Rep)	4 Oct 2001	
Cambodia	23 May 2001	25 Aug 2006	Kyrgyzstan	16 May 2002	12 Dec 2006
China	23 May 2001	13 Aug 2004	Laos	5 Mar 2002	28 Jun 2006
India	14 May 2002	13 Jan 2006	Malaysia	16 May 2002	
Indonesia	23 May 2001		Maldives		17 Oct 2006
Iran	23 May 2001	6 Feb 2006	Mongolia	17 May 2002	30 Apr 2004
Japan		30 Aug 2002	Myanmar		19 Apr 2004
Kazakhstan	23 May 2001		Nepal	5 Apr 2002	

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Pakistan	6 Dec 2001		Sri Lanka	5 Sep 2001	22 Dec 2005
Papua New Guinea	23 May 2001	7 Oct 2003	Tajikistan	21 May 2002	
Philippines	23 May 2001	27 Feb 2004	Thailand	22 May 2002	31 Jan 2005
Singapore	23 May 2001	24 May 2005	Vietnam	23 May 2001	22 Jul 2002

#### FAMILY MATTERS

Convention on the Recovery Abroad of Maintenance, 1956: *see* Vol. 11 p. 249.

Convention on the Law Applicable to Maintenance Obligations Towards Children, 1956: *see* Vol.6 p. 244.

Convention on the Conflicts of Law Relating to the Form of Testamentary Dispositions, 1961: *see* Vol. 7 p. 327.

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962: *see* Vol. 8 p. 178.

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**

(Continued from Vol. 11 p. 249)

(Status as provided by the Hague Conference on Private International Law)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
China	30 Nov 2000	16 Sep 2005

#### FINANCE

Agreement Establishing the Asian Development Bank, 1965: *see* Vol. 7 p. 327.

#### **Convention Establishing the Multilateral Investment Guarantee Agency, 1988**

(Continued from Vol. 11 p. 249)

(Status as at 31 December 2006, provided by the World Bank)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Maldives		19 May 2005

## HEALTH

Protocol Concerning the Office International d'Hygiène Publique, 1946: *see* Vol. 6 p. 245.

**World Health Organization Framework Convention on Tobacco Control**

Geneva, 21 May 2003

Entry into Force: 27 February 2005

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan	29 Jun 2004		Maldives	17 May 2004	20 May 2004
Bangladesh	16 Jun 2003	14 Jun 2004	Mongolia	16 Jun 2003	27 Jan 2004
Bhutan	9 Dec 2003	23 Aug 2004	Myanmar	23 Oct 2003	21 Apr 2004
Cambodia	25 May 2004	15 Nov 2005	Nepal	3 Dec 2003	7 Nov 2006
China	10 Nov 2003	11 Oct 2005	Pakistan	18 May 2004	3 Nov 2004
India	10 Sep 2003	5 Feb 2004	Papua New Guinea	22 Jun 2004	25 May 2006
Iran	16 Jun 2003	6 Nov 2005	Philippines	23 Sep 2003	6 Jun 2005
Japan	9 Mar 2004	8 Jun 2004	Singapore	29 Dec 2003	14 May 2004
Kazakhstan	21 Jun 2004		Sri Lanka	23 Sep 2003	11 Nov 2003
Korea (DPR)	17 Jun 2003	27 Apr 2005	Thailand	20 Jun 2003	8 Nov 2004
Korea (Rep)	21 Jul 2003	16 May 2005	Timor-Leste	25 May 2004	22 Dec 2004
Kyrgyzstan	18 Feb 2004	25 May 2006	Vietnam	20 Jun 2003	
Laos	29 Jun 2004	6 Sep 2006			
Malaysia	23 Sep 2003	16 Sep 2005			

HUMAN RIGHTS, INCLUDING WOMEN AND CHILDREN

Convention on the Political Rights of Women, 1953: *see* Vol. 10 p. 273

Convention on the Nationality of Married Women, 1957: *see* Vol. 10 p. 274

Convention against Discrimination in Education, 1960: *see* Vol. 7 p. 328.

International Convention on the Elimination of All Forms of Racial Discrimination, 1966: *see* Vol. 8 p. 179.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: *see* Vol. 11 p. 2.

Convention on the Rights of the Child, 1989: *see* Vol. 11 p. 251.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990: *see* Vol. 11 p. 251.

**International Covenant on Economic, Social and Cultural Rights, 1966**

(Continued from Vol. 11 p. 250)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia		23 Feb 2006	Maldives		19 Sep 2006
Kazakhstan	2 Dec 2003	24 Jan 2006			

**International Covenant on Civil and Political Rights, 1966**

(Continued from Vol. 11 p. 250)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia		23 Feb 2006	Maldives		19 Sep 2006
Kazakhstan	2 Dec 2003	24 Jan 2006			

**Optional Protocol to the International Covenant on Civil and Political Rights, 1966**

(Continued from Vol. 11 p. 250)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Maldives		19 Sep 2006

**Convention on the Elimination of All Forms of Discrimination against Women, 1979**

(Continued from Vol. 11 p. 250)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Brunei		24 May 2006

**International Convention against Apartheid in Sports, 1985**

(Continued from Vol. 6 p. 248)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kyrgyzstan		19 Jul 2005

**Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1992**

(Continued from Vol. 10 p. 274)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Iran		8 Nov 2005

**Optional Protocol to the Convention on the Elimination of All Form of Discrimination against Women, 1999**

(Continued from Vol. 11 p. 251)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Korea (Rep)		18 Oct 2006	Maldives		13 Mar 2006

**Optional Protocol to the Convention on the Rights of the Child  
on the Involvement of Children in Armed Conflict, 2000**

(Continued from Vol. 11 p. 251)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bhutan	15 Sep 2005		Thailand		27 Feb 2006
India	15 Nov 2004	30 Nov 2005	Turkmenistan		29 Apr 2005
Laos		20 Sep 2006			

**Optional Protocol to the Convention on the Rights of the Child  
on the Sale of Children, Child Prostitution and Child Pornography, 2000**

(Continued from Vol. 11 p. 251)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bhutan	15 Sep 2005		Nepal	8 Sep 2000	20 Jan 2006
Brunei		21 Nov 2006	Sri Lanka	8 May 2002	22 Sep 2006
India	15 Nov 2004	16 Aug 2005	Thailand		11 Jan 2006
Japan	10 May 2002	24 Jan 2005	Turkmenistan		28 Mar 2005
Laos		20 Sep 2006			

**Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman  
or Degrading Treatment or Punishment, 1984**

New York, 18 December 2002

Entry into force: 22 June 2006

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Cambodia	14 Sep 2005		Timor-Leste	16 Sep 2005	
Maldives	14 Sep 2005	15 Feb 2006			

HUMANITARIAN LAW IN ARMED CONFLICT

International Conventions for the Protection of Victims of War, I-IV, 1949: *see* Vol. 11 p. 252.

**Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to  
the Protection of Victims of International Armed Conflicts, 1977**

(Continued from Vol. 11 p. 252)

<i>State</i>	<i>Cons.</i>
Timor-Leste	12 Apr 2005



**Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977**

(Continued from Vol. 11 p. 252)

<i>State</i>	<i>Cons.</i>
Timor-Leste	12 Apr 2005

**INTELLECTUAL PROPERTY**

Convention for the Protection of Industrial Property, 1883 as amended 1979: *see* Vol. 11 p. 253.

Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.

Protocols 1, 2 and 3 annexed to the Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961: *see* Vol. 11 p. 253.

Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, 1979: *see* Vol. 6 p. 252.

**Convention for the Protection of Literary and Artistic Works, 1886**

as amended 1979

(Continued from Vol. 11 p. 252)

(Status as included in WIPO doc. 423(E) of 15 January 2007)

<i>State</i>	<i>Cons.</i>	<i>Latest Act to which State is party</i>	<i>State</i>	<i>Cons.</i>	<i>Latest Act to which State is party</i>
Brunei	30 Aug 2006	Paris	Uzbekistan	19 Apr 2005	Paris
Nepal	11 Jan 2006	Paris			

**Madrid Union Concerning the International Registration of Marks, including the Madrid Agreement 1891 as amended in 1979, and the Madrid Protocol 1989**

(Status as included in WIPO doc. 423(E) of 15 January 2007)

<i>State</i>	<i>Cons. Madrid Agreement</i>	<i>Cons. Madrid Protocol</i>	<i>State</i>	<i>Cons. Madrid Agreement</i>	<i>Cons. Madrid Protocol</i>
Bhutan	4 Aug 2000	4 Aug 2000	Kyrgyzstan	25 Dec 1991	17 Jun 2004
China	4 Oct 1989	1 Dec 1995	Mongolia	21 Apr 1985	16 Jun 2001
Iran	25 Dec 2003	25 Dec 2003	Singapore		31 Oct 2000
Japan		14 Mar 2000	Tajikistan	25 Dec 1991	
Kazakhstan	25 Dec 1991		Turkmenistan		28 Sep 1999
Korea (DPR)	10 Jun 1980	3 Oct 1996	Uzbekistan	25 Dec 1991	27 Dec 2006
Korea (Rep)		10 Apr 2003	Vietnam	8 Mar 1949	11 Jul 2006

**Nice Agreement Concerning the International Classification of Goods and Services  
for the Purposes of the Registration of Marks, 1957 as amended in 1979**

(Status as included in WIPO doc. 423(E) of 15 January 2007)

<i>State</i>	<i>Cons.</i>	<i>Latest Act to which State is party</i>	<i>State</i>	<i>Cons.</i>	<i>Latest Act to which State is party</i>
China	9 Aug 1994	Geneva	Mongolia	16 Jun 2001	Geneva
Japan	20 Feb 1990	Geneva	Singapore	18 Mar 1999	Geneva
Kazakhstan	24 Apr 2002	Geneva	Tajikistan	25 Dec 1991	Geneva
Korea (DPR)	6 Jun 1997	Geneva	Turkmenistan	7 Jun 2006	Geneva
Korea (Rep)	8 Jan 1999	Geneva	Uzbekistan	12 Jan 2002	Geneva
Kyrgyzstan	10 Dec 1998	Geneva			

**Convention Establishing the World Intellectual Property Organization, 1967**

(Continued from Vol. 11 p. 252)

(Status as included in WIPO doc. 423(E) of 15 January 2007)

<i>State</i>	<i>Membership</i>
Afghanistan	13 Dec 2005

**Convention for the Protection of Producers of Phonograms  
against Unauthorized Duplication of their Phonograms, 1971**

(Continued from Vol. 10 p. 276)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Vietnam		6 Apr 2005

**Patent Cooperation Treaty, 1970 as amended in 1979 and modified in 1984 and 2001**

(Status as included in WIPO doc. 423(E) of 15 January 2007)

<i>State</i>	<i>Cons.</i>	<i>State</i>	<i>Cons.</i>
China	1 Jan 1994	Mongolia	27 May 1991
India	7 Dec 1998	Papua New Guinea	14 Jun 2003
Indonesia	5 Sep 1997	Philippines	17 Aug 2001
Japan	1 Oct 1978	Singapore	23 Feb 1995
Kazakhstan	25 Dec 1991	Sri Lanka	26 Feb 1982
Korea (DPR)	8 Jul 1980	Tajikistan	26 Dec 1991
Korea (Rep)	10 Aug 1984	Turkmenistan	25 Dec 1991
Kyrgyzstan	25 Dec 1991	Uzbekistan	25 Dec 1991
Laos	14 Jun 2006	Vietnam	10 Mar 1993
Malaysia	16 Aug 2006		

## INTERNATIONAL CRIMES

- Slavery Convention, 1926 as amended in 1953, *see* Vol. 7 p. 331.
- Convention on the Prevention and Punishment of the Crime of Genocide, 1948: *see* Vol. 8 p. 182.
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, *see* Vol. 7 p. 331.
- Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963: *see* Vol. 9 p. 289.
- 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. 8 p. 289.
- Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971: *see* Vol. 8 p. 290.
- International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973: *see* Vol. 7 p. 331.
- International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989: *see* Vol. 11 p. 254.
- Convention on the Safety of United Nations and Associated Personnel, 1994: *see* Vol. 11 p. 255.
- Statute of the International Criminal Court, 1998: *see* Vol. 11 p. 255.

**Convention on the Prevention and Punishment of Crimes Against  
Internationally Protected Persons Including Diplomatic Agents, 1973**

(Continued from Vol. 11 p. 254)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>		<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh		20 May 2005		Cambodia		27 Jul 2006

**International Convention Against the Taking of Hostages, 1979**

(Continued from Vol. 11 p. 254)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>		<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh		20 May 2005		Iran		20 Nov 2006
Cambodia		27 Jul 2006				

**Convention for the Suppression of Unlawful Acts Against  
the Safety of Maritime Navigation, 1988**

(Continued from Vol. 11 p. 278)

(Status as included in IMO doc. J/9193 , as at 31 December 2005)

<i>State</i>	<i>Cons.</i> ( <i>Deposited</i> )	<i>E.i.f.</i>		<i>State</i>	<i>Cons.</i> ( <i>Deposited</i> )	<i>E.i.f.</i>
Afghanistan	23 Sep 2003	22 Dec 2003		Kazakhstan	24 Nov 2003	22 Feb 2004
Bangladesh	9 Jun 2005	7 Sep 2005		Korea (Rep)	14 May 2003	12 Aug 2003
Brunei	4 Dec 2003	3 Mar 2004		Myanmar	19 Sep 2003	18 Dec 2003

<i>State</i>	<i>Cons.</i> <i>(Deposited)</i>	<i>E.i.f.</i>	<i>State</i>	<i>Cons.</i> <i>(Deposited)</i>	<i>E.i.f.</i>
Philippines	6 Jan 2004	5 Apr 2004	Tajikistan	12 Aug 2005	10 Nov 2005
Singapore	3 Feb 2004	3 May 2004			

**Protocol for the Suppression of Unlawful Acts Against  
the Safety of Fixed Platforms Located on the Continental Shelf, 1988**

(Continued from Vol. 10 p. 277)

(Status as included in IMO doc. J/9193, as at 31 December 2005)

<i>State</i>	<i>Cons.</i> <i>(Deposited)</i>	<i>E.i.f.</i>	<i>State</i>	<i>Cons.</i> <i>(Deposited)</i>	<i>E.i.f.</i>
Afghanistan	23 Sep 2003	22 Dec 2003	Korea (Rep)	10 Jun 2003	8 Sep 2003
Bangladesh	9 Jun 2005	7 Sep 2005	Mongolia	22 Nov 2005	20 Feb 2006
Brunei	4 Dec 2003	3 Mar 2004	Tajikistan	12 Aug 2005	10 Nov 2005
Kazakhstan	24 Nov 2003	22 Feb 2004			

**Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving  
International Civil Aviation, Supplementary to the Convention for the  
Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1988**

(Continued from Vol. 11 p. 254)

(Status as at 31 December 2006 provided by the ICAO Secretariat)

<i>State</i>	<i>Cons.</i>	<i>Eff. date.</i>	<i>State</i>	<i>Cons.</i>	<i>Eff. date.</i>
Bangladesh	27 Jun 2005	27 Jul 2005	Malaysia	8 Sep 2006	8 Oct 2006
Bhutan	20 Aug 2005	25 Sep 2005			

**Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991**

(Continued from Vol. 11 p. 278)

(Status as at 31 December 2006 provided by the ICAO Secretariat)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh	16 Aug 2005	15 Oct 2005	Thailand	25 Jan 2006	26 Mar 2006
Bhutan	26 Aug 2005	25 Oct 2005	Turkmenistan	14 Jan 2005	16 Mar 2005
Tajikistan	18 Jul 2006	16 Sep 2006			

**International Convention for the Suppression of Terrorist Bombings, 1997**

(Continued from Vol. 11 p. 255)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>	<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Bangladesh		15 Oct 2005	Indonesia		29 Jun 2006
Cambodia		31 Jul 2006			

**International Convention for the Suppression of the Financing of Terrorism, 1999**

(Continued from Vol. 11 p. 255)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>	<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Bangladesh		26 Aug 2005	Indonesia	24 Sep 2001	29 Jun 2006
Cambodia	11 Nov 2001	12 Dec 2005	Myanmar	12 Nov 2001	16 Aug 2006
China	13 Nov 2001	19 Apr 2006	Turkmenistan		7 Jan 2005

**United Nations Convention Against Transnational Organized Crime**

New York, 15 November 2000

Entry into Force: 29 September 2003

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>	<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Afghanistan	14 Dec 2000	24 Sep 2003	Myanmar		30 Mar 2004
Cambodia	11 Nov 2001	12 Dec 2005	Nepal	12 Dec 2002	
China	12 Dec 2000	23 Sep 2003	Pakistan	14 Dec 2000	
India	12 Dec 2002		Philippines	14 Dec 2000	28 May 2002
Indonesia	12 Dec 2000		Singapore	13 Dec 2000	
Iran	12 Dec 2000		Sri Lanka	13 Dec 2000	22 Sep 2006
Japan	12 Dec 2000		Tajikistan	12 Dec 2000	8 Jul 2002
Kazakhstan	13 Dec 2000		Thailand	13 Dec 2000	
Korea (Rep)	13 Dec 2000	2 Oct 2003	Turkmenistan		28 Mar 2005
Kyrgyzstan	13 Dec 2000		Uzbekistan	13 Dec 2000	9 Dec 2003
Laos		26 Sep 2003	Vietnam	13 Dec 2000	
Malaysia	26 Sep 2002	24 Sep 2004			

**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 Contracts for the International Sale of Goods, 1980: *see* Vol. 11 p. 256.

UN Convention on the Liability of Operators of Transport Terminals in International Trade, 1991: *see* Vol. 6 p. 257.

## JUDICIAL AND ADMINISTRATIVE COOPERATION

Convention Relating to Civil Procedure, 1954: *see* Vol. 6 p. 258.

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970: *see* Vol. 9 p. 292.

**Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961**

(Continued from Vol. 11 p. 256)

(Status as at 31 December 2006 provided by the Hague Conference on Private International Law)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Korea (Rep)		25 Oct 2006

**Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965**

(Continued from Vol. 9 p. 291)

(Status as at 31 December 2006 provided by the Hague Conference on Private International Law)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
India		23 Nov 2006

## LABOUR

Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87): *see* Vol. 9 p. 292.

Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98): *see* Vol. 10 p. 280.

Equal Remuneration Convention, 1951 (ILO Conv. 100): *see* Vol. 10 p. 281.

Employment Policy Convention, 1964 (ILO Conv. 122): *see* Vol. 8 p. 186.

**Forced Labour Convention, 1930 (ILO Conv. 29)**

(Continued from Vol. 10 p. 280)

(Status as at 31 December 2006 as provided by the ILO)

<i>State</i>	<i>Ratif. registered</i>
Philippines	15 Jul 2005

**Abolition of Forced Labour Convention, 1957 (ILO Conv. 105)**

(Continued from Vol. 11 p. 256)

(Status as at 31 December 2006 as provided by the ILO)

*State*      *Ratif. registered*

Mongolia      15 Mar 2005

**Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111)**

(Continued from Vol. 8 p. 185)

(Status as at 31 December 2006 as provided by the ILO)

*State*      *Ratif. registered*

China      12 Jan 2006

**Minimum Age Convention, 1973 (ILO Conv. 138)**

(Continued from Vol. 11 p. 257)

(Status as at 31 December 2006 as provided by the ILO)

<i>State</i>	<i>Ratif. registered</i>	<i>Min. age spec.</i>		<i>State</i>	<i>Ratif. registered</i>	<i>Min. age spec.</i>
Laos	13 Jun 2005	14		Pakistan	6 Jun 2006	14
Singapore	7 Nov 2005	15				

**Worst Forms of Child Labour Convention, 1999 (ILO Conv. 182)**

(Continued from Vol. 11 p. 257)

(Status as at 31 December 2006 as provided by the ILO)

<i>State</i>	<i>Ratif. registered</i>		<i>State</i>	<i>Ratif. registered</i>
Cambodia	14 Mar 2006		Tajikistan	8 Jun 2005
Laos	13 Jun 2005			

## NARCOTIC DRUGS

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.

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.

International Opium Convention, 1925, amended by Protocol 1946: *see* Vol. 7 p. 334.

Agreement Concerning the Suppression of Opium Smoking, 1931, amended by Protocol, 1946: *see* Vol. 6 p. 261.

Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931, and amended by Protocol, 1946: *see* Vol. 7 p. 334.

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.

Convention on Psychotropic Substances, 1971: *see* Vol. 9 p. 294.

Protocol amending the Single Convention on Narcotic Drugs, 1972: *see* Continued from Vol. 11 p. 257.

**Single Convention on Narcotic Drugs, 1961**

(Continued from Vol. 7 p. 334)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Cambodia		7 Jul 2005

**Single Convention on Narcotic Drugs, 1961, as Amended by Protocol 1972**

(Continued from Vol. 9 p. 294)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bhutan		24 Aug 2005	Myanmar		22 Aug 2003
Cambodia		7 Jul 2005			

**United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988**

(Continued from Vol. 11 p. 258)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Cambodia		7 Jul 2005

**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. 8 p. 187.



## NUCLEAR MATERIAL

Convention on Civil Liability for Nuclear Damage, 1963: *see* Vol. 6 p. 265.

Joint Protocol Relating to the Application of the Vienna Convention (and the Paris Convention on Third Party Liability in the Field of Nuclear Energy), 1980: *see* Vol. 6 p. 265.

Convention on Early Notification of a Nuclear Accident, 1986: *see* Vol. 9 p. 295.

Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986: *see* Vol. 9 p. 295.

Protocol to amend the Convention on Civil Liability for Nuclear Damage, 1997: *see* Vol. 8 p. 188.

Convention on Supplementary Compensation for Nuclear Damage, 1997: *see* Vol. 8 p. 189.

**Convention on the Physical Protection of Nuclear Material, 1980**

(Continued from Vol. 11 p. 258)

(Status as at 31 December 2006, provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i> ( <i>deposit</i> )	<i>State</i>	<i>Sig.</i>	<i>Cons.</i> ( <i>deposit</i> )
Bangladesh		11 May 2005	Kazakhstan		2 Sep 2005
Cambodia		4 Aug 2006	Turkmenistan		7 Jan 2005

**Convention on Nuclear Safety, 1994**

(Continued from Vol. 11 p. 258)

(Status as at 31 December 2006, provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i> ( <i>deposit</i> )
India	30 Sep 1994	31 Mar 2005

**Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997**

(Continued from Vol. 11 p. 258)

(Status as at 31 December 2006, provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i> ( <i>deposit</i> )	<i>State</i>	<i>Sig.</i>	<i>Cons.</i> ( <i>deposit</i> )
China		13 Sep 2006	Kyrgyzstan		18 Dec 2006

## 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. 10 p. 284.  
 Convention on Registration of Objects launched into Outer Space, 1974: *see* Vol. 10 p. 284.

## PRIVILEGES AND IMMUNITIES

Convention on the Privileges and Immunities of the United Nations, 1946: *see* Vol. 10 p. 284.  
 Convention on the Privileges and Immunities of the Specialized Agencies, 1947: *see* Vol. 7 p. 338.  
 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.

**Vienna Convention on Diplomatic Relations, 1961**

(Continued from Vol. 11 p. 259)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Singapore		1 Apr 2005

**Vienna Convention on Consular Relations, 1963**

(Continued from Vol. 11 p. 259)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Cambodia		10 Mar 2006

**United Nations Convention on Jurisdictional Immunities of States and Their Property**

New York, 2 December 2004

Entry into Force: not yet

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
China	14 Sep 2005		Sri Lanka		4 May 2006
Singapore		1 Apr 2005	Timor-Leste	16 Sep 2005	

## REFUGEES

**Convention relating to the Status of Refugees, 1951**  
(Continued from Vol. 11 p. 259)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		30 Aug 2005

**Protocol relating to the Status of Refugees, 1967**  
(Continued from Vol. 11 p. 260)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		30 Aug 2005

## ROAD TRAFFIC AND TRANSPORT

**Convention on Road Traffic, 1968**  
(Continued from Vol. 7 p. 338)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kyrgyzstan		30 Aug 2006

**Convention on Road Signs and Signals, 1968**  
(Continued from Vol. 7 p. 338)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kyrgyzstan		30 Aug 2006

## SEA

- Convention on the Territorial Sea and the Contiguous Zone, 1958: *see* Vol. 6 p. 271.  
 Convention on the High Seas, 1958: *see* Vol. 7 p. 339.  
 Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958:  
*see* Vol. 6 p. 271.  
 Convention on the Continental Shelf, 1958: *see* Vol. 6 p. 271.  
 Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958:  
*see* Vol. 6 p. 272.  
 United Nations Convention on the Law of the Sea, 1982: *see* Vol. 10 p. 285.

**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. 10 p. 285)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Vietnam	16 Nov 1994	27 Apr 2006

**Agreement for the Implementation of the Provisions of the United Nations Convention  
on the Law of the Sea (...) relating to the Conservation and Management  
of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995**

(Continued from Vol. 11 p. 260)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Japan	19 Nov 1996	7 Aug 2006

### SEA TRAFFIC AND TRANSPORT

Convention Regarding the Measurement and Registration of Vessels employed in Inland Navigation, 1956: *see* Vol. 6 p. 273.

International Convention for the Safety of Life at Sea, 1960: *see* Vol. 6 p. 273.

International Convention on Tonnage Measurement of Ships, 1969: *see* Vol. 6 p. 274.  
Special Trade Passenger Ships Agreement, 1971, *see* Vol. 6 p. 275.

Convention on the International Regulations for Preventing Collisions at Sea, 1972 as amended: *see* Vol. 10 p. 286.

International Convention for Safe Containers, as amended 1972: *see* Vol. 10 p. 286.

Protocol on Space Requirements for Special Trade Passenger Ships, 1973: *see* Vol. 6 p. 275.

International Convention for the Safety of Life at Sea, 1974, as amended: *see* Vol. 6 p. 286.

Convention on a Code of Conduct for Liner Conferences, 1974: *see* Vol. 6 p. 276.

UN Convention on the Carriage of Goods by Sea, 1978: *see* Vol. 6 p. 276.

**Convention on Facilitation of International Maritime Traffic, 1965 as amended**

(Continued from Vol. 10 p. 286)

(Status as included in IMO doc. J/9193 as at 31 December 2005)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>	<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Indonesia	4 Nov 2002	3 Jan 2003	Japan	2 Sep 2005	1 Nov 2005

**International Convention on Load Lines, 1966**

(Continued from Vol. 10 p. 286)

(Status as included in IMO doc. J/9193 as at 31 December 2005)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Mongolia	3 Mar 2003	3 Jun 2003

**Protocol Relating to the International Convention for the Safety of Life at Sea, 1974 as amended 1978**

(Continued from Vol. 6 p. 276)

(Status as included in IMO doc. J/9193 as at 31 December 2005)

<i>State</i>	<i>Cons.</i> <i>(Deposit)</i>	<i>Excepted</i> <i>annexes</i>	<i>State</i>	<i>Cons.</i> <i>(Deposit)</i>	<i>Excepted</i> <i>annexes</i>
Bangladesh	18 Dec 2002		Korea (Rep)		
India (for Annexes III, IV and V)	28 Nov 2003		(for Annex IV)		
	11 Jun 2003		Maldives	20 May 2005	III and IV
Iran	25 Oct 2002	III and IV	Mongolia	15 Oct 2003	

**Protocol Relating to the International Convention on Load Lines, 1988**

(Continued from Vol. 10 p. 286)

(Status as included in IMO doc. J/9193 as at 31 December 2005)

<i>State</i>	<i>Cons.</i> <i>(Deposit)</i>	<i>E.i.f.</i>
Bangladesh	18 Dec 2002	18 Mar 2003

## SOCIAL MATTERS

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.

International Convention for the Suppression of the Traffic in Women and Children, 1921: *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.

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 1923: *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 of Full Age, 1933, amended by Protocol, 1947: *see* Vol. 6 p. 277.

**Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950**

(Continued and corrected from Vol. 11 p. 261)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan	17 Nov 2004	24 Jan 2006

**Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950**

(Continued from Vol. 11 p. 261)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Cambodia	27 Sep 2004		Uzbekistan		27 Nov 2004
Kazakhstan	17 Nov 2004	5 Sep 2006			

TELECOMMUNICATIONS

Constitution of the Asia-Pacific Telecommunity, 1976: *see* Vol. 8 p. 192.

Convention on the International Maritime Satellite Organization (INMARSAT), 1976 (as amended): *see* Vol. 8 p. 193.

Amendment to Article 11, Paragraph 2(a), of the Constitution of the Asia-Pacific Telecommunity, 1981: *see* Vol. 8 p. 193.

Amendments to articles 3(5) and 9(8) of the Constitution of the Asia-Pacific Telecommunity, 1991: *see* Vol. 9 p. 298.

Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977: *see* Vol. 10 p. 287.

Amendments to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1999: *see* Vol. 10 p. 288.

**Amendments to the Constitution of the Asia-Pacific Telecommunity**

New Delhi, 23 October 2002

Entry into force: not yet

<i>State</i>	<i>Cons.</i>	<i>State</i>	<i>Cons.</i>
Afghanistan	5 Jan 2005	Laos	2 Oct 2003
Bhutan	14 Jul 2004	Malaysia	28 Apr 2003
Brunei	26 Nov 2003	Myanmar	10 Sep 2003
China	27 Feb 2006	Singapore	7 Mar 2005
Indonesia	30 Dec 2004	Sri Lanka	27 Aug 2003
Iran	21 Jul 2006	Thailand	31 Jan 2005
Korea (DPR)	14 Jul 2003	Vietnam	19 Sep 2003
Korea (Rep)	23 Sep 2003		

## 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. 10 p. 288)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Maldives		14 Sep 2005

## 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. 11 p. 262.

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 Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, and Protocols, 1980: *see* Vol. 11 p. 263.

**Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972**

(Continued from Vol. 11 p. 262)

(Status at 31 December 2006, <http://disarmament.un.org/TreatyStatus.nsf>)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kyrgyzstan		12 Oct 2004		Tajikistan	27 Jun 2005

**Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976**

(Continued from Vol. 8 p. 194)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
China		8 Jun 2005		Kazakhstan	25 Apr 2005

**Convention on the Prohibition of the Development, Production, Stockpiling and Use  
of Chemical Weapons and on Their Destruction, 1993**

(Continued from Vol. 11 p. 263)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>		<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bhutan	24 Apr 97	18 Aug 2005		Cambodia	15 Jan 1993	19 Jul 2005

**Comprehensive Nuclear Test Ban Treaty, 1996**

(Continued from Vol. 11 p. 263)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Vietnam	24 Sep 96	10 Mar 2006

**Convention on the Prohibition of the Use, Stockpiling, Production and Transfer  
of Anti-Personnel Mines and on their Destruction, 1997**

(Continued from Vol. 11 p. 263)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>		<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bhutan		18 Aug 2005		Brunei	4 Dec 1997	24 Apr 2006

Amendment of Article 1 of the 1980 Convention on Prohibitions or Restrictions  
on the Use of Certain Conventional Weapons which may be Deemed  
Excessively Injurious or to have Indiscriminate Effects, 2001  
Entry into Force: 18 May 2004

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
India		18 May 2005





# CHRONICLE



# CHRONICLE OF EVENTS AND INCIDENTS RELATING TO ASIA WITH RELEVANCE TO INTERNATIONAL LAW

July 2004 – June 2005

Ko Swan Sik\*

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Afghanistan	Jurisdiction
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\* Member of the Editorial Board. For the considerations underlying the Chronicle, *see* the “Editorial Introduction” in 1 *Asian YIL* (1991) 265.

## AFGHANISTAN

### Role of foreign forces

According to data available in mid-2004 there was a 20,000-man US-led combat force and a 6,500-strong NATO-led peace-keeping force (“International Security Assistance Force”, later re-established as a NATO mission in August 2003) in the country (*see also* 10 Asian YIL 335-336), while NATO on 29 June 2004 pledged to increase its force by 1,500 (Afghanistan had been asking for even more). (IHT 01-07-04)

In February 2005 NATO and the US agreed to merge their separate missions, giving NATO command of an operation combining “counter-terrorism” and “peacekeeping” activities. The NATO Secretary General said that this implied that NATO would be in Afghanistan for a long time.

Yet uncertainty appeared to remain about how the merged mission would function, especially whether the NATO forces or the US would be in charge of “counter-terrorism” operations (called by the US “Operation Enduring Freedom”). The NATO mission on its part was supposed to participate in training a new Afghan army and to assist in achieving its reform and modernization, as well as extending security and stability outside Kabul. Under the arrangement the country would be divided into four zones, with Germany commanding the north; Italy and Spain, the east; Britain, the south, and the US, the east. (IHT 11-02-05)

## ASSOCIATION OF SOUTH EAST ASIAN NATIONS (ASEAN)

### ASEAN – China

*See:* Inter-state relations

### East Asia Summit

The Fifth Meeting of the ASEAN foreign ministers with those of China, Japan and South Korea (“ASEAN Ministerial Meeting + 3”) was held on 1 July 2004 at Jakarta. The meeting discussed, *inter alia*, the possibility of the formation of an East Asia Community that was to result from an intensified cooperation of ASEAN+3. It “recognized the potential value of an East Asia Summit at an appropriate time”.

This was followed by the announcement, at the tenth ASEAN Summit in November 2004 at Vientiane, that an ASEAN consensus had been reached on the launch of a first East Asian Summit (EAS) towards the end of 2005 in Malaysia. Consensus was achieved after Indonesia formally accepted the idea of transforming the ASEAN+3 framework into the EAS, with the possibility of additional countries being invited to join the new grouping.

Subsequently, a “retreat meeting” of the ASEAN foreign ministers, held in April 2005 at Cebu in the Philippines, agreed on the prospective EAS to be of an “inclusive” nature. It seemed that consensus was yet to be achieved on a number of issues, such as which other countries should be invited to join the EAS apart from ASEAN+3. In any case other countries would be eligible for invitation only if they

fulfil three conditions: being a full ASEAN dialogue partner, having a substantive level of relationship with ASEAN, and willing to adhere to the 1976 Treaty of Amity and Cooperation. The agreement achieved at Cebu was to be formally affirmed by the formal Foreign Ministers Meeting at Vientiane later in the year (July 2005).

Japan, supported by Indonesia, endorsed the idea of inviting Australia, New Zealand and India to join. (IHT 13-04-05)

### **ASEAN Chairmanship and Myanmar**

Increasing concern had arisen within ASEAN about the prospect of Myanmar's assuming the rotating Chairmanship of ASEAN in 2006, in view of the absence of the promised political reforms in that country. Strict maintenance of the non-intervention principle and of "constructive engagement" was considered to hold potential damage to the reputation and credibility of ASEAN with key "dialogue partners" such as the US and the EU.

Malaysia, which had actively sponsored Myanmar's admission into ASEAN in 1997, in particular, was reported to have been explicit in its opposition to its Chairmanship, and in late March 2005 the prime minister of Singapore delivered a message to Myanmar to the effect that while political development and democratization in Myanmar were a matter only Myanmar could decide, "in an interdependent world developments in one country could impact on ASEAN as a whole". On the other hand, Thailand was reported as avoiding aligning itself with demands to block Myanmar's Chairmanship because of Thailand's significant business ties.

The message was mooted for discussion at an informal ASEAN foreign ministers meeting in the Philippines on 10 April 2005. Rumours referred to a divide between the older members, on the one hand, and those such as Cambodia, Laos and Vietnam, which joined ASEAN at the same time as Myanmar, on the other. (IHT 01-04-05)

### **ASYLUM**

*See:* Refugees

### **BORDERS, BORDER DISPUTES AND BORDER INCIDENTS**

#### **Afghanistan – Tajikistan**

Under agreements signed on 16 October 2004 between Tajikistan and Russia the latter was to hand over complete control of the Tajik-Afghan border by 2006. (IHT 18-10-04)

#### **China – India**

*See:* Inter-state relations: China-India

#### **China – Japan**

*See:* Exclusive Economic Zone: China-Japan

### China – Kyrgyzstan

It was reported in September 2004 that the two countries had signed an agreement on the demarcation of their common border. Under the agreement, territory that had been a matter of dispute between China and the former Soviet Union was awarded to Kyrgyzstan. (FEER 30–09-04)

### China – Russia

An agreement was signed on 14 October 2004 during a visit by the Russian president to Beijing, settling the last border dispute that had remained between China and Russia. It concerned a stretch of river and islands along the most north-easterly tip of China. While no details of the agreement were released at the time, it turned out later that with regard to the disputed three river islands one was allocated to China, one to Russia, while the third and largest was divided, with a half to each nation. Consequently, the agreement included the cession by Russia to China of the western half of *Bolshoi Ussuriiskii* Island (Chin.: *Heixiazi*) and the adjacent *Tarabarov* Island (Chin.: *Yinshu*), both located between the *Amur* (*Heilong Jiang*) and *Ussuri* (*Wusuli Jiang*) rivers where these two rivers converge near the city of Khabarovsk. (IHT 15-10-04, 22/23-01-05)

Border negotiations between China and the former Soviet Union had been resumed in the late 1980s after having been frozen as a result of military clashes between the two countries at about a hundred miles' distance south of the above-mentioned location, at *Damansky* (Chin.: *Zhen Bao*) Island on the *Ussuri* River in the late 1960s.

On 16 May 1991 an agreement was reached on the alignment of the eastern section of the boundary line with some exceptions relating to the stretch from the Sino-Russian-Korean triangular border point on the *Tumen* (*Tuman*) River to the Sino-Russian-Mongolian triangular border point (see Asian YIL Vol.1:275, Vol.7:400). This excluded the so-called “three islands issue” which constituted the subject of the October 2004 agreement. Another agreement followed on 3 September 1994, dealing with the western section of the boundary (see Asian YIL Vol.4:418, Vol.6:347).

After various problems regarding the demarcation issue, a joint declaration in 1997 (see 8 Asian YIL 258) announced the successful completion of Sino-Russian eastern border demarcation work. Accordingly, two Protocols were concluded on 9 December 1999 sanctioning the demarcation of the boundary line in each of the sections to the extent covered by the 1991 and 1994 agreements.

Finally, the agreement of October 2004 completed the regulation of the whole Sino-Russian boundary. The instruments of ratification were exchanged at Vladivostok on 2 June 2005.

**DIVIDED STATES: CHINA**

*See also:* Embargo; Inter-state relations (China-Japan, China-Japan-US)

**US military representatives in Taiwan**

It was reported that the US would assign military officers to its *de facto* embassy in Taiwan, the so-called American Institute in Taiwan, for the first time in 25 years, reversing a long-standing policy of using civilian contractors. (IHT 22-12-04)

**Anti-secession Act**

As part of its efforts towards reunification the National People's Congress of China enacted an Anti-Secession Act on 14 March 2005. (For text *see* 11 Asian YIL 347) In commenting on the law the Chinese prime minister recalled that the US Congress passed similar resolutions in 1861 with the intent to stave off civil war. (IHT 15-03-05)

Whereas Article 8 of the Law contains the “non-peaceful means” clause, Article 7 affirms that “the state stands for the achievement of peaceful reunification through consultations and negotiations on an equal footing between the two sides of the Taiwan Strait”, while these consultations and negotiations “may be conducted in steps and phases and with flexible and varied modalities”. (IHT 30-03-05)

**Mainland – Taiwan contacts**

The chairman of the leading Taiwan opposition party (the Kuomintang, which governed China before the establishment of the People's Republic in 1949) visited China in late April 2005. Discussions with the Chinese president led to a common opinion in favour of reviving the rapprochement begun in 1992.

The resulting joint communiqué of 29 April 2005 read, *inter alia*: “The parties reached a common understanding on upholding the '92 consensus, opposing Taiwanese independence and striving for peace and stability in the Taiwan Sea.” (*cf.* 3 Asian YIL 366, 491) According to the communiqué the two sides would work to open China's market more broadly to Taiwanese goods, sign a formal peace agreement, and establish military-to-military ties. The two sides would allow Taiwan to join some international bodies, such as the WHO. (IHT 27-04, 01-05-05)

Another Taiwan politician, the leader of the “People First” Party, which favours an eventual reunification of Taiwan with the mainland, visited the mainland in May 2005. In a meeting with the Chinese president on 12 May agreement was reached on a slightly changed linguistic formula to describe relations between the mainland and Taiwan as “[the] two sides of the Strait, one China”. The phrase was immediately rejected by the Taiwanese president. (IHT 03-05, 13-05-05)

**EAST ASIA COMMUNITY**

*See:* Association of South East Asian Nations



## ECONOMIC COOPERATION

### **Sea port project under the auspices of the Bangladesh-India-Myanmar-Sri Lanka- Thailand Economic Grouping (BIMST-EC)**

In the framework of BIMST-EC ([www.bimst-ec.org](http://www.bimst-ec.org)) a project was set up for the building of a deep-sea port in *Dawei* in south Myanmar, which would be connected to *Kanchanaburi* in Thailand by a new highway. This would considerably shorten between India and Thailand cargo transport that at present has to go around the Malayan peninsula. (AToL 12-04-05)

## EMBARGO

### **EU embargo against China on arms sales and US views on its lifting**

On 17 December 2004 the European Union reaffirmed its intention to “continue to work” toward lifting the embargo that was imposed after the 1989 Tianenmen Square incident (on the basis of a non-binding resolution) and to decide on the issue during the following six months. France later urged the other EU states to act accordingly, but some EU states were backing US objections to the lifting. According to these objections a lifting could lead to increased Chinese intimidation of Taiwan, undermine stability in East Asia, and even threaten US troops in the region, as well as harming efforts to improve human rights in China.

On 2 February 2005 the US House of Representatives approved a resolution condemning the EU plans for lifting the embargo. The resolution stated that lifting of the embargo would be “inconsistent with the concept of mutual security interests that lies at the heart of US laws for trans-Atlantic defense cooperation”. The resolution also noted that China had been engaged in an extensive military build-up, including the deployment of a great number of ballistic missiles near the Taiwan Straits, and alleged that China’s military-industrial complex was involved in the transfer of military technology to Iran. Concerning Taiwan the resolution stated that “[t]he EU is directly undermining the security of one of Asia’s most vibrant democracies – our close ally Taiwan”.

During his European visit the US president on 22 February 2005 noted “deep concern” in the US that a lifting of the embargo would change the balance of relations between China and Taiwan and would imply transfer of technology, allowing China to modernize its military and upset the military balance of power in Asia. The US Secretary of State furthermore on 15 March 2005 expressed the hope that the recently adopted Chinese Anti-Secession Law (*see supra* at 267) would dissuade Europe from resuming arms sales to China.

The EU plans included the strengthening of an existing, formally not legally binding 1998 EU code of conduct in order to prevent a flood of arms into China. The code lists criteria on which export licencing decisions should be based. It also called on member states to ensure that the weapons sold would not be used for internal repression, would not prolong or provoke armed conflicts, and would not be used

“aggressively against another country to assert by force a territorial claim”. (IHT 08-10-04, 04-02, 09-02, 23-02, 09-03, 16-03-05)

The European plans to lift the embargo appeared to collapse in late March 2005 after months of intense lobbying by the US and a negative reaction to the recent Chinese Anti-Secession Act (*see supra* at 267). (IHT 23-03-05)

Besides, Japan too expressed its concern in January 2005. It later expressed its strong objection to the lifting when the prime minister met the French president on 27 March 2005 and did so once again later to the EU presidency. (IHT 28-03, 03-05-05; JT 15-01-05)

### **US embargo on use of mapping technology**

The US Defense Department denied the use of advanced mapping technology by its Australian licence holder in the latter’s search for mineral deposits in China. The “Falcon technology” was originally designed as a navigation system for US submarines to avoid undersea mountain ranges. It has been called “the holy grail of the exploration industry”. (IHT 2/3-04-05)

## ENVIRONMENTAL PROTECTION

### **Ban on commercial whaling**

The International Whaling Commission voted on 21 June 2005 to uphold the current ban on commercial whaling dating from 1986, contrary to Japanese wishes. The 66-member Commission voted against a Japanese proposal for regulated commercial whaling which needed a three-quarters majority to pass.

However, Japan said it would, *inter alia*, increase its annual catch of minke whales from 440 to 935. This is done under a six-year “research” whaling programme, extending a previous one started in 1987. (IHT 22-06-05, JT 22-06, 23-06-05)

## EXCLUSIVE ECONOMIC ZONE

### **China – Japan**

(*see also* 11 Asian YIL 288)

The two countries disagree on the boundary line between their exclusive economic zones in the East China Sea in an area where the sub-soil is thought to contain huge quantities of oil and gas, although there is as yet no proof of existing or profitable natural gas veins.

In February 2001 the two sides agreed on a mutual prior notification system. Under this agreement each party must inform the other before entering waters near the other country if these are in an area in which that country “takes interest”.

In April 2002 China resumed its surveys in the disputed areas while meeting the notification obligation. Japan protested, however, when in August 2003 China reached agreement with a number of Chinese and Western companies on the development

of the gas fields and granted concessions (“*Chunxiao*” gas field) in areas on the Japanese side of the Japan-claimed boundary line (the “intermediate line”) and when drilling started in 2004 near the boundary line claimed by Japan. The latter held itself entitled to claim its share if resources in the Chinese EEZ are found to straddle the boundary line.

While protesting, Japan asked China to provide drilling data, but in vain. Japan itself in July 2004 started considering to allow companies to drill on Japan’s side of its claimed boundary, in its turn giving rise to Chinese protests to the effect that the Japanese actions were infringing upon China’s interests and sovereignty, and to Chinese calls for Japan to negotiate a settlement instead of acting unilaterally.

On 13 April 2005 Japan announced that it would grant exploratory drilling rights in waters claimed by China, and would review oil company applications for exploration drilling. (IHT 24-02, 14-04-05; JT 07-07, 09-07, 18-10, 19-10, 27-10, 19-12-04, 17-01, 29-03, 02-04, 31-05-05)

Dozens of Taiwanese fishing boats massed in the East China Sea on 9 June 2005 to protest Japan’s claim to an EEZ close to *Diaoyu* (*Senkaku*) Islands claimed by both Japan and China (as well as by Taiwan). The boats were expelled by the Japanese, after which China lodged a complaint claiming that the expulsion of the fishing boats violated China’s sovereignty. (AToL 10-06, 11-06-05)

## EXTRADITION

### The Fujimori case

Having failed to obtain the extradition of its former president from Japan (*see* 11 Asian YIL 289) Peru made a second request in October 2004 on the basis of corruption charges and alleged irregular payments. (Mainichi Shimbun 17-10-04, JT 17-10-04)

## FOREIGN ASSISTANCE

### US assistance to Asian countries

It was reported in September 2004 that the US Senate Appropriations Committee voted in the 2005 Foreign Operations Bill to provide assistance to Indonesia, Cambodia and Thailand for various security and democracy *qua* human rights purposes. (FEER 30-09-04)

## FOREIGN FORCES IN ASIA

*See also:* Afghanistan; Military cooperation

### Kyrgyzstan

Since the war in Afghanistan, there had been 1,000 US and 800 NATO troops deployed in Kyrgyzstan in support of that war. Yet it was reported that the foreign

minister disclosed in February 2005 that Kyrgyzstan had rejected requests by the US and NATO to deploy surveillance aircraft in the country and that Kyrgyzstan was increasingly looking north and east in its foreign policy priorities, referring to the Collective Security Treaty and the Shanghai Cooperation Organization. (IHT 03-03-05)

## FOREIGN INVESTMENT

### **Chinese bid for US oil company**

One of the largest Chinese state-controlled oil companies, the China National Offshore Oil Corporation (CNOOC), made a bid for the US Californian oil company Unocal on 23 June 2005, two months after Unocal had agreed to be sold to (US) Chevron. Twenty-seven per cent of Unocal's proven oil reserves and seventy-three per cent of its proven natural gas reserves are in Asia. The US Treasury Secretary announced that a review on national security grounds would be likely. (IHT 24-06-05)

## HUMANITARIAN AID

### **Food aid to North Korea**

It was reported in late 2004 that Japan planned to give five billion Yen-worth of food and medical aid by the end of 2004 as part of a promise made during a visit by the Japanese prime minister to Pyongyang in May 2004 (*see* 11 Asian YIL 301). (JT)

The US government announced in June 2005 that it would provide 50,000 tons of food to North Korea. The donation was made in response to an appeal by the World Food Programme and was unrelated to the efforts to persuade North Korea to return to the six-party talks on its nuclear programme.

In 2003 the US provided 100,000 tons of food aid to North Korea, and 50,000 in 2004. (IHT 23-06-05)

### **Thai position towards foreign humanitarian aid**

In the aftermath of the Tsunami disaster of December 2004 Thailand in January 2005 declined a Japanese aid offer of \$20 million, saying it had come to grips with the situation and that the aid should go to countries with greater need of aid. (JT 10-01-05)

## INSURGENTS

### **Aceh, Indonesia**

An Indonesian government delegation and representatives of the *Free Aceh Movement* (GAM: *Gerakan Aceh Merdeka*) met in Helsinki, Finland, on 28-29 January

2005. The talks were held under the auspices of the Crisis Management Initiative (CMI) group under the leadership of the former Finnish president Martti Ahtisaari (see [www.cmi.fi](http://www.cmi.fi)). The realization of the meeting between the two parties was facilitated by the Tsunami disaster on 26 December 2004, which pressed the parties to work together in overcoming the catastrophe. A further meeting took place in February, and a third in April 2005. (IHT 24-01, 27-01-05; Kompas 11-04-05)

## INTERNATIONAL CRIMINAL LAW

### **Indonesia – East Timor: international or municipal adjudication**

(See also: Inter-state relations: East Timor – Indonesia)

It was reported in December 2004 that the Indonesian government had rejected UN plans for the establishment of a Commission of Experts to review Indonesian efforts to try persons responsible for alleged human rights abuses in East Timor in 1999 and, eventually, to recommend the establishment of an international tribunal. Indonesia classified the idea as redundant in view of Indonesian-East Timorese plans to set up a bilateral Commission of Truth and Friendship (CTF).

The East Timorese government first seemed to share a negative view on a Commission of Experts when the East Timorese foreign minister said, *inter alia*: “We prefer focusing on a better relationship between Indonesia and East Timor. The current situation is far more important than what happened in the past”. However, the East Timorese president later said that his government accepted a UN commission that could complement the CTF.

The UN-sponsored Special Crimes Unit set up in Dili for the detection of suspected Indonesian soldiers and Timorese militiamen had jailed seventy-four suspects, yet it was powerless in respect of the extradition of Indonesian military officers. Meanwhile, Indonesian courts had charged eighteen persons, of whom twelve were acquitted and five had their sentences overturned on appeal. (Tempo 16-08-04; JP 24-12-04, 10-03-05)

### **Cambodia**

A donor conference in late March 2005 pledged the funds necessary for the establishment of the projected tribunal for the adjudication of Khmer Rouge crimes (see 10 Asian YIL 357).

The tribunal agreement with the UN of 2003 (*via* [www.cambodia.gov.kh](http://www.cambodia.gov.kh)) was ratified by Cambodia in October 2004. The agreed tribunal structure is that of “Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea”. It includes, *inter alia*, a balance between a numerical majority of Cambodian judges and a numerical minority of international judges, with a “super-majority” mechanism of the necessary vote of at least one international judge. (IHT 2/3-04-05)

**INTERNATIONAL ECONOMIC AND TRADE RELATIONS**

*See also:* Inter-state relations (ASEAN-China); World Trade Organization

**Japan – Mexico**

The Japan-Mexican agreement of 17 September 2004 was Japan's first comprehensive bilateral free trade agreement after that with Singapore of January 2002. It was expected that it would provide momentum to efforts to conclude similar agreements with South Korea, Malaysia, the Philippines, and Thailand. (JT 19-09-04)

**Japan – Malaysia**

The Japanese and Malaysian prime ministers reached agreement in May 2005 on a bilateral free trade agreement, the first for Malaysia, including the abolition of most tariffs in 2015. Significantly, custom duties on most finished motor vehicles would be removed gradually, but within a shorter period for larger cars than those for smaller cars. Signature was scheduled for later in the year.

The Japanese government in late December 2004 approved a basic plan of promoting (bilateral) free trade agreements with priority to agreements with Asian countries in accordance with the efforts toward an (East) Asian Community. (JT 22-12-04, 26-05-05)

**Japan – Philippines**

On the sidelines of the ASEAN summit meeting at Vientiane in late November 2004 the two countries agreed to cut tariffs on various goods starting in 2006, thus opening the way for a later economic cooperation accord. (IHT 30-11-04)

**Singapore – Korea (South)**

On the same occasion the two countries concluded negotiations on a free-trade agreement that would serve as a model for similar agreements between South Korea and other Southeast Asian countries. (IHT 30-11-04)

**INTER-STATE RELATIONS: GENERAL ASPECTS****Afghanistan – US**

The president of Afghanistan announced on 13 April 2005 that he would send a formal request to the US president seeking a long-term, strategic relationship between the two countries, including economic assistance as well as security guarantees and military cooperation. He referred to the US as the foreign power that had restored sovereignty to the Afghan people and that was already at the forefront of assistance to rebuild Afghanistan's security and economy, and defined the intended strategic security as enabling Afghanistan to defend itself and to continue to prosper, and stop the possibility of interferences in Afghanistan. (IHT 14-04-05)

**ASEAN – China**

On the occasion of the ASEAN summit meeting in November 2004 at Vientiane the ASEAN member states and China signed a free-trade agreement.

Under the agreement tariff and non-tariff barriers will be reduced and a mechanism to settle disputes was set up. The six more economically advanced ASEAN member states (Brunei, Indonesia, Malaysia, The Philippines, Singapore and Thailand) and China would begin cutting tariffs on 1 July 2005 with the aim of reducing duties on 4,000 categories of goods to between 5 per cent and zero by 2010, while the other member states will have until 2015 to comply with the target. Meanwhile each party to the agreement may nominate up to 400 goods as “sensitive goods” for which the tariffs will not be reduced below 20 per cent until 2012.

At the meeting China also signed a strategic declaration committing China to good behaviour in Southeast Asia, including the contentious area of the South China Sea. (WSWS 20-12-04; IHT 29-11, 30-11-04)

**Asian-African Conference, “New Asian-African Strategic Partnership”**

The fiftieth anniversary of the 1955 Asian African Conference was commemorated on 22-24 April 2005 by representatives of ninety Asian and African countries at Bandung, Indonesia, the place where the original conference of twenty-nine countries was held. The gathering resulted in the signing of an accord of “New Asian-African Strategic Partnership”.

The participants agreed to meet again in South Africa in 2009, hoping that the Asian-African Summit would become a regular event. (IHT 25-04-05)

[Many of the countries that attended the Bandung summit in 1955 convened in Belgrade in 1961 at the initiative of Yugoslavia and Egypt to create the Non-aligned Movement.]

**China – European Union**

*See:* Embargo

**China – India**

China and India signed an agreement for a “strategic partnership for peace and prosperity” on 11 April 2005, during a visit to India by the Chinese prime minister. Furthermore, the two countries signed a series of agreements on improving economic ties and on resolving the decades-old dispute over their 3,500-kilometre Himalayan border. The latter did not contain a definitive settlement and was more a kind of (three-stage) roadmap, merely emphasizing that the two countries would make “meaningful and mutually acceptable adjustments to their respective positions”. It stressed, however, that the border issue would not be permitted to sour broader relations between the two countries. (IHT 12-04-05)

## China – Japan

### Japanese visa for former Taiwan president

Japan in December 2004 issued a tourist visa to the former Taiwan president Lee Teng-hui despite renewed Chinese appeals for Japan not to do so, adding a major irritant to Japan's already-tense relations with China. China opposes contact between Taiwan leaders, and former leaders, and other countries. However, the Japanese prime minister said that as the person concerned wanted to travel as a private citizen, there was no reason to turn down his visa application. (IHT 22-12-04)

### *Anti-Japanese demonstrations*

Relations between the two countries deteriorated sharply in March 2005, caused by a combination of several factors, such as a dispute about the delineation of the border line between their exclusive economic zone in the East China Sea (Sea of Japan) (*see supra* at 269), the presentation in recent Japanese history textbooks of Japan's role in the Second World War including Japan's failure to atone for its war crimes in World War II (*see infra*), and the Japanese participation in US plans concerning the defence of Taiwan (*see infra*: China-Japan-US, and at 283).

On the weekends of 9-10 and 16-17 April 2005 further waves of mass protest erupted in several places in China although the government tried to ease the tensions with Japan. In Guangzhou where demonstrators gathered near the Japanese consulate, police blocked them from getting close to the building. In Shanghai and Shenyang protesters also marched on and attacked the Japanese consulate. In Beijing where demonstrators tried to storm the residence of the Japanese ambassador, riot police broke up the confrontation.

The Japanese foreign minister summoned the Chinese ambassador and protested at the demonstrations. He demanded an apology from China and also compensation. The ambassador did not apologize, but said that the Chinese government condemned the demonstrations. The Chinese foreign ministry issued a statement chiding the protesters though avoiding apologies, while the spokesman actually said that Japan was to blame for the anti-Japanese violence and stressed that Japan should expect no apology. It was reported that China later did pay compensation for the damage caused at the Japanese embassy and the ambassador's residence.

The Japanese foreign minister visited China on 18 April in an effort to ease friction between the two countries. In discussing steps to improve relations the Japanese side proposed setting up a group of experts to study the history of Sino-Japanese relations. On his renewed demand for an apology and compensation for the damage done, the Chinese minister was reported to have said that "the Chinese government has never done anything for which it has to apologize to the Japanese people". On the other hand, he said Japan was to blame for "a series of things that have hurt the feelings of the Chinese people" over issues such as relations with Taiwan and "the subject of history". However, the Chinese authorities did call for a stop of the riots, and China seemed to soften its stance toward Japan when it declared on 22 April it would no longer tolerate anti-Japanese protests, warning that "unauthorized marches" were illegal and that the police would take strong measures against those vandalizing



property. The Chinese president and the Japanese prime minister met at the fringes of the Commemorative Bandung Summit (*see supra*) to ease existing strains (*see infra*: **Japan - Asia**). (IHT 11-04, 12-04, 18-04, 21-04, 23/24-04, 25-04-05, JT 10-04, 11-04, 13-04, 18-04, 17-06-05)

In May 2005 the Chinese deputy prime minister, who visited Japan mainly for trade purposes, unexpectedly and abruptly cancelled a scheduled meeting with the Japanese prime minister that she had requested, a few hours before it was to take place. It was initially suggested that this might have been related to urgent matters in China, but the following day the spokesman of the Chinese foreign ministry said that China was extremely dissatisfied that during the stay of the Chinese minister in Japan suggestions were raised in Japanese circles on the possibility of the Japanese prime minister's visit to the controversial Yasukuni shrine and that "clearly, in these circumstances there was not the necessary atmosphere for a meeting between the two leaders". (IHT 24-05, 25-05-05, JT 24-05, 25-05-05)

### **China – Japan / US**

Japan and the US issued a joint statement on 20 February 2005, which contained a list of "common strategic objectives" among which was "encouraging the peaceful resolution of issues concerning the Taiwan Strait". It also recognized Taiwan as a "mutual security concern". China issued a denunciation of the declaration, opposing it since it concerned Taiwan as part of China and meddled in the internal affairs of China and hurt Chinese sovereignty.

The statement represented a departure from the previous military cooperation statement of 1997, which called for the two countries to work together in the "area surrounding Japan" (*see* 7 Asian YIL 458). The Taiwanese chief representative in Japan said the new policy statement represented a very important gain for Taiwan. A 1960 US-Japanese security pact simply called for joint cooperation on "Far East" regional security. (IHT 21-02-05, ATOL 23-02-05)

### **China – Korea (Republic of)**

A dispute emerged between the two countries about the position and boundaries of the ancient Korean kingdom of *Koguryo* that ruled much of present-day North Korea and Manchuria from 37 BC to 668 AD when it was conquered by the unifying southern kingdom of *Shilla* (which, together with *Koguryo* and *Paekje*, constituted Korea's three founding kingdoms).

*Koguryo* is seen by Koreans as the forerunner of their nation, but around late July or early August 2004 the Chinese foreign ministry deleted references to *Koguryo* from the Korean history section of its website. Besides an official Chinese study group issued academic papers bolstering the position that *Koguryo* was in fact merely a Chinese vassal state. The population of North-east China consists of, among others, about two million ethnic Koreans.

On 24 August 2004 the South Korean foreign ministry announced a five-point "understanding", which referred to the *Koguryo* question as a pending issue between the two countries and which apparently implied the absence of Chinese intention to claim the kingdom as part of its history. The understanding also called for efforts

to prevent the dispute from turning into a political issue, and for academic exchanges on the matter. North Korea remained silent on the dispute.

UNESCO accepted applications of both North Korea and China to have Koguryo tombs, murals and other cultural items on each side of the *Yula (Amok)* River registered as World Heritage sites of their own country. It avoided, however, indicating the national parentage of the ancient kingdom. (IHT 25-08-04, ATOL 11-08-04)

### **China – Russia**

During a visit by the Russian president in mid-October 2004 the two countries signed 13 agreements, including a boundary treaty (*see supra* at 266), but no mention was made of a prospective oil pipeline from Siberia to China (*see* 11 Asian YIL 326, and *infra* at 294).

Among the agreements was a joint declaration supporting a common position against terrorism. The declaration explicitly mentioned the rebels in Chechnya and in Xinjiang province as “part of international terrorism” who “should become a target of the joint antiterrorist struggle by the international community”. (IHT 15-10-04)

### **China – US**

*See also:* Divided states, Embargo; *supra* (China-Japan-US), Monetary matters

During a visit by the US national security adviser to China in early July 2004 the Chinese leadership warned that continued US sales of high-tech weapons to Taiwan would increase the chances of conflict and was contrary to a Sino-US agreement that the weapons sales would be gradually phased out. On her part the US official emphasized that the US did not support Taiwan independence but that the weapons sales were an obligation under the (US) Taiwan Relations Act. (IHT 09-07-04)

### **China – Vatican**

Upon the election of a new Roman Catholic Pope in April 2005 China reiterated its position that the Vatican and China could establish formal relations only if the Vatican dissolved its diplomatic links with the authorities in Taiwan and promised not to interfere in China’s internal affairs.

Starting in early 2004 there had been several indirect, unofficial and exploratory meetings in Rome and Beijing between representatives of both sides, indicating increased willingness to yield on the differences. Relations reached a low point in 2000 when the Pope canonized 120 Chinese Catholics as martyrs on 1 October, the anniversary of the Chinese Communist revolution.

The official (state-controlled) Chinese Catholic church accepts the Pope as a spiritual leader but not as the organizational head of the Chinese church, and consequently the latter condition denies a formal role for the Vatican in the appointment of clergy. In Vietnam the government appoints the bishops on the recommendation of the Pope. (IHT 21-04, 17-05-05)

### **East Timor – Indonesia**

In March 2005 the two countries reached agreement on setting up a Commission of Truth and Friendship (CTF) to deal with human rights atrocities committed by pro-Indonesian militia in the wake of the 1999 vote for independence in East Timor. The Commission is to function for a two-year period and would have neither political nor judicial power. It would only make recommendations to the responsible national institutions, such as parliaments, as a basis for decision-making. It was to consist of five Indonesian and five Timorese members, appointed by the respective governments. (JP 10-03-05)

### **India – EU**

India and the EU signed a “strategic partnership” agreement on 8 November 2004, aimed at tightening economic and political ties. (IHT 09-11-04)

### **India – Pakistan**

In April 2005 the Pakistani president (who was born in Delhi) visited India and met the Indian prime minister (who was born in the present-day Pakistani province of Punjab) amid signs of warming relations between the two countries. (IHT 18-04-05)

### **India – US**

During her visit to India in March 2005 the US Secretary of State warned India about US concerns over plans for a gas pipeline running between India and Iran (*see*: Oil and gas, *infra* at 295). The pipeline would extend 2,775 kilometres, a quarter of which through Pakistani territory, and was tentatively scheduled for completion by 2009. (IHT 17-03-05)

In late June 2005 the two countries signed a ten-year defence agreement, titled “New Framework for the US-India Defence Relationship”. India was thus the only country to have concluded a strategic defence partnership with both the US and Russia. (AToL 01-07-05)

### **Iran – Iraq**

The two countries re-established diplomatic relations in September 2004, but many issues, including a peace treaty following the 1980-1988 war, had yet remained unresolved.

In May 2005 the Iranian foreign minister visited Iraq. On that occasion he assured his counterpart that Iran would not interfere in its neighbour’s affairs: “Iraqis are in charge of their own affairs. Any interference would be an insult to the Iraqi people.” (IHT 18-05-05)

### **Iran – UK**

In connection with the 21 June 2004 incident when UK boats were arrested on the Shatt-al-Arab for entering Iranian territorial waters (*see* 11 Asian YIL 298-299) the British crewmen insisted that they were “forcibly escorted” over the border. The

UK foreign secretary urged Iran on 1 July to return navigational equipment taken from the sailors. (IHT 02-07-04)

### **Iran – US**

It was reported that the US had been conducting secret reconnaissance missions inside Iran at least since summer 2004 aiming at identifying targets that could be destroyed by precision strikes and short-term commando raids. While the US Defense Department rejected the report, the US president said in an interview on 17 January 2005 he could not rule out a resort to military action if the US failed to persuade Iran to abandon a nuclear energy programme that the US considered a cover for developing nuclear weapons. (IHT 19-01-05)

The newly elected president of Iran said in his first press conference, *inter alia*: “Our nation is continuing on the path of progress and on this path has no significant need for the United States.

... We would like to have relations with any country that does not have hostile relations (*sic*) toward us. ...” (IHT 27-06-05)

### **Iran – UK / US**

The US president in his “State of the Union” address on 2 February 2005 accused Iran of being “the world’s primary state sponsor of terror, pursuing nuclear weapons while depriving its people of the freedom they seek and deserve.” The spokesman of Iran’s foreign ministry responded by saying that the remarks were “a repetition of his former groundless claims and accusations”.

The US accusation was echoed by the UK prime minister, who several days later said: “It [Iran] certainly does sponsor terrorism. There’s no doubt about that at all.” (IHT 04-02, 09-02-05)

### **Japan – Asia**

#### ***The textbook issue***

The Japanese ministry of education on 5 April 2005 approved one hundred and three textbooks for use in junior high schools, including a revised edition of a contentious history book criticized for glossing over Japan’s wartime aggression. The Japanese foreign ministry emphasized that the officially approved books did not necessarily reflect Japanese policy. [In 2001 the first edition of one of the books raised tensions with China and South Korea, *see* 10 Asian YIL 373.]

On the same day the Chinese embassy in Japan filed a protest for the alleged alteration of historical facts, damaging public sentiment of Asian nations who had been victims of Japanese aggression. (JT 06-04-05)

#### ***Japanese apologies***

Using the occasion of the fiftieth anniversary of the Asian-African Conference at Bandung (*see supra* at 274) and speaking to the representatives of more than hundred

countries, the Japanese prime minister on 22 April 2005 made a public apology for Japan's aggression in the Second World War:

“In the past, Japan, through its colonial rule and aggression, caused tremendous damage and suffering to the people of many countries, particularly to those of Asian nations. ... Japan squarely faces these facts of history in a spirit of humility. ... With feelings of deep remorse and heartfelt apology always engraved in mind, Japan has resolutely maintained ... its principle of resolving all matters by peaceful means, without recourse to use of force.”

[The last time a Japanese prime minister made such a declaration was in 1991 in a speech in Singapore.] (IHT 23/24-04-05, JT 23-04-05)

### **Japan – Korea (North)**

There was continuous squabbling between the two countries on the matter of actual or alleged abductions of Japanese nationals by North Korea in past years and the abductees' whereabouts. In 2002 North Korea had admitted to the abductions and had apologized for the abduction of thirteen persons in the period between 1977 till 1982. They said eight of them had died and the other five were returned to Japan in 2002 (*see* 11 Asian YIL 300) The Japanese list, however, comprised seventeen names.

In July 2004 Japan demanded a report, earlier promised by North Korea, about eight allegedly deceased abductees and two others who, according to the North Korean side, had never been in North Korea. North Korea provided medical records pertaining to two of the eight persons. In December 2004 the Japanese prime minister declared that the North Korean explanations were unsatisfactory. In the case of *Yokota Megumi*, abducted from Japan in 1977 as a 13-year old schoolgirl, it was said that the cremated human remains presented as evidence of her death did in fact not belong to the person concerned, although doubts later arose about the correctness of the methods used in the DNA analysis. Later, North Korea said the talks on the fate of Japanese abductees were no longer meaningful as Japan was criticizing the results of North Korean investigations.

By way of sanction in retaliation of the unsatisfactory and incomplete settlement of the issue of North Korean abductions of Japanese nationals Japan in early 2005 introduced an insurance obligation for certain categories of North Korean ships calling at Japanese ports (*see* the *Mangyongbong* incident, 11 Asian YIL 301). (JT 23-07, 03-11-04, 01-01, 02-03-05, ATOL 23-06-05)

Separate from that of the abductees, there was the issue of a group of four Japanese former members of the “Red Army Faction”, who had been involved in the hijacking of a Japan Airlines plane on 31 March 1970. They were living in North Korea and Japan had repeatedly demanded their extradition. They themselves expressed their wish to return to Japan; the North Korean government did not raise objections (Of the initial nine hijackers three had since died and two others had returned to Japan earlier). (JT 06-07-04)

### **Japan – Korea (South)**

The South Korean president and the Japanese prime minister met on 20 June 2005. They failed to resolve their differences over Japan's militaristic past and remained far apart on how to chart their future together in Northeast Asia. The meeting ended with two low-level agreements. They would conduct a second joint study of interpretations of history and Japan would study a Korean suggestion that Japan build a national memorial for the war dead without including Yasukuni's war criminals. [A joint history study group had actually already been agreed in principle at a summit meeting of the two countries' presidents in October 2001.] (IHT 21-06-05)

### **Korea (North) – US**

In late October 2004 the US together with its allies conducted joint exercises in the Sea of Japan, named "Team Samurai" and the twelfth in the framework of the Proliferation Security Initiative, a programme designed to block illicit cargoes from an unnamed country (*see* 11 Asian YIL 287). North Korea in a letter to the UN Secretary-General warned that the exercise "constitutes a breach of the UN Charter, international law and order and a dangerous act that could entail global instability". (IHT 24-08, 29-10-04)

Meanwhile, the US Secretary of State in January 2005 referred to North Korea as an "outpost of tyranny". (IHT 11-02-05)

### **Pakistan – US**

The US announced in March 2005 that it would sell F-16 fighter planes to Pakistan. This had no connection with the issue of the thirty-two F-16 planes which were ordered and paid fifteen years earlier but were never delivered (*see* Asian YIL Vol.1:271, Vol.2:286, Vol.4:508). These planes were sold to third countries and Pakistan was reimbursed the amount paid. (IHT 18-04-05, ATOL 29-03-05)

### **(NON-)INTERVENTION**

*See:* Association of South East Asian Nations (Chairmanship of Myanmar), Inter-state relations (Iran-Iraq)

### **IRAQ WAR**

#### **South Korean military contribution**

It was reported that South Korea planned to send an additional 3,000 troops to join the 660 already in Iraq. The first deployment was comprised of military engineers and doctors, but this time it was said that the government planned to send combat troops, making the South Korean contingent the third largest behind the US and Britain. (IHT 01-07-04)

### **Japanese military contribution**

It was reported that Japan had decided to keep its forces stationed in Iraq as participants in the multi-national force (*see* 11 Asian YIL 306) following the hand-over of formal sovereignty to an Iraqi government. (JT 06-07-04)

### **Japan and the question of the legitimacy of the war**

In an interview on 15 September 2004 the UN Secretary-General said that permission from the UN Security Council was needed for the war in Iraq and that consequently from the point of view of the UN Charter the war was illegal.

Resolution 1441 of the UN Security Council, adopted in November 2002, contained the warning of “serious consequences” if Iraq were found to be in breach of earlier resolutions. According to the UN Secretary-General it had been “up to the Security Council to approve or determine what those consequences should be”.

In contrast to this comment the governments of the countries that supported the US-led war, insisted that the war was justified under international law. According to them, despite the absence of a UN resolution explicitly permitting the invasion, the action was justified because Iraq had failed to comply with previous resolutions requiring the country to disarm and, specifically, to abandon its programs for acquiring weapons of mass destruction and long-range missiles.

The Japanese chief cabinet secretary, the main Japanese spokesman, said that the Secretary-General’s remarks had been “unclear” and that Japanese officials would make inquiries about his “real meaning”. The Japanese troops sent to Iraq in December 2003 on a non-combat, humanitarian mission, constituted the first Japanese military deployment since the Second World War in a country where fighting was under way. On 9 December 2004 the Japanese government decided to extend the mission of the Japanese troops beyond its expiration that month. The Japanese prime minister motivated the decision by saying: “Japan’s foreign policy is based on the Japan-US alliance and international cooperation.. As an ally, we need to carry out as much as possible humanitarian activity that is suitable for Japan, and it is also necessary as a country to attach importance to international cooperation that meets our national interests.”

Japan also indicated that it was not yet convinced of the absence of weapons of mass destruction. Upon an admission by the US Secretary of State at a hearing of the US Senate that WMD were unlikely to be found in Iraq the Japanese Chief Cabinet Secretary said that it was unclear if the US Secretary was saying the US had failed to discover WMD despite its all-out search, or that US intelligence about Iraq’s WMD programme was flawed from the start. Since it was the US that had been conducting the investigation in Iraq, it was not possible for Japan to say on its own if such weapons existed: “It is not appropriate to give clear comments of our view at this stage”. Also, one day before the first anniversary of the beginning of the war the prime minister said “I still believe [weapons of mass destruction] exist. I believe it was a right war.” (IHT 17-09, 10-12-04, JT 15-09, 16-09-04)

## JAPAN'S MILITARY ROLE

*See also:* Iraq War

### **New military policy**

In a break with its pacifist tradition Japan on 10 December 2004 announced plans (the National Defence Programme Outline) to shift its military focus to guarding against North Korean missiles or Chinese incursions on Japan's southernmost islands, remotely located off Kyushu and Okinawa. In another break with the past, the plan called for selectively ending Japan's long-standing ban on arms exports. The export of components to the US would be part of the joint development of a missile defence system with the US. Paradoxically the plans implied a budget reduction. Japan is able to keep its defence spending low because of its security alliance with the US. China immediately expressed its concern about the Japanese policy alteration. (IHT 11/12-12-04; JT 16-01-05; JT 12-12-04)

### **Overseas military operation**

The Japanese relief efforts in Indonesia after the Tsunami disaster of December 2004 were classified as the largest Japanese overseas military operation since World War II. (IHT 28-01-05)

## JURISDICTION

*See:* Insurgents

## LAW OF THE SEA

### **Submarine passage through territorial waters**

A Chinese nuclear-powered submarine on 10 November 2004 passed through Japanese territorial waters between two Japanese islands, about 400 kilometres southwest from Okinawa near the Sakishima Islands, failing to identify itself by raising its national flag as required by international law, and without surfacing. The following day it had returned to international waters west of Okinawa.

Japan lodged a protest and demanded an apology for the two-hour intrusion. China later admitted the incident and called it "regrettable", blaming "technical errors". (IHT 11/12-12-04; JT 12-11, 13-11, 17-11-04; AToL 17-11-04)

## MIGRANT WORKERS

### **Foreign workers in and from Southeast Asia**

About 400,000 undocumented Indonesian workers in Malaysia were facing prison and lash penalties if they had not left the country by a twice-extended deadline of 1 March 2005.



Malaysia had a workforce of around eleven million and, in addition, half a million legal and, initially, an estimated one million illegal foreign workers (estimates differ) of whom roughly half had left the country following an amnesty. Most of the foreign workers in Malaysia were from Indonesia, next to large numbers from the Philippines, Bangladesh and India. In its efforts to keep illegal workers away Malaysia had built a concrete wall along part of its border with Thailand, and since 2002 it had arrested more than 18,000 illegal foreigners. With regard to Indonesians it was considered questionable whether it would be possible to break time-honoured migration patterns from Indonesia (Sumatra) across the strait to the Malay Peninsula.

In Singapore there were approximately 150,000 foreign domestic servants, mostly from Indonesia.

The Philippines is second to Indonesia as labour supplier within ASEAN, while Thailand was described as both a supplier of labour, mainly to Northeast Asia and the Gulf, and a recipient of more than one million mostly illegal (“undocumented”) workers from Myanmar and Cambodia.

Japan announced in early April 2005 it would increase its intake of foreign workers to make up for an anticipated labour shortfall (IHT 16-02, 05-04-05)

## MILITARY ALLIANCES

*See:* Iraq War

## MILITARY COOPERATION

### **Central Asia – Russia**

*See also:* Borders

Under an agreement of 16 October 2004 Russia obtained a permanent military base in Tajikistan, after having obtained a similar facility in Kyrgyzstan in 2003. The Russian moves followed an increased US military profile in Central Asia since the 11 September attacks in the US, which served its operations in Afghanistan..

In exchange Russia agreed to forgive part of existing Tajik debts to Russia and pledges for some \$2 billion in investments over the next five years. (IHT 18-10-04)

### **India – Sri Lanka**

It was reported in late October 2004 that the two countries had finalized a draft bilateral defence cooperation agreement. The proposed agreement was described as general in nature, falling in the category of a standard agreement, formalizing existing cooperation and providing a framework for cooperation in the future. (AtoL 27-10-04) [Previously an agreement of 1987 aimed at resolving the ethnic conflict at Sri Lanka, leading to Indian troops being deployed in northwest Sri Lanka in the period October 1987 - March 1990.]

## **Indonesia – US**

The US Congress, concerned about Indonesia's human rights record, curbed military ties in 1992, and cut them back further in 2000 because of the East Timor dispute. In early 2005 it was reported that the US had moved to restart US training of Indonesian officers, which includes modern warfare methods, the American system of civilian control over the military, accountability and human rights issues (other Asian military receiving this training programme included those of Thailand, Malaysia, India and Pakistan).

However, US Congressional approval was needed for actual resumption. This approval was made conditional upon Indonesian cooperation in an FBI investigation into the killing in 2002 of two American schoolteachers in the Indonesian province of Papua. Such cooperation was allegedly blocked by the Indonesian army, while there were suspicions of involvement by elements of the Indonesian military.

While dispatching spare parts for the aged Indonesian fleet of military transport planes the US did not yet plan to remove its ban on the sale of weapons. (IHT 08-02-05)

## **MINORITIES**

### **Muslims in Southern Thailand**

A riot erupted in the southern Thai province of Naratiwat on 25 October 2004 (the "Tak Bai riot") when a crowd gathered outside a police station to demand the release of six men arrested on suspicion of stealing weapons from a military base earlier in the year and distributing them to Islamic militants. After the riot 78 persons died, most of them by suffocation, when the army and police loaded 1,300 persons arrested in the course of the violence into overloaded army trucks. Besides, six persons were reportedly shot and killed by the army.

The casualties were the latest of more than 300 who had died in violence in south Thailand in 2004. The prime minister described those involved in the riots as supporting separatism. Among the international response Malaysia and Indonesia called for an inquiry.

[Thailand's three southern, mainly Muslim, provinces once formed the Sultanate of Pattani. In the early 20th century the three sultanates of Kedah, Perlis and Terengganu, presently part of Malaysia, were annexed by the British, yet Pattani, which remained part of Thailand, was not. Muslims account for ten per cent of the 63 million population of Thailand.] (IHT 27-10, 28-10-04)

## **MONETARY MATTERS**

### **Asian monetary arrangements**

On the fringes of the annual meeting of the Asian Development Bank in Istanbul in May 2005 Asian finance ministers took another step toward creating a set of confidence-building measures that might eventually develop into some sort of Asian

monetary fund (cf. the abortive efforts in 1997, 8 Asian YIL 294). The finance ministers of thirteen Asian countries agreed to enhance the modest mechanism that was first set up in Chiang Mai in 2000 (*see* 9 Asian YIL 409) and that allows countries to swap their foreign reserves to ease liquidity problems on a bilateral basis. The bilateral basis was to be transformed into a single multilateral process by increasing the size of the swaps and developing a surveillance mechanism similar to that currently applied by the IMF. The process was started by a system of bilateral mutual swap agreements among South Korea, Japan and China. (IHT 13-05-05, JT 29-05-05)

### **US warning on Chinese currency**

The US semi-annual Currency Report warned China to move to a more flexible exchange rate for its currency within six months or, alternatively, be formally designated by the US Treasury Department under US law as a currency manipulating country. Such finding would trigger bilateral negotiations on the exchange rate and possible retaliatory action.

The report read, *inter alia*: “The fixed exchange rate that China now maintains is a substantial distortion to world markets, blocking the price mechanism and impeding adjustment of international imbalances”. (IHT 18-05-05)

### **IMF voting system**

It was reported that, in an effort to keep (Asian) states tied to the IMF system of international currency regulation (“preserving the centrality of the IMF in the global financial system”), the US was pushing a change of the IMF voting system by enhancing the voting power of Asian states with rising economic power. (AToL 11-06-05)

## **NUCLEAR ENERGY ISSUES**

### **Joint nuclear fusion reactor project**

An “International Thermo-nuclear Experimental Reactor” (ITER) project to emulate the sun’s nuclear fusion had been set up in 1992 and was to be jointly funded by the US, Russia, Japan, South Korea, China, and the EU.

There were competing bids from France and Japan to host the reactor. Japan was backed by the US and South Korea, France by China and Russia. Later Japan consented to give up its bid in return of substantial compensation by a much lower financial contribution, the construction of the project’s main research facility in Japan and twenty per cent of the jobs at the head office including the top post of the organization. The consortium also promised Japan that any subsequent fusion reactor would be built there. It was reported that China and South Korea were not happy with the concessions granted to Japan that were seen as preferential treatment. (IHT 03-05, 23-06, 28-06, 29-06-05, JT 26-06-05)

[Nuclear fusion is the process by which the atomic nuclei are forced together, releasing huge amounts of energy, as with the sun or the hydrogen bomb. In contradistinction to nuclear fission, it does not produce radioactive waste.]

## **Review of Non-Proliferation Treaty**

A conference on the review of the 1970 Nuclear Non-Proliferation Treaty was held in May 2005 yet did not produce a new action plan. (IHT 28/29-05-05)

### **Iran**

*See also:* Inter-state relations (Iran-US)

#### ***Western objections against Iran's nuclear ambitions***

Iran announced on 13 July 2004 that it would resume negotiations with the three EU countries over its disputed nuclear program. Iran was angered in June 2004 when it was rebuked for poor cooperation by a tough IAEA resolution (*see* 11 Asian YIL 317). It accused the European countries of not fulfilling their promise to close Iran's nuclear dossier and, in response, had resumed its programme of building centrifuges (though not its enrichment programme), considering its suspension under an October 2003 agreement as a temporary one (*see* 11 Asian YIL 316). It referred to its contracts with Russia on the building of several nuclear reactors for the production of electricity.

Talks between officials from the three EU countries and Iran late July in Paris produced "no substantial progress". The EU countries wanted Iran to stop its activity on the nuclear fuel cycle as the US suspected Iran of using a civilian nuclear programme as a cover for a secret nuclear weapons project. (IHT 14-07, 28-07, 02-08, 23-08-04)

News reports early September 2004 referred to an IAEA report which mentioned the Iranian intention to terminate the suspension of its enrichment processes and to re-start the conversion of forty tons of raw uranium in mineral form ("yellow cake") into uranium hexafluoride. [Spun in centrifuges uranium hexafluoride produces enriched uranium that in turn can be used to generate power or make nuclear war-heads, depending on the degree of enrichment. The phrase "nuclear fuel cycle" refers to everything from mining uranium ore to reprocessing nuclear waste]. (IHT 02-09-04)

On 12 September 2004 Iran said that abandonment of uranium enrichment and of carrying out the nuclear fuel cycle, a technology it already possessed, was out of the question, calling enrichment a legitimate right of all IAEA members. It was, however, ready to give any sort of guarantees within the framework of the "additional protocol" (*see* 11 Asian YIL 316) that it would only make peaceful use of nuclear energy. (IHT 13-09-04)

On his part the IAEA director-general called on Iran to fully suspend its enrichment programme and to do its utmost to build the required confidence until the agency was able to assure the world that Iran had no covert weapons program. The European strategy was said to consist of, essentially, trying to persuade Iran to give up nuclear fuel-making capabilities in exchange for a guarantee that it would be enabled to run a peaceful nuclear programme. On the other hand the US held that Iran had forfeited its right to any nuclear programme by concealing its enrichment for nearly two decades. (IHT 14-09, 17-09, 18/19-09-04)

On 18 September 2004 the IAEA Board of Governors adopted a resolution (GOV/2004/79) which, in its preambular paragraphs, noted the Director General's

assessment of the Agency's "steady progress towards understanding Iran's nuclear programmes", and "recognise[d] the right of states to the development and practical application of atomic energy for peaceful purposes ... consistent with their Treaty obligations, with due consideration for the needs of the developing countries". In its first operative paragraph the resolution "strongly urge[d]" Iran, *inter alia*, "to take all steps within its power to clarify the outstanding issues before the Board's 25 November meeting, specifically including the sources and reasons for enriched uranium contamination, and the import, manufacture, and use of centrifuges". This demand referred, *inter alia*, to the discovery, by the agency, of contamination by highly enriched uranium at two sites in Iran that, as an IAEA report said, "may not have resulted from the enrichment of uranium at these locations" but had come from imported equipment.

With regard to the enrichment procedure the resolution in its preambular part "not[ed] with serious concern" that Iran had not suspended "all enrichment-related and reprocessing activities" as notified to the IAEA on 29 December 2003 and 24 February 2004 (*see* 11 Asian YIL 316).

[“Reprocessing” is the conversion of uranium into uranium hexafluoride and constitutes a stage preceding enrichment. “Enrichment” *expressis verbis* refers to the concentrating of the 235 isotope in the gas with high-speed centrifuges, which may result in “low-enriched uranium”, a 3.5 per cent concentration for use in nuclear power plants. On the other hand, “high-enrichment” results in high concentrations of the isotope necessary for a nuclear weapon. Iran reportedly possessed less than thousand centrifuges. Reprocessing did not explicitly fall under the Iranian suspension commitment, and enrichment *per se* is not prohibited by the Non-proliferation Treaty.]

In paragraph 3 of its operative part the resolution “stresses that such suspension would provide the Board with additional confidence in Iran’s future activities”. It therefore “consider[ed] it necessary, to promote confidence, that Iran immediately suspend all enrichment-related activities, including the manufacture or import of centrifuge components, the assembly and testing of centrifuges”. The resolution in its operative paragraph 4 also “[c]all[ed] again on Iran, as a further confidence-building measure, voluntarily to reconsider its decision to start construction of a research reactor moderated by heavy water”.

Iran rejected the call for further suspension of enrichment-related activities and on 21 September announced it had started the conversion process. Besides, there were voices from the Iranian parliament calling for non-ratification of the additional protocol and even for withdrawal from the Non-Proliferation Treaty. (IHT 02-09, 20-09, 22-09-04)

In October 2004 the three EU members France, Germany and the UK (the “EU-3”) made an offer to Iran consisting of technology for the building of light-water reactor systems in exchange for an indefinite suspension of the latter’s uranium enrichment programme and related activities such as reprocessing uranium and the building of a heavy-water research reactor. The offer also included the resumption of talks on a trade pact (with an eye to Iran’s entry into the WTO), guarantees of Russian nuclear fuel, and assistance on a range of “political and security issues” such as treating the Iranian resistance group “People’s Mujahadeen” as a “terrorist organization”. Iran

considered the offer, and then rejected it, urging a “more balanced” proposal. (IHT 22-10, 25-10-04)

A preliminary draft agreement was after all worked out on 7 November (IHT 09-11-04) to which Iran responded on 11 November. Iran wanted the suspension to be limited to six months and to still be allowed to conduct certain enrichment activities (*see infra*). (IHT 13/14-11-04) On 14 November Iran informed the IAEA that it was prepared to suspend its uranium enrichment activities as part of a deal with the EU and that the suspension would remain in place as long as the talks with the EU regarding a final solution would last. These talks were later estimated to be completed within a few months after their projected start in January 2005. Iran repeated its emphasis on the temporary character of its freeze on uranium enrichment as late as the end of January 2005. The tentative agreement was confirmed by the European side although it kept awaiting further official Iranian approval. There was also (*see supra*) the Iranian request for an exemption from the suspension of its enrichment programme for a limited number (twenty) of centrifuges for research purposes. It linked its demand with its consent for IAEA monitoring of the centrifuges.

The agreement between Iran and the EU-3 related exclusively to uranium enrichment and was not concerned with the different process of production of plutonium by heavy-water reactors. Plutonium is often preferred over enriched uranium for compact warheads. It was said that the EU-3 gave priority to the uranium issue as more pressing compared with that of plutonium production, then considered to be years away. On the other hand it seemed that the main US concern was the site at *Arak* (see 11 Asian YIL 314), where Iran had started work on a 40-megawatt heavy water reactor that, in US eyes, was likely to have the purpose of the production of plutonium for nuclear weapons. The reactors use natural uranium rather than its enriched form. (IHT 15-11, 16-11, 22-11, 23-11, 25-11, 26-11, 27/28-11, 01-12-04; 01-02-05)

The IAEA Governing Board met on 25 November 2004. The EU-3 circulated a draft resolution which qualified as “essential” that Iran keep all parts of its enrichment programme suspended in order to have its case resolved “within the framework of the Agency”. Iran rejected the text. On its part the US raised the objection that the text did not contain a “trigger” clause that would automatically refer the case to the UN Security Council if Iran resumed any enrichment-related activity. The board on 29 November 2004 finally adopted by consensus a mildly worded resolution (GOV/2004/90) (*via* [www.iaea.org/Publications](http://www.iaea.org/Publications)) whereupon the US accused Iran of deceit and the IAEA board of irresponsibility.

The resolution “welcomes the fact that Iran has decided to continue and extend its suspension of all enrichment-related and reprocessing activities”, classifying the suspension as “a voluntary, non-legally-binding, confidence-building measure”. The resolution noted Iran’s right to develop peaceful nuclear energy programs by “[r]ecognizing the right of states to the development and practical application of atomic energy for peaceful purposes, including the production of electric power”, although it criticized Iran for failing to cooperate fully with the Agency and seemed to have left open the possibility that Iran might have an “undeclared” nuclear programme that could be used to make nuclear weapons by “[reaffirming] its strong concern that Iran’s policy of concealment up to October 2003 has resulted in many breaches of

Iran's obligations to comply with its NPT Safeguards Agreement". The compromise on the resolution was reached after Iran in a letter to the IAEA had stated rather ambiguously that in exchange it would give up its demand for partial exemption; the ambiguity was affirmed when the head of the Iranian delegation afterwards refused to confirm explicitly that Iran had indeed so agreed. (IHT 25-11, 26-11, 29-11, 30-11-04) On the other hand, the Iranian negotiator later said in a newspaper interview that taking the issue to the UN Security Council for eventual sanctions would turn the issue into a "North-South question". (IHT 26/27-02-05)

After the above developments the IAEA started trying to get access to two military sites where, according to various intelligence reports and allegations by the Iranian opposition group *Mujahadeen Khalq*, Iran might conduct activities related to the pursuit of nuclear weapons, such as the research on and the development and production of ammunition, missiles and high explosives that could, among other things, be used to detonate nuclear weapons ("dual use" equipment). The two sites were *Parchin*, southeast of Tehran and *Lavisan II*, in the north-eastern section of Tehran. The procurement records on which the suspicions were based contained equipment that had plausible uses for both nuclear and non-nuclear programmes. Military facilities, however, fall outside the scope of the Agency's monitoring competence, which is limited to civilian programmes. The complex was not considered a nuclear-related site and, consequently, the Agency could only ask for access on a voluntary basis. Iran agreed to access to part of the Parchin site in January 2005 (IHT 03-12-04, 06-01-05) but refused a new request for access to another part in early March 2005. (IHT 02-03-05)

The EU-3 restarted negotiations with Iran in December 2004 on a longer-term arrangement. In February 2005 Iran rejected a European demand that it stop building a heavy-water nuclear reactor (*see* above for this process) near the city of Arak, in exchange for assistance in building a less threatening light-water reactor.

Meanwhile, US pressure on Iran appeared to have grown sharply and there were reports of pilotless US drones flying over Iran. However, in March 2005 the US agreed on a joint approach with Europe and announced that it would drop objections to Iran's eventual membership of the WTO and allow some sales of civilian aircraft parts as an economic incentive. In return the Europeans agreed to take the Iranian issue to the UN Security Council if negotiations failed. The incentives were meant to make Iran give up its enrichment activities to which it was entitled under current law.

While it was said that the talks would be to determine "that Iran's nuclear programme can only be used for peaceful purposes", this precisely underlined the difficulty of the task. It was considered not practically possible to monitor those activities reliably enough to ensure that they do not lead to the production of bomb-grade uranium. The US was also described as having "taken the position that a country like Iran is too dangerous to be allowed the technology to produce nuclear material for electricity, even if the treaty itself does not explicitly ban it." (IHT 14-12-04, 22/23-01, 14-02, 04-03, 12/13-03, 23-03-05)

The "EU3" states and Iran met again on 23 March 2005 to review their three months' negotiations toward a permanent settlement. Iran said that if there had been

tangible and specific progress in the talks, it would continue the talks for three more months, but that it would consider breaking off if the conclusion about their results were negative. At the meeting the Iranian side presented proposals including enhanced monitoring and the technical guarantees designed to allow Iran to engage in uranium enrichment, but the Europeans rejected that approach. The two sides basically repeated their fixed positions with regard to the November 2004 preliminary agreement when Iran had pledged to give “objective guarantees”, but the two sides disagreed on its meaning. According to the European interpretation Iran would have to permanently stop enrichment, whereas Iran emphasized its sovereign right to conduct all nuclear activities that are not bomb-related. At the review conference of the NPT the Iranian foreign minister repeated Iran’s willingness to provide guarantees of its peaceful intent, but harshly criticized the demands being made which were “arbitrary and self-serving criteria and thresholds regarding proliferation-proof and proliferation-prone technologies”. (IHT 23-03, 24-03, 04-05-05)

The two sides met again when an EU-Iran working group began talks in April 2005. The Iranian side said that “Iran will definitely resume a part of its enrichment activities but we are still discussing its conditions and the time of restarting the activities.” On 11 May 2005 the EU-3 responded by writing a letter, warning that any resumption of nuclear work “would bring the negotiating process to an end” and “would be a clear breach” of earlier agreements. According to unofficial sources the compromises proposed by Iran included the right to run a small plant for uranium enrichment and the option of adding a great number of centrifuges to produce enriched uranium fuel on an industrial scale. The compromise would also include turning the *Natanz* uranium enrichment plant into a joint venture under multinational ownership. (IHT 21-04, 13-05-05) According to the Iranian side it had proposed reaching a complete enrichment cycle in four phases over two years in order for the West to grow confident that Iran was not attempting to build nuclear weapons. In exchange Iran would expect a major package of incentives involving its security and economic development (Before the Islamic Revolution the US had offered some 23 nuclear power plants, Germany was building the Bushehr plant, and France had signed a contract about the supply of nuclear fuel.) (19-05-05)

The Iranian parliament on 15 May 2005 added weight to the Iranian position by approving a bill that read, *inter alia*, “The government of the Islamic Republic of Iran is required to pursue peaceful use of nuclear energy, including the cycle of nuclear fuel.” (16-05-05)

At the negotiations between the EU-3 and Iran in late May 2005 Iran agreed to postpone the resumption of its nuclear activities in anticipation of detailed European proposals by early August on the implementation of the provisional agreement of 14 November 2004. (IHT 19-05, 26-05-05)

Meanwhile another idea was raised involving Iranian-Russian cooperation. According to this idea Iran would be allowed to resume the production of the intermediate uranium hexafluoride gas which would then be shipped to Russia for further enrichment there after which the enriched material would be brought back to Iran for use. (IHT 25-05-05)



### ***The Russian-built nuclear plant at Bushehr***

The two countries on 27 February 2005 concluded an agreement under which Russia would supply nuclear fuel for the nuclear plant at Bushehr (*see* 5 Asian YIL 477) while Iran would return the spent fuel after use, thus preventing it from reprocessing the material into plutonium. (IHT 26/27-02, 28-02-05)

### **North Korea**

North Korea on 24 July 2004 rejected a US offer made in June 2004 consisting of a gradual lifting of sanctions and the offer of economic aid from neighbouring countries in return for a rapid dismantlement of North Korea's nuclear weapons programme. The offer required the dismantlement and submission to intrusive (IAEA) inspections before the implementation of the economic concessions. North Korea on the other hand insisted on returning to a "freeze" like the one in effect between 1994 and 2002. (IHT 26-07-04)

A new round of six-nation talks was in fact planned for September or October 2004 but North Korea seemed to prefer to wait and see the results of the upcoming US presidential election. Besides it announced on 16 September 2004 that it would not attend further talks until the disclosures about nuclear experiments in South Korea (*see infra*) had been fully explained. (IHT 24-08, 17-09-04)

In April 2005 the US suggested discussing the option of referring the North Korean issue to the UN Security Council if North Korea refused to return to the talks, but this was rejected by South Korea as "inappropriate". The US was considering a UN resolution empowering all states to intercept shipments into or out of North Korea that might contain nuclear materials or components, effectively amounting to a quarantine of North Korea. The latter had always said that it would consider sanctions to be a declaration of war. (IHT 21-04, 26-04-05)

In a comment of 10 May 2005 the Chinese foreign ministry spokesman said that China's strategy remains basically unchanged and that it had urged North Korea to return to the six-party talks as being the right channel for addressing the pending issues, instead of referring the case to the UN Security Council. China ruled out applying economic or political sanctions. He emphasized, in response to US insistence to cut off fuel shipments to North Korea to signal displeasure, that Chinese oil and food shipments were part of its normal trade and should be separated from the nuclear problem. (IHT 11-05-05)

In December 2004 the IAEA director general said in an interview that he assumed North Korea had by then completed the conversion of its stockpile of spent nuclear fuel that was previously monitored by the IAEA, thus having at its disposal fuel for four to six nuclear bombs. His assessment was based on the Agency's knowledge of North Korea's abilities and the amount of time that had passed since North Korea had ejected the IAEA inspectors and had begun removing the 8,000 spent nuclear fuel rods (*see* 11 Asian YIL 318-319). (IHT 07-12-04) The reactor was restarted in February 2003 (*see* 11 Asian YIL 319). The North Korean side on 11 May 2005 confirmed suspicions that it had unloaded the spent fuel rods, which after a few weeks of cooling could be reprocessed to produce plutonium. (IHT 19-04, 12-05-05)

On 10 February 2005 the North Korean government declared publicly for the first time that North Korea had “manufactured nuclear weapons for self-defence” and that it would “bolster its nuclear weapons arsenal”. The statement also said: “We are compelled to suspend our participation in the talks for an indefinite period” and that North Korea would return only when “there are ample conditions and atmosphere to expect positive results from the talks”. Yet analysts were not certain about the real meaning of the North Korean declaration, coming as it did from “a country prone to making dramatic statements aimed at intimidating its interlocutors”. The South Korean foreign minister said that North Korea might be bluffing, and the minister of unification noted that North Korea had made similar assertions at least ten times since 2003. He said: “We see it as a claim to own nuclear weapons, not an official statement of being a nuclear weapons state”. This, however, seemed to contradict a South Korean Defence White Paper, according to which North Korea might have assembled one or two nuclear weapons and was believed to have conducted an aerial blast test, which could precede an actual nuclear weapons test. (IHT 11-02, 16-02-05)

On 31 March 2005 North Korea issued a statement, repeating its declaration of being a nuclear power and demanded that talks on reducing weapons on the Korean Peninsula occur between North Korea and the US on equal terms. According to unconfirmed reports in April North Korea had taken the position that the US must pledge to respect North Korean sovereignty and territorial integrity before the issue of a freeze of its nuclear programme could be discussed. This was said to be a hardening shift of policy since the previous year.

On its part the US rejected preconditions for resuming negotiations. In May 2005 it deployed so-called “stealth” fighter planes to South Korea which the US Defense Department said were meant to assure the safety of US troops in the “uncertain environment created by North Korea’s unwillingness to participate in the six-party talks”. However, according to newspaper reports US officials visited the North Korean UN delegation on 13 May, passing on the message that the US had no plans to invade North Korea and urging it to return to the negotiating table. (IHT 11-04, 31-05, 06-06-05-05)

The attitudes of the several countries involved in the North Korean issue were also discussed at a hearing of the US Senate Foreign Relations Committee in June 2005. The top US negotiators with North Korea, an assistant secretary of state and a special envoy said they harboured increasing doubts that North Korea was ready to give up its nuclear weapons programme in return for security guarantees and economic incentives. The assistant secretary of state said, *inter alia*, that “I agree with you that China has been reluctant to use the full range of leverage that we believe China has”. He noted that China’s and South Korea’s trade and investment with North Korea had actually gone up in recent years. He also acknowledged that without support from these two countries it would be very difficult to impose economic or political penalties on North Korea. (IHT 16-06-05)

On 17 June 2005 the North Korean leader told the visiting South Korean minister of unification that if the US firmly recognized North Korea as a partner and respects it, the latter could return to the six-party talks as early as July 2005. He also said

that if the nuclear crisis was resolved, North Korea was prepared to rejoin the NPT and allow international nuclear inspectors into the country. (IHT 18/19-06-05)

### **South Korea**

South Korea issued a statement on 23 August 2004 admitting that a group of government scientists had, without government knowledge, enriched a small quantity of uranium in 2000 to a level beyond that needed for civilian purposes but not pure enough for a nuclear weapon.

South Korea began a nuclear weapon programme in the 1970s that was abandoned in the late 1970s under US pressure. It has signed the Nuclear Non-proliferation Treaty and an Additional Protocol (*see* 11 Asian YIL 315). It is also bound by a thirteen-year-old bilateral treaty with North Korea (*see* 2 Asian YIL 411). (IHT 03-09, 04/05-09, 06-09-04)

On 9 September 2004 the South Korean government disclosed that in the early 1980s (1979 to 1981) South Korean scientists had conducted an experiment in plutonium extraction at a state-run research facility. (IHT 10-09-04) These experiments had been covered up and were not reported to the IAEA in accordance with South Korea's obligations under the Non-Proliferation Treaty (which went into force for South Korea in 1975, *cf.* 6 Asian YIL 282). However, at the IAEA board meeting in November 2004 South Korea stated that it had adopted a new policy of transparency and pledged to never develop or own nuclear weapons. The IAEA Director General considered the failure to report the activities in accordance with the applicable safeguards agreement to be "of serious concern" but the Agency also said that the quantities of nuclear material had been insignificant and that there was no indication that the experiments had continued. (IHT 27/28-11-04)

### **OIL AND GAS**

*See also:* Exclusive economic zone; Inter-state relations (China – Russia); Territorial claims and disputes

### **China – Japan**

China was laying a 450-500 km gas line to offshore deposits, but Japan complained that China would consequently tap into a 246 billion cubic-metre gas field that is allegedly partly Japanese (*see* Exclusive economic zone, *supra* at 269). Talks in October 2004 resulted in a stalemate. (IHT 4/5-09, 04-11-04)

### **China / Japan – Russia**

On the issue of whether an oil pipeline from Siberia to the east would go to Daqing in North-Eastern China or to Nakhodka on the Sea of Japan (*see* 11 Asian YIL 326), Russia apparently took a decision in favour of Nakhodka, partly, possibly, as a result of a Japanese offer of financial assistance. However, subsequent inconsistent and contradictory reports from Russia said the new pipeline would deliver oil to China first and only later to Japan, although according to some reports this oil would be transported not by a special China spur pipeline, but by rail from the Russian pipeline

terminal at Skorovodino which is located much further to the north and east of the initially planned Angarsk – Daqing route. (IHT 04-11-04, AToL 29-04-05, JT 21-04, 29-04-05)

### **China – Kazakhstan**

It was reported that under an agreement of 1997 a pipeline was projected from the Kazakh oil terminal of Atasu to the Chinese railway station of Alashankou, crossing Russian territory. Building would start in 2005. (AToL 09-02-05)

### **China – Vietnam**

A partnership of oil companies from Vietnam, Malaysia, Singapore and the US announced in October 2004 the discovery of a new offshore oilfield at the *Yen Tu* field, about 70 kilometres east of the port of Haiphong, and west of Hainan Island.

The Chinese foreign ministry reacted by raising concerns, invoking the 2002 Declaration on the Conduct of Parties in the South China Sea. In 2003 China and Vietnam had agreed to keep the status quo in the region and abide by the Declaration. The Chinese reaction called on Vietnam to “cease to adopt any unilateral action that would complicate or give rise to further expansion of the disputes”, and called on oil companies to “cease to do anything that would impair China’s sovereign rights and maritime rights and interests”. (AToL 27-10-04)

### **India – Iran - Pakistan**

*See also:* Inter-state relations (India-US)

India had been busy securing oil and natural gas supplies. Among the materialized deals three government-controlled Indian energy companies, among which Oil & Natural Gas Corp. (ONGC), had concluded a \$40 billion deal on 7 January 2005 to buy liquefied natural gas from Iran over the next 25 years and invest in gas fields in that country. Iran also granted ONGC a twenty per cent stake in its *Yadavaran* oil field. Further, plans existed for a gas pipeline to be built from Iran through Pakistan to India. The pipeline would originate in the South Pars gas field in Iran and traverse southwest Pakistan to the Indian border. (IHT 17-01-05)

### **India – Myanmar - Bangladesh**

It was reported that agreement in principle was reached among the three countries in January 2005 on the construction and operation of a pipeline to transport gas from Myanmar across Bangladesh to India. The pipeline would run from Rakhine and Arakan state in North Myanmar through the Indian states of Nizoram and Tripura, into Bangladesh and crossing back into India. (IHT 19-04-05; AToL 12-04-05)

### **Iran – China - Japan**

An agreement was concluded in October 2004 under which Iran committed itself to supply China with natural gas over thirty years and granted a fifty per cent stake in the *Yadavaran* oil field to the Chinese company Sinopec.

Equally, in 2004 Iran granted a development contract for the *Azadegan* oil field to the Japanese company Inpex. (IHT 20-04-05)

### **North Korea**

It was reported that the Anglo-Irish oil company Animex had signed a 20-year deal to develop North Korea's oil industry under which Animex would receive certain royalties. (FEER 20-09-04)

## **PIRACY**

### **Strait of Malacca**

The passage is 600 miles long and just over a mile wide at one point. It is used annually by approximately 50,000 ships, which carry a third of the goods involved in international commerce and half of the crude oil transported by sea.

In spite of a 27 per cent global decline in the number of pirate attacks in 2004 (according to the annual report by the International Maritime Bureau of the International Chamber of Commerce), the number of raids in the Malacca Strait increased from 28 in 2003 to 37 in 2004. There was evidence of involvement of the Free Aceh Movement (*see supra*, Insurgents) in many of these raids. Piracy in Asia as a whole, though still accounting for roughly half of all cases worldwide, fell from 262 in 2000 to 171 in 2004.

In one case in March 2003 the pirates were less interested in robbery than in taking turns steering the ship down the congested waterway, giving rise to the possible scenario of an attack for the purposely grounding of a very large carrier at a very narrow part of the strait, thereby closing the waterway indefinitely. (IHT 23-02-05, JT 16-03-05)

## **REFUGEES**

### **US legislation in support of North Korean refugees**

The US House of Representatives passed the "North Korean Human Rights Act of 2004" in July 2004, aiming at, *inter alia*, supporting North Korean refugees.

### **North Korean asylum seekers in China**

Forty-four North Koreans who entered the Canadian embassy in Beijing in September 2004 had been allowed in December 2004 to leave China for a third country. A group of North Koreans entered the premises of the Japanese School at Beijing on 1 September 2004. They were later moved to the main compound of the Japanese embassy and part of them later left China for a third country. Most of the hundreds of North Koreans who had sought asylum in embassies, schools and other foreign offices in Beijing over the past three years eventually had gone to South Korea, usually through a third country.

Under a Sino-North Korean treaty China is obligated to send North Korean asylum seekers home, but it had not done so in cases that had become public. China rejected appeals to treat these people as refugees, classifying them as economic migrants and illegal border-crossers instead. Most of the asylum seekers had been allowed to leave China within a few days. (*inter alia*, JT 02-09, 06-09, 03-12-04)

### **North Korean asylum seekers in Vietnam**

Vietnam had denied that it was involved in the secret airlift of more than 460 North Korean refugees to South Korea in July 2004, but North Korea criticized Vietnam by name, accusing it of conspiracy.

It was reported in December 2004 that North Koreans had entered the French embassy and the Swedish diplomatic mission at Hanoi. (IHT 24/25/26-12-04)

### **Japanese policy on refugees**

Japan in January 2005 deported two Kurds to Turkey although they were recognized as refugees by the Office of the UN High Commissioner for Refugees (the *Kazankiran* case). The Japanese Ministry of Justice held the opinion that a UNHCR decree classifying a person as refugee (so-called “mandate refugees”) is not binding and that the conditions under which the UNHCR granted refugee mandate differed from the 1951 Convention on the Status of Refugees. The designation as refugee by the UNHCR was considered the expression of the Office’s opinion that the person was in need of humanitarian support.

The deportation meant that Japan did not consider the persons to be in danger of persecution in their home country, the criterion contained in the 1951 Convention. Yet, the UNHCR described the deportation as “contrary to Japan’s obligations under international law”.

On 25 January 2005 the Minister of Justice announced the possible deportation of another five Kurdish “mandate refugees”, to a third country.

According to the ministry Japan in 2004 granted refugee status to 15 persons among whom fourteen from Myanmar, against twenty in 2003. There were 426 applications in 2004, among which from Myanmar, Turkey and Bangladesh. Unofficial sources differed slightly. . (JT 19-01, 21-01, 26-01, 25-02-05)

## **RIVERS**

*See also:* Borders

### **India – Pakistan: the Baglihar Dam**

A dispute had arisen concerning the building of a dam by India on the *Chenab* River, one of five rivers that were the object of the Indo-Pakistani Indus Water Treaty of 1960. Pakistan contended that the Indian plans, dating from 1992 violated the Treaty since the dam would severely reduce water supplies to Pakistan, adversely affecting agricultural lands.

The Treaty classifies disagreements between the parties into three categories: “questions”, “differences” and “disputes”, to be dealt with by the Permanent Indus Commission, a Neutral Expert and a Court of Arbitration, respectively.

Pakistan had asked the World Bank to intervene in the conflict, which the Bank refused to effect as it is not a guarantor of the treaty. The Bank is admittedly a signatory of the treaty, but only for certain specific purposes, many of which had already been completed. One of the remaining responsibilities of the World Bank was the appointment of a Neutral Expert, the only thing the Bank could do on request of a party to the Treaty, after failure of a settlement by the Commission. (AToL 09-02-05)

## SANCTIONS

### US sanctions against Chinese companies

(See also *infra*: US sanctions against Iran)

The US invoked trade sanctions against the North China Industries Corp. (Norinco) on 19 September 2003 for weapons proliferation, although immediately waived them for a year. In September 2004 it was decided to continue the waiver until March 2005. The sanctions would block up to \$12 billion in annual Chinese exports to the US. (FEER 30-09-04)

It was reported that in implementing sanctions against Chinese companies the US did also formally apply them to the subsidiaries of these companies but did not harm them as these subsidiaries, while fulfilling the conditions for the sanctions, did little or no business with the US. On the other hand it was said that in many cases the sanctions were not being applied to the parent company as the latter is liable under the (US) sanctions law only if it has “knowingly” assisted the subsidiary, implying a burden of proof that the US is not always willing to undertake. It was suspected that the reason might be unwillingness to hurt the financial interests of American firms that do business with the parent company. (IHT 26/27-02-05)

### US sanctions relating to Chinese currency rate

See: Monetary matters

### US sanctions against Iran

The US imposed penalties in January 2005 on some large Chinese companies for aiding Iranian efforts to improve its ballistic missiles by exporting certain technology the nature of which was kept classified. The penalties barred the companies from doing business with the US government and also prevent them from obtaining export licences that would allow them to purchase controlled technologies from US companies. The previous set of US penalties on Chinese sales to Iran was announced in July 2003 (see also 11 Asian YIL 330) (IHT 19-01-05)

[The penalties were imposed under the (US) “Iran Non-proliferation Act of 2000”.]

## SETTLEMENT OF DISPUTES

*See:* Rivers

## SINO-JAPANESE WAR

**Demolition of chemical weapons**

Two Sino-Japanese joint studies in 2003 and 2004 led to a joint project for the search and demolition of an estimated 700,000 chemical projectiles that had been abandoned by the Japanese army in China after the end of the war. The project started in September 2004 and had led to the recovery of more than 1,000 wartime weapons in North China.

It was the fifth such mission undertaken by Japan since 2000. China had started asking Japan to carry out clean-up operation in 1990, to which Japan formally agreed in 1995 after having ratified the Chemical Weapons Convention. (JT 25-09-04)

## SOUTH ASIA ASSOCIATION FOR REGIONAL COOPERATION (SAARC)

**Cancellation of summit meeting**

A SAARC summit meeting that was due to be held in early February 2005 at Dhaka was cancelled because India declined to attend for “security considerations”. However, according to news reports the real reason lay in the existing tensions between India and the Bangladeshi government over various issues, such as the refusal to sell natural gas to India, the Ganges waters, Bangladeshi illegal immigration to India, trans-border smuggling of goods and the use of Bangladesh as a scapegoat for insurgency and security problems in India’s north-eastern states. (IHT 08-02-05)

## SPECIFIC TERRITORIES WITHIN A STATE: KASHMIR

*See also:* Inter-state relations (India-Pakistan)

**Indo-Pakistani efforts**

The two countries in November 2004 proceeded with their discussions on prime-minister level concerning Kashmir. There had been some flare-up resulting from remarks made by the Pakistani president in which he raised the possibility of parts of Kashmir being made independent, or placed under joint Indian-Pakistani control, or put under the administration of the UN. Nevertheless, India announced that it would begin pulling about 20,000 troops out of Kashmir.

The prime ministerial meeting gave rise, *inter alia*, to an agreement under which the two countries would reopen branches of state banks in each other’s country. These branches were closed as a result of the 1965 Kashmir War. (IHT 17-11, 26-11-04)

In early 2005 the two countries reached agreement on re-establishing a bus service between the two parts of the disputed territory of Kashmir, which the Indian foreign



minister called “the mother of all confidence-building measures”, crediting “people power” for the warming of relations. (IHT 26/27-02-05)

## TERRITORIAL CLAIMS AND DISPUTES

*See also:* Exclusive Economic Zone

### **China – Philippines**

The two countries agreed in September 2004 to make a “pre-exploration study” on potential oil deposits in the South China Sea as part of a three-year research project. Research agreements like this were permitted by the 2002 Declaration on the Conduct of Parties in the South China Sea (*see* 11 Asian YIL 281), in contradistinction to actual exploration.

Under the Declaration the building of installations and structures on or near the atolls are banned until the territorial conflicts have been settled. However, most claimant states had already violated the Code by having military garrisons or tourism facilities or monitoring stations under the guise of “bird-watching towers” or “weather huts”.

[Paragraph 6 of the Declaration reads: “Pending a comprehensive and durable settlement of the disputes, the Parties concerned may explore or undertake cooperative activities. These may include the following: ... (b) marine scientific research ...”] (AToL 04-09-04)

### **China – Russia**

*See:* Borders

### **East Timor – Indonesia**

It was reported that the East Timorese foreign minister had acknowledged during a meeting on border issues with Indonesian authorities in August 2004 that *Batek* Island, located north of the East Timorese enclave *Oecusi*, is not East Timorese territory. This acknowledgement was contrary to earlier claims. (Tempo 19-08-04)

### **Indonesia – Malaysia**

A dispute had erupted in 2005 over a sea(-bed) territory near the northwest corner of the Island of Borneo. The Indonesian foreign minister said that Indonesia based its claim to the area on the country’s status as an archipelagic state.

In March 2005 the Indonesian president and the Malaysian prime minister agreed to avoid open conflict and to have it solved on the basis of technical talks between the foreign ministers. The dialogue took place in March and was to be resumed in early May.

Tension between the two states emerged when the Malaysian state-owned oil company Petronas granted contracts to Shell Oil in February 2005 for the exploration of two deep-water blocks (Malaysian N6 block) that overlap the maritime area of (Indonesian) *Ambalat*. Shell had previously held a concession from the Indonesian

government for exploration and exploitation in the same area. These rights were transferred to ENI (Italy) in 2001.

As tension mounted anti-Malaysian rallies took place in various Indonesian cities, while Indonesia started to construct a lighthouse in the area. (JP 8-3, 24-03-05, Tempo 14-03-05)

### **Japan – Korea**

In 2004 a gas exploration project had started southwest of *Dokdo (Takeshima)* Island east of the Korean peninsula. A second oil and gas exploration was to start north of Dokdo in 2005 by a Korean-Australian consortium while a third, South Korean state-led, project was starting a survey of marine and mineral resources around Dokdo.

In 1905 Dokdo was the first Korean territory annexed during the Japanese conquest. The Japanese claim on the island was, therefore, seen by the South Korean National Security Council as a denial of the history of Korean national liberation, as well as a justification of aggression (*see* Asian YIL Vol.6:460, Vol.7:482). (IHT 06-05-05)

### **Japan – Russia**

With reference to the dispute between the two countries concerning four Kurile Islands (*see* Asian YIL Vol.1:346, Vol.2:376, Vol.3:448, Vol.4:512, Vol.5:499, Vol.6:461, Vol.7:482, Vol.8:310) the Russian president promised in December 2004 to return the two smallest Kurile islands to Japan, but the Japanese prime minister was holding out for all four islands. (IHT 22/23-01-05)

## **TERRORISM**

*See:* Inter-state relations (China - Russia, Iran – US), Piracy

## **UNITED NATIONS**

### **Response to Japanese endeavours toward permanent membership of Security Council**

Japan was among several states that were candidates for permanent membership in case of an eventual restructuring and expansion of the UN Security Council. Japan has the second largest economy of the world and is one of the largest financial contributors to the UN (For an indication of the yearly regular contributions of Asian countries, *see* 5 Asian YIL 502).

It was reported in early April 2005 that a grass-roots campaign in China had been started for a petition to prevent Japan from being elected. Although the Chinese authorities did not explicitly endorse the petition, there were instances of supportive comments. Initially China remained officially neutral although the foreign ministry spokesman seemed to have said that the effort reflected rising alarm about Japan's treatment of history, and that China believed the UN overhaul should mainly focus on increasing the power of developing countries rather than rich, industrialized ones. On 12 April 2005, however, the Chinese prime minister explicitly said that Japan

was not ready for a permanent seat until it faced up to its history of aggression and won its neighbours' trust.

North and South Korea also opposed Japan's candidacy. They argued that Japan had not done as much as Germany to atone for its past misconduct and that it could not become a leading member of the international community unless it addressed the legacy of mistrust among its neighbours. It was not clear to what extent the Korean position resulted from the designation, by a Japanese prefectural assembly, of the date of 27 February as "Takeshima Day", referring to the disputed island. (IHT 01-04, 13-04-05, JT 02-04-05)

On the other hand the US announced on 16 June 2005 that it would propose the addition of the Security Council membership with two permanent members, one of which would be Japan. In defending Japanese membership it was noted that Japan was second to the US only in its financial contribution to the UN and was a major provider of military supplies for peacekeeping operations. (IHT 17-06-05)

### **Other attitudes towards revision of Security Council membership**

Through the speaking of a State Councillor in October 2004 China expressed its support for the bid by India for a permanent seat in the Security Council. Thus, four out of the five current permanent members (with the exception of the US) supported India's claim.

Pakistan opposed India's claim and insisted that the question of Kashmir should first be resolved.

A group of like-minded "Uniting for Consensus" countries, among which South Korea and Pakistan, opposed any increase in the number of permanent members and, instead, backed an increase in non-permanent members. (AToL 26-10-04, 14-04-05)

## **WORLD TRADE ORGANIZATION (WTO)**

### **Cambodia's and Nepal's entry**

The Cambodian legislature on 31 August 2004 gave final approval to Cambodia's entry into the WTO. This step was more or less forced by the impending termination of the Multi-Fibre Agreement on 1 January 2005 which included the proviso that quotas would remain in place for exports from countries that are not members of WTO (this is to be distinguished from the proviso of so-called safeguard quotas which would apply if, after the expiration of MFA, imports soar in particular categories of garments or textiles).

Cambodia became the second country (after Nepal in April 2004) to enter the WTO under new procedures to help least developed countries join it more quickly. (IHT 01-09-04)

### **China – US / EU**

China warned on 8 September 2004 that it had the right to challenge any limitation of its textile exports to the US when all global, 30-year-old quotas on textile and apparel would be lifted on 1 January 2005. The elimination of the quota system was

a key demand of developing states in talks leading to the establishment of the WTO. Anticipating a Western backlash to a very strong increase in Chinese textile imports, China had already decided to introduce export duties on 1 January 2005 with respect to many textile products in an effort to pre-empt retaliation. Consequently, China, at least initially, rejected suggestions by the US in the first half of 2005 that China should accept voluntarily restrictions or caps on the amount of clothing it exports to the US (cf. the so-called “voluntary” restrictions of Japanese auto exports in the 1980s and 1990s, *see* Asian YIL Vol.1:321, Vol.3:409). However, the US textile industry started to petition the US government, claiming that China was giving its industries unfair subsidies and was profiting from currency manipulation and was therefore breaking the WTO rules. On 4 April 2005 the US Commerce Department announced it would start an investigation into the need to re-impose trade quotas.

On 13 May 2005 the US Department of Commerce announced that it would impose “safeguard measures” in the form of new quotas on China-made garments. The quotas would take effect fifteen days after the start of the WTO-required 30-day period of formal consultations at the WTO if China failed to take action to meet the objections raised. The Chinese government called the quotas a “betrayal of the fundamental spirit of trade liberalization espoused by the WTO” and “reserves the right to adopt further measures under the WTO framework”. It said the Western governments had failed to prepare their domestic manufacturers for the removal of quotas on 1 January 2005 and, instead, had kept most of their quotas until the last moment. Yet, on 20 May 2005 China decided to raise the export tariffs on many of its textile and apparel exports in an attempt to ease Western concerns. However, later dissatisfaction with the attitude of the US and the EU led to the complete lifting of tariffs on those categories threatened by US and EU quotas. On the other hand the US was likely to ultimately accept a deal such as the one made between China and Europe (*see infra*).

With regard to the intended EU investigation into whether the surge of textile imports from China had distorted markets, China said it would “resolutely oppose any developed countries attempting to re-apply restrictions” on imports that would limit Chinese exports. Following the US re-introduction of quotas the EU Trade Commissioner on 17 May 2005 called for China to curb exports of two important textile products. With regard to these two textile categories the EU would cut short its 60-day preliminary investigation and would, instead, request immediate emergency talks with China.

Apparently not satisfied by the Chinese offer of additional export tariffs, the EU decided on 25 May to cut short the talks and to start formal consultations at the WTO. Hoping to ease tensions China agreed on 10 June 2005 on voluntary limits of ten per cent annually through 2008 to the growth of certain categories of its textile and apparel exports to Europe.

(IHT 09-09, 14-12-04, 06-04, 26-04, 16-05, 18-05, 21/22-05, 26-05, 30-05, 31-05, 11/12-06, 18/19-06-05)

[- The system of quotas limiting the international trade in textiles and apparel for decades under the so-called Multi-Fibre Arrangement expired on 1 January 2005, under an agreement worked out in 1993 as part of the creation of the WTO.  
- China had agreed to a “safeguard clause” under its WTO accession agreement in 2001, allowing other WTO members, until the end of 2008, to safeguard their own textile industries with trade restrictions in the event of a sustained surge in Chinese imports causing irrevocable harm to local producers.]

The EU expressed its worries in early June 2005 about the sudden rise in imports of Chinese shoes. In contradistinction to textiles, the Chinese accession agreement did not contain special rules allowing the EU to allow safeguards in the case of shoes. (IHT 09-06-05)

### **Iranian membership**

By way of incentive for Iran to accept the West’s demands on the cessation of its nuclear ambitions the US said it would drop its objection to Iran’s eventual membership of the WTO. (IHT 12/13-03-05)

Iran had applied for membership in 1996. The WTO announced on 26 May 2005 that it would start talks to admit Iran as a member. (IHT 27-05-05)

## **WORLD WAR II**

*See also:* Sino-Japanese War

### **Japanese court decisions on liability for forced labour during wartime**

The *Hiroshima High Court* on 9 July 2004 overturned a ruling by the Hiroshima District Court of July 2002 and for the first time in a series of lawsuits awarded damages to the (Chinese) plaintiffs who had claimed to have been forced during the war to work under severe conditions at a working site in Japan.

Mirroring the District Court’s decision the High Court considered that the defendant’s (a Japanese construction firm) actions in forcibly bringing the plaintiffs to Japan and making them work under severe conditions resulted from a dovetailing of government policy and the company’s desire to make a profit. Whereas the lower court ruled that damages could not be claimed because the plaintiffs’ rights to compensation had expired under the statute of limitations, the High Court said: “Forcibly taking people to Japan and making them work is a serious violation of human rights, and the argument that brings up the statute of limitations runs counter to (the course of) justice.”

Yet, regarding compensation for the illegal act of forcibly bringing the workers to Japan, the High Court ruled that there was no reason to disregard the 20-year statute of limitations and awarded no damages. (JT 10-07-04)

On 23 June 2005 it was the appeal court, the *Tokyo High Court*, which denied compensation to the family (who took over the lawsuit after the original plaintiff’s death) of a Chinese slave labourer, overturning a decision of the Tokyo District Court of July 2001. This latter decision had ruled in favour of the claimant and had

sentenced the Japanese state to pay compensation for negligence, being the first time that a Japanese court held the state responsible for forcibly bringing persons to Japan to work as forced labourers during the war.

The High Court ruled that the Japanese state bore no responsibility in terms of paying damages because there was no mutual assurance between China and Japan to pay state compensation; nor was there responsibility of the Japanese state for the abduction and the slave labour because the (Meiji) Constitution, in effect at the time, absolved the state from liability for damages. Furthermore, the Chinese plaintiffs had no right to demand payment, due to the signing of the Sino-Japanese Joint Communiqué in 1972 (containing the Japanese recognition of the People's Republic's government), and the China-Japan Peace and Friendship Treaty in 1978.

In a similar case before the *Osaka High Court* with the wartime employer (a stainless steel producing company) and the Japanese government as defendants a settlement was reached on 29 September 2004 between the plaintiffs and the employer. The case would continue between the plaintiffs and the Japanese state, which had invoked the statute of limitations.

It was reported that the *Kyoto District Court* ruled in January 2003 that the Japanese government and the wartime employer had acted illegally in abducting the plaintiffs to Japan and forcibly putting them to work without pay, yet rejecting the claim to compensation on the basis of the statute of limitations.  
(JT 10-07, 30-09-04, 24-06-05)



# LITERATURE





## BOOK REVIEWS\*

*India and International Law*, BIMAL PATEL (ed.) ISBN 9004145192 EUR 125.-/ US\$179.- pp. 379+xii.

The aim of this collection of essays is to examine the contribution of India to the development of international law. In addition to the introductory chapter there are 15 substantive chapters, arranged in no particular order, and concluding material relating to India's status concerning multilateral treaties and human rights provisions in UN documents and in the constitution and laws of India.

The first chapter, by Subhash Kashyap, considers the Constitution of India and international law, examining those provisions of the Constitution that relate to international law. It provides a useful introduction to the subject. The following chapter by Pemmaraju Screenivasa Rao, member of the International Law Commission, considers the position of India in relation to certain areas of international law concerning, for example, succession, recognition, self-determination and the issue of international terrorism. The chapter by Surindar Kaur Verma examines the issue of the trade in services, India and the WTO, while that by V.G. Hegde considers the international patent system and India. In the following chapter, Ravindra Pratap addresses the questions of sovereign economic freedom and the interests of other States. This is an interesting subject and the survey of relevant instruments is well done, yet the issue is not directly related to the overall theme of the collection (this may be said of a number of the chapters in this anthology). Manoj Kumar Sinha returns to the issue of the Indian Constitution in his chapter, specifically the protection of

human rights and the Indian Constitution. Sinha examines the role of the Indian Supreme Court, providing a useful introduction to its workings and the development of human rights jurisprudence in India. On a related issue, B.C. Nirmal examines the legal status of refugees in India. The following chapter by Vishnu Dutt Sharma surveys issues relating to international criminal law.

The next two chapters examine issues relating to international environmental law. The chapter by M. Ghandi considers the issue of state responsibility and international environmental law. Ghandi argues that Indian policy on environmental protection is significantly influenced by the refusal of India to consider issues concerning environmental protection in isolation from development issues. The chapter by David Ambrose discusses the issue of international environmental law and India. Both chapters examine the role of the Indian Supreme Court in the area of environmental protection. The chapter by C. Jayraj examines the law of outer space and India, which has its own space programme. Jayraj argues that India's domestic laws do not fully accord with its international obligations in relation to launching state liability, compensation for damage caused by space objects, registration and insurance of space objects, and procedures for the settling of claims. The chapter concludes by outlining the areas in which Indian law is deficient and the necessary law reform. The chapter by Bimal Patel examines the International Court of Justice and India. The concern is to analyse the way in which cases involving India have contributed to the jurisprudence of the International Court. In addition to examining the contentious cases

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\* Edited by Thio Li-ann, General Editor.

involving Pakistan which related to the question of jurisdiction, the chapter also considers India's position on a number of advisory opinions that have come before the Court. Patel concludes (perhaps not surprisingly) that India's attitude towards the International Court of Justice has been conditioned by considerations of (perceived) national (self-) interest. The final chapter by Amal Ganguli looks at the law relating to the enforcement of foreign awards in India.

As noted, the aim of this collection of essays is to examine the contribution of India to the development of international law. This is certainly an important subject. India holds a unique position in the international community as the world's largest democracy and second most-populous country, with a developing market economy, serious problems of poverty, and possession of nuclear weapons. There is no doubt that India has played an important role in the development of international law, both in its participation in international organizations (notably the United Nations) and in its own state practice: the interventions in Goa, East Pakistan and Sri Lanka, and the dispute over Kashmir being notable examples. This collection of essays fails, however, to engage systematically with this legacy, and while certain of the chapters are valuable in outlining the perspective of India on developments in international law, or the way in which international norms have been or should be transposed into domestic law, certain chapters fail to engage with the overall theme of the book in any substantive way, if at all. Those concerned to discover the position of India on current developments in international law, or the impact of international norms on the market democracy now emerging in India, will find valuable material in this collection; there is, however, much more to be said on the issue.

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*International Law in Korean Perspective*, CHOONG-HYUN PAIK (ed.), Seoul National University Press, Seoul, Korea, 2004, ISBN 89-521-0598-2 93360, xxii + 473 pp, KoreanW17,000/US\$20.00.

Starting with an episode in 1876 when the Korean negotiator had no knowledge of "full

powers" in his encounter with his Japanese counterpart, and a second episode in 1998 when the Korean delegation made an important contribution in the last phase of negotiating the jurisdiction of the International Criminal Court, the editor, Professor Emeritus of Seoul National University College of Law, offers a brief sketch of the acceptance of international law in the Republic of Korea over the last century. (It may be recalled that in 1872 the Japanese negotiator had had precisely the same experience in his encounter with the United States Secretary of State. More or less the same state of affairs would have existed in other Asian countries in those days.)

The long and arduous efforts of the Korean pioneers of international law made a symbolic achievement in the establishment of the Korean Society of International Law in 1953 in the final phase of the Korean War. The Society now publishes its *Korean Journal of International Law* on a quarterly basis. The International Law Association's Korean Branch was established in 1964, and has since been publishing the *Korean Yearbook of International Law*. In addition to these, Prof. Paik set up the Seoul International Law Academy, a private research institute, which has been publishing the *Seoul Journal of International Law* twice a year since 1994. Almost all colleges or faculties of law in Korea, now approximately 90 in number, offer courses in international law; many have post-graduate programmes in international law.

Against this backdrop, Prof. Paik thought that it was "high time that one took stock of international law study in Korea," and has collected seventeen articles discussing "Special Issues of Particular Concern" in Chapter 1 (five articles); "Law of the Sea" in Chapter 2 (three articles); "International Economic Law" in Chapter 3 (three articles); "International Criminal Law Affairs" in Chapter 4 (three articles), and "Practice in the Domestic Courts" in Chapter 5 (three articles).

The list of contributors reveals their striking backgrounds in terms of legal education: of the seventeen contributors, including the editor himself, sixteen are graduates of the College of Law, Seoul National University, whether they proceeded to higher degrees in the United State or the United Kingdom later on. Another noticeable feature is that eleven currently have or have had some practical experience in government

agencies in their official or advisory capacities. This fact would have given some practical perspective to their writings.

While the editor's preface provides a convenient summary of each contribution in about ten to 15 lines, this reviewer would rather select certain articles or their chosen topics and make comments in his own way.

The first point to make is that the contributors generally seem to be independent and free from ideological biases. Indeed, some do not hesitate to criticize government policies or domestic court decisions. This is a most welcome attitude for a fair analysis of problems. Secondly, an impressive point is made in the preface, as well as in one of the articles, that the more "normative impact of international law" should be made in "the domestic legal arena". At the same time the editor points out the need for "a new methodology of international law that will extricate [Korean international lawyers] from the Eurocentric outlook of the present approaches". In a word, "Korean international legal scholars are confronted with many challenging tasks."

Chapter 1 starts with the editor's contribution that discusses the desired return of the Korean cultural property, especially the "Oe Kyujanggak Manuscripts", taken by the French army during the 1866 armed conflict. After a review of the law of armed conflict in those days, the author argues that the French are under legal obligation to return them to Korea. The unification of Korea is discussed by Seong-Ho Jhe, who takes up the *communiqué* of June, 2000 adopted by the two leaders at their unprecedented summit. He compares the South's confederation idea with the North's "low stage federation" proposal, extensively discussing their similarities and differences. Chin-Sok Chung deals with the role of the legislature in the conclusion of treaties, and shows that it is rather modest in that the National Assembly may give prior consent only to those kinds of treaties specified in the Constitution, without the power to modify them. The possible contribution of Korea as a middle power to international law-making is discussed by Suh-Yong Chung, who proposes the training of able negotiators and better inter-agency co-ordination as well as focusing on emerging "soft" issues, such as the environment, rather than the hard ones of international peace and security. The hard issue of

the UN Security Council is extensively discussed by Jae-Min Lee. He tests not only the "*ultra vires* action" but also the "*ultra vires* inaction" of the Security Council by examining the roles of the Secretary General, the Member States, the International Court of Justice, and the Rule of Law while subjecting these to scrutiny.

In Chapter 2, Kak-Soo Shin takes up the Korean-Japanese Continental Shelf Joint Development Agreement and makes a critical analysis of jurisdictional issues contained in it. The author says that the unique "operator" system under which the national law of the concessionaire designated as operator applies in its sub-zone has *lacunae* in a number of ways, and suggests that they may be filled by reference to the Antarctic Treaty, status of foreign forces agreements, condominium, co-imperium and unitization. In a well researched and reasoned paper on maritime boundaries in Northeast Asia, Keun-Gwan Lee presents a critical discussion of the method of delimitation. He criticizes China's neglect of international judicial decisions on maritime boundaries in its relations with Korea and Japan on the one hand, and the "positivist" method of the ICJ and the arbitral tribunals as seen in such decisions on the other. On this second point, he proposes a "meta-positivistic recognition of international law" on the basis of the diversity of the international society and heterogeneity of its members.

In discussing "like domestic products" in Article 3(2) of the General Agreement on Tariffs and Trade, Won-Mog Choi in Chapter 3 makes a detailed analysis of the concept of "like products" in comparison with the "aim and effect" theory. He strongly argues for a "transparency and rationality" of criteria (*e.g.*, customs duties proportionate to the strength of alcohol) and an increased judicial nature of the WTO dispute settlement procedure, in view in part of the growing non-tariff barriers. Seung Hwan Choi succinctly describes the "garlic dispute" between Korea and China and puts the relevant issues into perspective. The Korean countermeasure of raising the tariff on the bulk imports of garlic as an emergency safeguard met the retaliatory suspension of Korean exports of electric appliances by China, which inflicted a loss on Korea 55 times bigger than that on China. Korea resorted to legal action in the WTO, while China reacted through political

retaliation, as it had not then been admitted to the WTO.

In Chapter 4 on international criminal law, Young-Sok Kim proudly introduces the Korean contribution to the drafting of the jurisdictional clause of the Rome Statute; Kim argues that the gaps in the Korean penal code should be filled to implement the Statute in Korea. Jae-Ho Sung extensively discusses the controversial criminal jurisdiction in the Korean-U.S. status of forces agreement. Its detailed analysis in comparison with the NATO, German and Japanese agreements with the United States is followed by the author's argument that the Korean agreement should be revised to ensure more extended jurisdiction for Korea, while the negligent practice of the Korean authorities should also be corrected. A Korea-U.S. extradition case involving a Swiss national is discussed by Young-Jin Jung. Criticizing the Seoul High Court decision to extradite the alleged criminal, the author suggests that under the Korean Extradition Act the Minister of Justice could have exercised his discretion so as to reject extradition.

In the final Chapter, Tae-Hyun Choi deals with the principle of restrictive sovereign immunity recently adopted by the Korean Supreme Court. The relevant aspects of the problem are fully discussed before the author concludes that national legislation on this subject, as in European and American countries, would bring greater judicial stability and predictability and would plug loopholes more efficiently than would the further accumulation of cases. Two recent cases of the Constitutional Court involving the relationship between international law and municipal law are taken up and discussed succinctly by In-Seop Chung. The cases in point are, firstly, the prohibition of outdoor assembly and demonstration within 100 metres of the premises of foreign diplomatic missions in favour of the receiving State's obligation to ensure their inviolability under the Vienna Convention on Diplomatic Relations and the freedom of assembly and association under the Constitution, and secondly, the Korean Military Service Act and the conscientious objector to military service in relation to the freedom of conscience under the International Covenant on Civil and Political Rights. The author claims that the Court has failed to pay due attention to international law in its reasoning despite the

constitutional provision that international law had the same effect as national law.

It may be pointed out in passing that some papers have grammatical errors, for example, "the" placed before "Chapter VII", "Great Britain", "paragraph 2", etc., and the erroneous use of singular/plural forms of nouns. This is not a major defect because the writers are not native English speakers, yet it may possibly give an adverse impression.

The reviewer regrets that he has been unable to touch on all of the contributions in this limited space. However, he is gratified to learn that Korean international lawyers have been and are extremely active, and have great potential for contributing to the development of international law in the years to come.

MIYOSHI MASAHIRO  
Of the Board of Editors

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