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ABBREVIATIONS

AC	-	Appeal Cases
AD	-	Annual Digest and Reports of Public International Law Cases
ADS	-	ASEAN Documents Series
Afr. JICL	-	African Journal of International and Comparative Law
AIR	-	All India Reporter
AJIL	-	American Journal of International Law
All ER	-	All England Reports
ALR	-	Australia Law Reports
BLD	-	Bulletin of Legal Developments
Boston ULR	-	Boston University Law Review
BYIL	-	The British Yearbook of International Law
CanYIL	-	Canadian Yearbook of International Law
CMLR	-	Common Market Law Review
Col.JTr.L	-	Columbia Journal of Transnational Law
Den.JILP	-	Denver Journal of International Law and Policy
Dick.JIL	-	Dickinson Journal of International Law
Duke JCIL	-	Duke Journal of Comparative and International Law
ECOWAS	-	Economic Community of West African States
ECR	-	European Court Reports
EHRR	-	European Human Rights Reports
EJIL	-	European Journal of International Law
ER	-	England Reports
FEER	-	Far Eastern Economic Review
FRY	-	Federal Republic of Yugoslavia
GATT	-	General Agreement on Tariffs and Trade
Geo Wash.JILEc	-	George Washington Journal of International Law and Economics
Georgia JICL	-	Georgia Journal of International and Comparative Law
Hastings ICLR	-	Hastings International and Comparative Law Review
HRQ	-	Human Rights Quarterly
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ICJ Rep.	-	International Court of Justice, Reports of Judgements, Advisory Opinions and Orders
ICLQ	-	The International and Comparative Law Quarterly
ICSID Convention	-	Convention on the Settlement of Investment Disputes between States and Nationals of Other States

ICSID Rep.	-	Reports of Cases decided under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965
IHT	-	International Herald Tribune
ILM	-	International Legal Materials
ILO	-	International Labour Organisation
ILR	-	International Law Reports
IMF	-	International Monetary Fund
Iran.J.Int.Aff.	-	Iranian Journal of International Affairs
Issues & Stud.	-	Issues and Studies
JAIL	-	The Japanese Annual of International Law
JIA	-	Journal of International Arbitration
JP	-	Jakarta Post
JT	-	Judgements Today (India)
JWT	-	Journal of World Trade
L. Japan	-	Law in Japan
LJIL	-	Leiden Journal of International Law
LN	-	Lembaran Negara (Official Gazette, Indonesia)
LNTS	-	League of Nations Treaty Series
MLJ	-	Malayan Law Journal
MTCR	-	Missile Technology Control Regime
NATO	-	North Atlantic Treaty Organization
NPT	-	Non-Proliferation Treaty
NRC	-	NRC Handelsblad (Netherlands)
NST	-	New Straits Times (Malaysia)
NYIL	-	Netherlands Yearbook of International Law
NYL Sch.JICL	-	New York Law School Journal of International and Comparative Law
NYUJILP	-	New York University Journal of International Law and Policy
NYULR	-	New York University Law Review
OAS	-	Organization of American States
ODIL	-	Ocean Development and International Law
PCIJ	-	Permanent Court of International Justice
Phil.	-	Reports of cases decided in the Supreme Court of the Philippines
Phil.YIL	-	Philippine Yearbook of International Law
PhTS	-	Philippine Treaty Series
PLD	-	Pakistan Law Digest

Proc.ASIL	-	Proceedings of the American Society of International Law
QBD	-	Queen's Bench Division
RdC	-	Recueil des Cours de l'Académie de Droit International de la Haye
RIA	-	Review of International Affairs (Belgrade)
SCRA	-	Supreme Court Reports Annotated (Philippines)
SJLS	-	Singapore Journal of Legal Studies
Sri Lanka JIL	-	Sri Lanka Journal of International Law
St.John's L.Rev.	-	Saint John's Law Review
Stan.JIL	-	Stanford Journal of International Law
STAR	-	The Star (Malaysia)
Temple JICL	-	Temple Journal of International and Comparative Law
Tex.ILJ	-	Texas International Law Journal
UNDP	-	United Nations Development Programme
UN GAOR	-	United Nations General Assembly Official Records
UNPROFOR	-	United Nations Protection Force
UNTAC	-	United Nations Transitional Authority in Cambodia
UNTS	-	United Nations Treaty Series
UNYB	-	Yearbook of the United Nations
Va.JIL	-	Virginia Journal of International Law
Wash.L.Rev.	-	Washington Law Review
WLR	-	Weekly Law Reports

ARTICLES

OUTER SPACE WITHOUT ARMS: SUBSTRATUM OF A PEACEFUL REGIME FOR COMMON BENEFIT

Subrata Roy Chowdhury*

1. DISCORDANT TRENDS IN DISARMAMENT PROGRAMMES

One can observe two conflicting trends in the disarmament programme having special relevance to the problem of prevention of an arms race into outer space. The teleological linkage between reduction of strategic offensive weapons and limitation of defensive weapons as reflected, for instance, in the two pre-ambular paragraphs of the Anti-Ballistic Missile Treaty (ABM) of 1972 has been well demonstrated in recent years. The series of sophisticated arms control accords, coinciding in particular with the gradual decline and eventual demise of world communism, have played a significant role in the reorientation of the national security-international peace syndrome.

Apart from the 13 multilateral disarmament agreements in force today,[1] the progressive trend in bilateral initiative commenced with the historic break-

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* Of Lincoln's Inn, Barrister; Senior Advocate, Supreme Court of India; Member, International Institute of Space Law; International Space Law Committee, International Law Association. The Editors were greatly saddened to hear that Subrata Roy Chowdhury passed away on 29 October 1994.

[1] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925); The Antarctic Treaty (1959); Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water (1963); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967); Treaty for the Prohibition of Nuclear Weapons in Latin America (1967); Treaty on the Non-Proliferation of Nuclear Weapons (1968); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil thereof; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (1972); Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1977); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1979); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (1981); South Pacific Nuclear Free Zone Treaty (1985); Treaty on Conventional Armed Forces in Europe (1990).

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through at the conclusion of the Intermediate Range Nuclear Forces (INF) Treaty signed in Washington on December 8, 1987. Hailed by *Le Monde*[2] as 'the dawn of the new philosophy' and by President REAGAN as a 'landmark in post-war history', the three outstanding features of the INF Treaty[3] are: *first*, mandatory injunction for the elimination of an entire class of missiles (intermediate and short range) with a range between 500-5000 kilometres; *second*, prohibitory injunction against future production and flight-testing of such weapons; and *last* but not the least, the provision for unprecedented on-site verification measures.

The next important events in the bilateral arms control scenario are the consensus on the Strategic Arms Control Treaty (START-I) of 31 July 1991 and START-II of 3 January 1993. As explained by President BUSH in his transmittal letter of 15 January 1993 to the Senate, the START-I Treaty was the first treaty actually to reduce strategic offensive arms of both countries with overall reductions of 30-40 per cent and reduction up to 50 per cent in the most threatening systems. Building upon it, the START-II treaty surpassed the accomplishment by further reducing strategic offensive arms for promoting the stability of the strategic nuclear balance. It bans deployment of the most destabilising type of nuclear weapon systems, namely, land-based intercontinental ballistic missiles (ICBMs) with multiple independently targetable nuclear warheads. The central limits of START-II require reductions to 3000-3500 warheads by January 1, 2003 which may be reached earlier, by 2000, if both sides can agree on a programme of assistance to the Russian Federation regarding dismantling strategic offensive arms within a year after entry into force of the treaty. There are sub-limits to the aforesaid central limits.[4]

President BUSH declared that the acceptance of the reductions served as a "clear indication of the ending of the Cold War", while President BORIS YELTSIN exclaimed that the START-II treaty was a "treaty of hope" and that "we will be able to hand over to our children, the children of the 21st century, a more secure world".[5] Indeed, YELTSIN explained that the treaty "strengthens the security of Russia rather than weakens it", *inter alia*, because the proposed reductions would cost Russia "much less than the mere maintenance of nuclear

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[2] Reproduced in *The Guardian Weekly*, 20 December 1987 at 13.

[3] Text of the INF Treaty (Treaty on the Elimination of Intermediate-Range and Shorter Range Missiles) in: 27 ILM (1988) 90-98.

[4] MARIAN NASH (LEICH), 'Contemporary Practice of the United States Relating to International Law', 87 AJIL (1993) 258-281 at 258-259.

[5] Ibid. at 259; 4 *US Department of State Dispatch* No. 2 (January 11, 1993) 20.

weapons systems in a safe condition" and again, Russia saves seriously on the two most expensive items of expenditure, namely, verification and inspection.[6]

The euphoria thus emanated was considerably subdued by a divergent trend aimed at promoting an arms race particularly in the area of conventional arms. The genesis of this trend can be traced to the lessons learnt from the recent Gulf war popularly described as Desert Storm. The first lesson is that it has shown how devastating air weapons can be in any future warfare. If the high ground of air superiority is important today, then the high ground of space superiority may be crucial tomorrow. The second lesson is the importance of advanced conventional weapons in any future warfare. A defined strategic objective could be achieved by air power alone capable of delivering advanced conventional munitions. In other words, the exercise for nuclear disarmament is to be counterbalanced by a parallel exercise for refined conventional munitions rearmament. Both the United States and the erstwhile Soviet Union or CIS or Russia are contemplating identical strategies.
In a recent report (1989) Admiral CROWE and General POWELL of the US stated:

> "Space is the ultimate 'high ground' for military operations of the future [. . .] it is very possible that the near future will include space-based weapons."[7]

The idea was further expanded by Maj. Gen. DON MILLER (United States Marine Corps) who commented that space weapons "may well provide support to a wide range of future military missions".[8] According to MILLER, the advantage lies in forward presence, rapid response, adaptive capability and flexibility. He noted the ability to deliver conventional ordnance from space could be the ultimate in strategic bombing without risking any American lives. It could cover any area of the world, 24 hours a day, and be able to deliver firepower within minutes or a few hours. Any weapon system of this kind has the great advantage of compressing time and space.[9]

This new development was perceived as a serious threat by the Soviet Union/CIS/Russia to their own security because the advanced weaponry would

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[6] Ibid.

[7] Letter from General POWELL to Secretary CHENEY, 'Report on Roles and Functions of Armed Forces', dated 1989, written by Admiral CROWE at the end of his term as Chairman and forwarded by General POWELL at the beginning of his term. Also see, HAL E. HAGEMEIER, 'A Recommended National Security Strategy for a Certain Class of Space Weapons *or* What do We Do About Bombs in Space?', 11 *Comparative Strategy* (1992) 49-64 at 52.

[8] Speech given by Maj. Gen. DON MILLER, United States Marine Corps, at the Armed Forces Communications and Electronic Association, Annual Meeting, 24 May 1990.

[9] HAGEMEIER, loc.cit. n. 7 at 52 and 61 (note 16).

likely be incorporated into NATO force posture. The most important lesson of Desert Storm relates to the nature of future warfare. Gen. Maj. SLIPCHENKO was of the view that the primary contingency for military planning would be the 'aerospace war' in which the adversary would employ deadly weapons with the object of destroying certain military targets. Such weapon systems would include ballistic missiles with manoeuvring warheads, orbital airplanes, cruise missiles with ranges up to 4000-5000 kilometres and the widespread application of stealth technology. SLIPCHENKO concluded:

> "In order to support the 'air war', wide use can be made of space-based systems for reconnaissance and attack, communications and meteorological services. There are prospects for systems for the destruction of land-based targets from space."[10]

Apart from earth-to-space and space-to-space weapons, the development of non-nuclear space-to-earth weapon systems has been suggested in certain quarters. The technology for such a system is yet to be developed but it is stated to be within the capability of the USA, Russia and other space-faring nations. HAL E. HAGEMEIER for instance, has suggested the experiment despite being aware of popular reaction against it and despite the danger that it might fuel anti-ballistic programmes of other space-faring nations. HAGEMEIER contends that there is no international law in general or space-related treaty in particular which prohibit the development of such a weapon system for self-defence or national security.[11]

2. PEACEFUL USE OF OUTER SPACE

This brings us to the central theme of international space law that exploration and use of outer space for peaceful purposes should be done in the common interest of all mankind and for the benefit of all peoples. This is a fundamental obligation and prevention of an arms race in outer space is a condition precedent to its fulfilment.

There are two basic documents of the United Nations which reflected this principle long before the conclusion of the Treaty on Principles Governing the

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[10] Gen. Maj. V.I. SLIPCHENKO, 'Impending Changes as a Result of Reform in Plans for the Use of Soviet Armed Forces', National Defence University, 15 (March 20, 1991) at 3-5. Also see LINDA HOR VLAHOS, MICHAEL J. DEANE and MARC J. BERKOWITZ, 'Aerospace Defence Requirements in Post-Soviet Russia', 11 *Comparative Strategy* (1992) 431-445 at 436-437.

[11] See, generally, HAGEMEIER, loc.cit. n. 7.

Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies of 27 January 1967 (hereafter, the 1967 treaty). General Assembly Resolution No. 1721 (XVI) of 20 December 1961 recognizes the "common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes" while resolution no. 1962 (xvii) of 13 December 1963 laid down that the activities of States in this area shall be carried out "in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding".[12] As the late Judge MANFRED LACHS, one of the principal architects of international space law, observed:

> "The reason for this seems self-evident. Not only does the Charter constitute an integral part of contemporary international law, but in the light of its provisions it is something in the nature of a 'higher law', a Magna Carta of international relations in the world of to-day. The growth of the organization has given it an almost universal character."[13]

Two of the conclusions of Judge LACHS are:

(1) The application of international law, including the Charter of the United Nations, to outer space results from the opening up of this new sphere to human activities;
(2) This implies automatic extension to outer space of the principles and rules of international law, of the Charter of the United Nations - *mutatis mutandis* - wherever this may be necessary.[14]

The expression 'peaceful purposes' in outer space in General Assembly resolution 1721 (XVI) of 1961 or the term 'peaceful use' from its very inception became the subject of two conflicting interpretations. *First*, the term would exclude only aggression but not military use; *second*, it would mean non-military purposes of a peaceful nature. In support of the first interpretation, then Senator GORE, for instance, said as early as on 3 December 1962:

> "It is the view of the United States that outer space should be used only for peaceful purposes that is, non-aggressive and beneficial purposes."[15]

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[12] Texts in *Yearbook of the United Nations* 1961 at 35-36 and id. 1963 at 101-102.
[13] MANFRED LACHS, 'The International Law of Outer Space', 113 *Recueil des Cours* (1964-III) 42.
[14] Ibid. 45.
[15] UN Doc.A/C.1/PV 1289 (3 December 1962) at 13.

On the other hand, at about the same time, Judge MANFRED LACHS had said:

> "The issue still remains subject to serious controversy. Yet there seems to be little doubt as to the real meaning of these words.
> If it was intended to forbid aggressive uses only, mere reference to international law and the Charter of the United Nations would have sufficed. Is it not evident that they prohibit such action in all environments and outer space can be no exception? . . . 'Peaceful' cannot be limited to 'non-aggressive', it excludes what may be called 'military' uses. This remains true even if one takes into account the fact that not all military actions are necessarily 'non-peaceful'. (Some may even be undertaken in order to maintain or restore international peace and security).
> For the essential consideration is to prevent the extension of national rivalries into outer space, to arrest the dangerous developments in the global armaments race. Hence, the well justified claim for a special status of outer space: its use for non-military peaceful purposes only. This remains the goal."[16]

It does not seem that the *lex specialis* of the 1967 and other space-related treaties has made any fundamental departure from the basic legal position, even though it is generally believed that, as a result of the 1967 treaty, it is only the regime of the moon and other celestial bodies that has been totally demilitarised, while outer space *per se* has only been partially demilitarised.

As Professor M. MARCOFF points out,[17] a partial demilitarisation does not imply that a given kind of space activity which has not been formally forbidden, is in accordance with international law of outer space. This is because the *criteria of legality* in matters of space law which is specified not only by the rules of prohibition in Art. IV of the 1967 treaty and other international law provisions, but also in the key provision of Art. 1(1) of the 1967 treaty: exploration and use of outer space shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development and shall be the province of all mankind. Military activities that are still not prohibited are just tolerated, but they remain in conflict with the basic norm of Art. 1(1) because no military activity of space nature, *even if non-aggressive*, might meet the requirement of that rule. Contemporary practice of using military devices cannot neutralise the 'general interests' rule, because they are carried out for the benefit of one State or a group of States, and not all countries. There is only one exception: the acceptance of an International Satellite Monitoring Agency (ISMA) proposed

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[16] LACHS, loc.cit. n. 13 at 90-91.

[17] Reply to questions put by the Chairman of the ILA Space Law Committee, in: International Law Association, *Report of the Sixty-first Conference held at Paris* (1984) 360-361.

by France in 1978. Such an agency might fulfil the condition of Art. 1(1) in the matter of 'verification', or remote sensing space objects passing over foreign countries. There is no formal reservation to Art. 1(1) by any party although, as of 1991, 90 States are parties to the treaty. This is particularly relevant because, as GOEDHUIS points out:

> "[. . .] notwithstanding the fact that more than half of the American and Soviet satellites registered so far, serve military purposes, not one of the launchings has been described as having a *military* function. Both the US and the Soviet Union pretend that all their satellites are 'peaceful'."[18]

It is common knowledge that satellites operating in outer space have both military and non-military functions and objects. There are satellites, intended for civilian purposes, but used to perform military functions. For example, reconnaissance satellites can be used both for the discovery of the origin of typhoons as well as for monitoring naval and troop movements, as was done during the Falkland War. The technique is neutral but its deployment depends upon the policy decision of a space power. The lack of publicity of the military character of satellite systems creates serious difficulties. It is estimated that some 75 per cent of all satellites are launched for military purposes; and it should be noted that 'all types of satellites essentially can have a military aspect: meteorological satellites; direct broadcasting satellites, remote sensing satellites; oceanographic satellites; geodetic satellites etc.'[19]

Professor G.P. ZHUKOV challenges the United States interpretation (peaceful = non-aggressive) and points out that those who support the view rely upon the impossibility of complete banning of military activities in outer space, one of the basic arguments being put forward is the reference to the fact that the majority of civilian space objects can also be used for military ends (dual-purpose space objects). Professor ZHUKOV comments:

> "This is true, but it drives one to the conclusion that in the name of human progress it is necessary to put under a ban the use of such dual-purpose objects for military purposes and not [. . .] [to the conclusion of] the impossibility to ban military activity in the Space."[20]

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[18] Report of the ILA Space Law Committee, in: International Law Association, *Report of the Sixtieth Conference held at Montreal* (1982) 498.

[19] M. BENKÖ, W. DE GRAAFF and G.C.M. REIJNEN (eds.), *Space Law in the United Nations* (1985) 151; see also SUBRATA ROY CHOWDHURY, 'Legal Aspects of Maintaining Outer Space for Peaceful Purposes', *Proceedings of the 31st Colloquium on the Law of Outer Space* (Bangalore) 1988 at 13.

[20] Loc.cit. n. 18 at 502.

The expansion 'exclusively for peaceful purposes' in the 1967 treaty appears only in relation to a regime for the moon and other celestial bodies. As a matter of interpretation, it would be meaningless if not absurd to substitute in the treaty that the moon and other celestial bodies should be 'exclusively for non-aggressive purposes'. It would be more consistent to read instead that the moon and other celestial bodies should be used 'exclusively for non-military purposes', barring stipulated exceptions permitting the use of military personnel or equipment for scientific research or other peaceful purposes. Again, the substitution of 'non-aggressive' for 'peaceful' purposes would be redundant because of the express incorporation of international law and the Charter of the United Nations in Art. III of the 1967 treaty and Art. 2 of the Agreement Governing the Activities of States on the Moon and other Celestial Bodies, 1979, and accordingly aggressive acts in outer space as a whole are forbidden.

Just as the test of legality in Art. 1(1) of the 1967 treaty has been declared to be the central theme of peaceful uses of outer space, professor I.H.PH. DIEDERIKS-VERSCHOOR considers Art. III of the 1967 treaty to be the 'cornerstone' of space law. It declares that States shall carry on activities in the exploration and use of outer space in accordance with international law including the Charter of the United Nations, in the interest of maintaining international peace and security. Professor DIEDERIKS-VERSCHOOR has added two other recent dimensions to the concept of peaceful use of outer space: *first*, environmental consequences of weapons in space have shifted the emphasis from purely military consideration; *second*, the growing utility of commercial use of space activity has given a new direction to the principle of peaceful purposes.[21]

The incorporation of the United Nations Charter in the international law of outer space focuses the relevance of two important resolutions of the General Assembly: resolution 2625 (XXV) of 24 october 1970 (Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations) and resolution 3314 (XXIX) of 14 December 1974 (Definition of Aggression).[22]

There are two aspects of the 1970 Declaration which are relevant in the present context: *first*, it recalls that outer space is not subject to national appropriation in any form, thereby underscoring its peaceful use for common

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[21] I.H.PH. DIEDERIKS-VERSCHOOR, *An Introduction to Space Law* (1993) 125-128.

[22] Text of res. 2625 (XXV) in 9 ILM (1970) 1292; text of res. 3314 (XXIX) in 69 AJIL (1975) 480.

benefit. In other words, as the late Judge NAGENDRA SINGH has explained,[23] it reflects the shared anxiety of mankind for the right of present and future generations to protection, in their interest, of the *res communis humanitatis* (common heritage of mankind), a relatively new concept which has succeeded *terra nullius*. *Second*, the prohibition is not confined to a war of aggression (a crime against the peace) but expressly extends to acts of reprisal involving the use of force; such reprisal or retaliation being inconsistent with the purposes of the United Nations to maintain international peace. Again, apart from the permissible use of force in self-defense in case of actual 'armed attack', the dispute-resolving mechanism of the UN Security Council must be used. This excludes any unilateral use of force outside the collective security system of the United Nations. There is a further obligation to negotiate for the early conclusion of any international treaty on general and complete disarmament applicable equally to terrestrial and outer space regions. This means that since the Cold War is now a thing of the past, the rationale behind military alliances like the Atlantic Pact and the Warsaw Pact no longer exists and one has to turn to a regime of collective security both for preventive and enforcement action as stipulated in Chapter VII of the Charter.

It has been suggested that the definition of 'aggression' in the UNGA resolution 3314 (XXIX) applies *mutatis mutandis* to international space law. The first use of armed force in contravention of the Charter is *prima facie* evidence of an act of aggression unless the Security Council decides otherwise (Art. 2). That apart, what is relevant is Art. 3 which states that the following acts, *inter alia*, qualify as acts of aggression:

(a) The invasion or attack by the armed force of a State of the territory of another State; and
(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.

It is significant that the Explanatory Notes in the Report of the Special Committee on the question of defining aggression agreed that, with reference to Art. 3(b), the expression 'any weapons' is used without making any distinction between conventional weapons, weapons of mass destruction and any other kind of weapons.[24] In view of this definition it is clear that in outer

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[23] Judge NAGENDRA SINGH, *Foreword* to R.D. MUNRO et al., *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (1986) at xix.
[24] 69 AJIL (1975) 483.

space *per se* there can be an act of aggression even though the weapons used are not nuclear weapons or any other kind of weapons of mass destruction.

Dr. GYULA GAL has analyzed the UN definition and stated that acts of aggression might include:

(1) Invasion or attack by the armed forces of a state on the territory of another state;
(2) Bombardment or the use of weapons against the territory of another state;
(3) The attack by the armed forces of a state on land, at sea or in the air against the land forces, sea or air fleets of another state.

Dr. GAL concluded:

> "Applying single elements of this definition to military space activity, an act of 'space aggression' in all three respects would be technically possible. Such act may be simply an attack on the territory of another state, an attack on armed forces of another state from outer space or a *par excellence* space attack, i.e., destroying a space object of another state by its own space object or ground or air-based ASAT weapon would also be an 'act of space aggression'.
> The incorporation of the Charter into the body of space law by Article III of the Space Treaty makes it clear that an attack carried out by new-type weapons could also qualify as an act of aggression."[25]

The meaning of the expression 'weapons of mass destruction' is far from clear. The expression has been described by one author as a typical misnomer on two counts: the weapons so indicated cannot 'destroy mass', and to the extent that the term aims to point to the massive or widespread destruction the weapons are supposed to cause, "there is not really all that much difference between the effects of the smaller versions of these weapons and the effects of certain modern so-called conventional seasons".[26] This was considered in the Conference on Disarmament and it appeared that States have certain understanding that the expression includes chemical, biological and radioactive weapons, and as one US negotiator pointed out:

> "[. . .] and then being open-ended [. . .] in order to take care of developments which one cannot specify at the present time, some form of weapon which

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[25] GYULA GAL, '"Threat or Use of Force", Observations on Article 2 of the U.N. Charter and Article III of the Outer Space Treaty', 17 *Journal of Space Law* (1989) 54-61 at 60.
[26] FRITS KALSHOVEN, 'Arms, Armaments and International Law', 191 *Recueil des Cours* (1985-II) at 266.

> might be invented or developed in the future, which would have devastating effects comparable to those of nuclear or chemical or biological weapons but which one cannot simply describe at the present time."[27]

A recent example of a new weapon system which can be described as a mass destruction weapon can be seen in the non-nuclear precision-guided munitions used in the recent Gulf War. In December 1990, the Soviet General of the Army I.M. TRET'YAK, Air Defense Forces' Commander-in-Chief, in a press interview focused on this issue:

> "The growth in power and accuracy of conventional weapons has brought them closer in effectiveness to tactical nuclear weapons, which permits planning their employment for strikes against strategic nuclear force targets and the state and military command and control system. Thus the accelerated development of conventional weapons and air assets for delivering them to strike targets not only does not reduce military danger, but even aggravates it to a certain extent."[28]

TRET'YAK also stated that:

> "the United States and its NATO allies continue to strive for a military superiority over the USSR [. . .] the United States essentially has not cut back a single programme for creating new offensive airspace weapons and modernising existing ones."[29]

Consequently, instead of substantially reducing air defense TRET'YAK asserted that the Soviet Union's air defense needed to be maintained and improved "to prevent an enemy from gaining air superiority and seize the initiative using SAMs and interceptor aircrafts".[30]

One would wish a fundamental change of attitude in regard to the current negotiations for prevention of an arms race in outer space similar in spirit to the recent developments for a global convention banning chemical weapons. In May 1991 the United States announced its intention to unconditionally destroy its chemical weapons stocks and the production of such weapons and to formally foreswear the use of chemical weapons under any circumstances,

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[27] 74 AJIL (1980) at 821, note 82.

[28] General of the Army IVAN M. TRET'YAK, interview with Colonel V.P. CHIGAK, editor of the General Staff journal *Voyennaya mysl*, 'Defense Sufficiency and Air Defense', 12 *Voyenna mysl* (December 1990) 2.

[29] Ibid. See also VLAHOS, DEAN and BERKOWITZ, loc.cit. n. 10 at 435-438.

[30] Ibid. at 435.

including retaliation in kind against any State as of the Convention's entry into force.[31]

3. EQUATION BETWEEN OFFENSIVE AND DEFENSIVE WEAPONS: ABM TREATY, SDI AND ASATS

Any exercise for disarmament in outer space is critically linked with the broader question of disarmament in general. As then Senator GORE had correctly pointed out in 1962:

> "The question of military activities in space cannot be divorced from the question of military activities on earth. To banish these activities, we must continue our efforts for general and complete disarmament with adequate safeguards."[32]

The reduction of strategic offensive arms, limitations of anti-ballistic missile systems, and a moratorium followed by ultimate banning of anti-satellite (ASATs) weapon systems are of vital importance in this regard.

It would be pertinent to refer briefly to the SDI/ABM treaty equation. It had been the consistent position of the REAGAN Administration that the Strategic Defense Initiative (SDI) (popularly known as Star Wars) would be in compliance with Anti-Ballistic Missile (ABM) Treaty of 1972 between the US and the USSR. President REAGAN was ecstatic about a new defensive space-based, non-nuclear, strategic defense initiative for his concept of world-wide security. Such a system would enable the United States to intercept and destroy strategic ballistic missiles of the Soviet Union before they could reach the American soil.

On the other hand, the Soviet Union considered that by whatever name called, SDI was an offensive system to support American stations in orbit over the Soviet Union which would constitute a 'Sword of Damocles'. In response to the American proposal that the ABM treaty should be observed for a period of ten years during which SDI laboratory research would continue, Mr. SHEVARDNADZE was very critical of any prospect for future legalization of the advanced space-based defense and he retorted: 'We were invited to endorse the

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[31] *Yearbook of the United Nations* 1991 at 50.

[32] Senator GORE, loc.cit. n. 15.

development of space weapons and sign the treaty's (ABM) death sentence, postponing its execution for ten years'.[33]

The linkage between strategic arms reduction and limitation of ballistic missile defense will clearly appear from the two pre ambular paragraphs to the ABM treaty which are important guideposts for the interpretation of the treaty provisions:

> "Considering that effective measures to limit anti-ballistic missile systems would be a substantial factor in curbing the race in strategic offensive arms and would lead to a decrease in the risk of outbreak of war involving nuclear weapons. Proceeding from the premise that the limitation of anti-ballistic missile systems as well ascertain agreed measures with reference to the limitation of strategic offensive arms, would contribute to the creation of more favourable conditions of further negotiations on limiting strategic arms [. . .]"[34]

Articles III and V(1) and Agreed Statement 'D' are the important provisions of the treaty. Art. III contains the permissive provision for the deployment of only one fixed land-based ABM system (having a radius of 150 kms) and centred on the national capital of the party. Art. V(1) contains an undertaking not to develop, test or deploy ABM systems or components which are sea-based, air-based, space-based or mobile land-based. The Agreed Statement 'D' then provides:

> "In order to ensure the fulfilment of the obligation not to deploy ABM systems and their components except as provided for in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Art. XIII and agreement in accordance with Art. XIV of the Treaty."

The treaty is of unlimited duration but each party may withdraw by giving six months' notice "if it decides that extra-ordinary events related to the subject matter of this treaty have jeopardized its supreme interest" (Art. XV).

In the view of the REAGAN Administration, Agreed Statement 'D' on exotic technologies is to be read in conjunction with and as an expansion of

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[33] *L.A. Times*, 6 November 1986, Part-1 at 8, col. 5-6. See also CHOWDHURY, loc.cit. n. 19 at 15.

[34] For text of the ABM Treaty, see BENKÖ, DE GRAAFF and REIJNEN (eds.), op. cit. n. 19 at 188-299.

Article V of the treaty, not as a limitation on the basing modes and systems permitted under Art. III. However, critics say that 'D' only allows development and testing of new technologies that are introduced to replace fixed, land-based ABM systems or their substitutes. KEVIN KENNEDY pointed out that the views of the Administration differed substantially from the consenting Senate's understanding of the treaty, and a fair reading of Arts. III & V(1) and 'D' read together suggested two conclusions: (a) the development and testing of 'Star Wars' technology in any basing mode other than a fixed, land-based mode is prohibited; and (b) deployment of such technology in even the fixed land-based mode is prohibited.[35]

JAMES P. RUBIN had observed that the ABM treaty was signed with the express purpose of making reductions in offensive arms possible. Without confidence that its offensive deterrent would remain effective, neither side would risk cuts in offensive forces; and ensuring this confidence requires not only a ban on deployment of defenses but also prohibitions against development and testing. With only a deployment ban, one country could begin constructing a defense and then break out to deploy the defense before the other side could respond by increasing its offensive system. For this reason, the liberal re-interpretation of the treaty by the Administration, which would permit unfettered development and testing of SDI in space, would be inconsistent with the underlying logic of strategic arms control. Hence adherence to the ABM treaty would remain critical to US security and a prerequisite to cuts in strategic arms.[36]

SDI conflicts remained unchanged although the original dome-like Star Wars was down-sized and finally, under president BUSH, SDI was further redrawn to provide ground and space defenses against limited ballistic missile attacks or accidental launches (Global Protection Against Limited Strikes or GPALs).[37]

As DUNBAR LOCKWOOD points out,[38] while Russia is clearly interested in collaborating on a joint early warning system, in developing anti-tactical ballistic missiles (ATBMs) and, in receiving western technology and research

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[35] KEVIN KENNEDY, 'Treaty Interpretation by the Executive Branch: The ABM Treaty and "Star Wars" Testing and Development', 80 AJIL (1986) 854 at 862, 866.

[36] JAMES P. RUBIN, 'START Finish', *Foreign Policy*, Fall 1989, 96-118 at 111-114.

[37] MARCO RIMANELLI, 'The Rationale, Evolution and Future of Arms Control', 11 *Comparative Strategy* (1992), 307-329 at 319.

[38] DUNBAR LOCKWOOD, 'START II, The penchant for peace', *The Bulletin of the Atomic Scientists*, October 1992 at 11.

funds, it has never embraced space-based weapons. In an interview in June, 1992, Secretary of State JAMES BAKER said: "If we had said (to Russia), we're walking away from the ABM treaty just pure and simple [. . .] I don't think we would have gotten this (START II) arms reduction agreement".

The position has not changed in post-Soviet Russia as would appear from a press interview to *Izvestia* by the Defence Minister of Russia PAVEL GRACHEV, published on June 23, 1992: "the process of strategic offensive arms cuts is tied in to observance of the ABM treaty. If the United States tries to step outside the bounds of this treaty the (START I and START II) accords will immediately lapse".[39]

On 28 January 1992 President YELTSIN announced a new set of proposals to attain 'minimal nuclear and conventional defence sufficiency'. The proposals include, *inter alia*:

i) that all new and existing strategic weapons modernisation and production be terminated (bombers and air and sea-launched cruise missiles);
ii) a bilateral halt to nuclear testings and the creation of an international agency for nuclear arms reduction and global control over the entire nuclear cycle from uranium mining to radioactive waste disposal;
iii) a sharp reduction in the military budget;
iv) adherence to the ABM treaty, elimination of reciprocal ASATs and cooperation with the United States in developing GPALs space-based defence.[40]

Several delegations at the Conference on Disarmament in 1992 expressed serious concern about the issue of GPALs. China, for instance, indicated that although the world had undergone major changes, the research and development of space weapons had not come to an end. In its view, the new anti-ballistic missile system was not totally defensive in nature and also had an attacking capability and hence the development of such a system would inevitably give rise to mutual suspicion among the States and contribute to more tensions in the world. It could also provoke countries with the ability to develop ABM systems to speed up such eventuality. China stated that the implementation of GPALs would surely violate the ABM treaty which would

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[39] Ibid. 45.

[40] RIMANELLI, loc.cit. n. 37 at 324-325.

either have to be terminated or amended.[41] In this context, it seems that if the assessment of the CIA Director WILLIAM WEBSTER at the 1989 Congressional hearing on nuclear and missile proliferation is correct, fifteen Third World countries would possess ballistic missiles by the year 2000;[42] these countries might be provoked to accomplish the programme with greater urgency.

The policy of the CLINTON Administration, when further clarified, would require a thorough evaluation. On 14 May 1993, US Defense Secretary ASPIN announced a new name and focus for the Strategic Defense Initiative Office (SDIO) to reflect priorities of the CLINTON Administration in the post-Cold War World. While allegedly ending the Star Wars era of strategic defence, an attempt is now being made to replace it with a refined ballistic missile defence. According to ASPIN, this is necessary to cope with the new danger of a post-Cold War, post-Soviet world. The SDIO will be replaced by the new BMDO (Ballistic Missile Defense Organization) and in this context, ballistic missile defence will be the first priority of the United States, consisting of theatre ballistic defense as well as national missile defense systems.[43] Keeping in view the prohibitions and restrictions of the ABM treaty and other arms control accords, one has to examine the ballistic missile defence programme of the CLINTON Administration when it is further clarified.

We now turn to the implications of the anti-satellite weapons systems (ASATs). Although ASATs have been described by some jurists as double purpose weapons, since they are designed not only for space warfare but also for ballistic missile defense, others have felt that because of their highly destabilising effects such weapons can hardly be described as defensive weapons. As early as 1983, the Council for the Federation of American Scientists described ASAT as a first-strike weapon, emphasized its impact in reducing strategic stability, urging the need for an immediate moratorium on testing to be followed by a limitation treaty.[44]

It is also said that future anti-satellite weapons would reduce strategic stability and their continued development would encourage renewed anti-ballistic missile competition. This was confirmed in a study by the American

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[41] VLADIMIR BOGOMOLOV, 'Prevention of an Arms Race in Outer Space: Developments in the Conference on Disarmament in 1992', 20 *Journal of Space Law* (1992), 137-141 at 138.

[42] RIMANELLI, loc.cit. n. 37 at 322.

[43] See United States Information Service, Calcutta, 'Aspin Announces New Name and Focus for SDIO' (May 14, 1993).

[44] FAS Public Interest Report, 'Space Weapons Race - Stop it Now', 36 *Journal of the Federation of American Scientists* No. 9 (November 1983) at 1.

Congressional Office of Technology which focused on the danger that the future ASAT technology might affect the very survivability of future satellites:

> "Nuclear weapons now being deployed or tested by the US and the Soviet Union are limited in altitude capability and responsiveness and can only attack a limited number of military satellites. Technologies applicable to future ASAT weapons would be able to attack virtually all military satellites of the type currently deployed. To maintain survivability of future satellites it will be necessary to constrain the development and deployment of ASAT weapons."[45]

Dr. VLADIMIR KOPAL concluded:

> "Under these conditions, the negotiation and conclusion of a special agreement banning ASAT weapons remains one of the important goals which should be achieved as soon as possible. As an intermediate step, a moratorium on testing and developing such weapons should be agreed upon between the parties."[46]

4. UN EXERCISE IN PREVENTING AN ARMS RACE IN OUTER SPACE

A convenient starting point would be paragraph 80 of the programme of action contained in the final document adopted at the tenth Special Session of the General Assembly in 1978 in the context of disarmament, which reads:

> "In order to prevent an arms race into outer space, further measures should be taken and appropriate international negotiations held in accordance with the spirit of the Treaty (1967) [. . .]"[47]

The UN General Assembly in its regular 36th session in 1981 discussed 20 disarmament items and adopted on 9 December 1981 a record number of 49 resolutions on specific disarmament questions. While Resolution 36/9 2D focused on the need for the conclusion of international agreements "keeping in mind the ultimate objective of general and complete disarmament under effective international supervision", Resolution 36/97C dealt specifically with the need for effective measures to prevent an arms race in outer space and

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[45] Quoted by D. GOEDHUIS, Report of the ILA Space Law Committee, in: International Law Association, *Report of the Sixty-third Conference held at Warsaw* (1988) at 329.
[46] Ibid. 307-308.
[47] *Yearbook of the United Nations* 1978 at 44.

requested the Committee on Disarmament from the very beginning of its 1982 session to consider "the question of negotiating effective and verifiable agreements aimed at preventing an arms race in outer space . . ." and further to consider as a priority measure the question of negotiating "an effective and verifiable agreement to prohibit anti-satellite systems" as an important step towards the fulfilment of the aforesaid objectives.[48]

The United Nations has been consistently perturbed by the increasing arms race in outer space and has been urging the international community to take preventive measures. This concern was expressed by the United Nations at various regular sessions, particularly the General Assembly's 36th (1981) to 47th sessions (1992), apart from the Second United Nations Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE 82). It was recognized that the introduction of weapons into the space environment and the deployment of new weapon systems would have a serious negative effect on the development of international cooperation for peaceful use and exploration and hence it was proposed by some delegations to the Committee on Peaceful uses of Outer Space (COPUOS) to include a new agenda item: "ensuring the use of outer space exclusively for peaceful purposes". Such discussions would lead to further elaboration of the principle of non-militarization of outer space as envisaged in Art. IV of the 1967 treaty.[49] Dr. KOPAL highlights that a new basis for deliberations was created by the Soviet Draft Treaty on the Prohibition of the Use of Force in Outer Space and from Space against the Earth. Discussions followed at the 38th Session of the General Assembly (1983) on the Draft Treaty, resulting in the adoption of Resolution 38/70 of 15 December 1983 which, *inter alia*, emphasized that further effective measures to prevent an arms race in outer space should be adopted by the international community. As stated in the Conference on Disarmament (as the Geneva Committee on Disarmament came to be known from 1984) the international community has a primary role in negotiating an agreement or agreements for the prevention of an arms race in outer space. On the same day, in Resolution 38/90, the General Assembly called upon all States, particularly those with major space capabilities:

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[48] *Yearbook of the United Nations* 1981 at 19, 25, 82-83.

[49] Dr. VLADIMIR KOPAL, 'Evaluation of the Main Principles of Space Law in the Institutional Framework of the United Nations', 12 *Journal of Space Law* (1984-1985) 22-25, particularly at 23.

> "to undertake prompt negotiations, under the auspices of the United Nations, with a view to reaching agreement or agreements designed to halt the militarization of outer space and to prevent an arms race in outer space, thus contributing to the achievement of the internationally accepted goal of ensuring the use of outer space exclusively for peaceful purposes."

At the same time, the General Assembly also requested the COPUOS to consider as a matter of priority questions relating to the militarization of outer space, taking into account the need to coordinate the efforts of the COPUOS and the Conference on Disarmament.[50]

A survey of the pertinent resolutions of the General Assembly from 1981 to 1992 (both the pre-ambular and operative paragraphs)[51] basically reveal the following principles: *First*, since the exploration and use of outer space should be in the common interest of all mankind and for the benefit of all countries, such exploration and use "[s]hall be exclusively for peaceful purposes". *Second*, a constant reminder to the members of the United Nations that international law and the UN Charter mandate the duty to maintain international peace and to refrain from the threat or use of force – this is applicable to outer space. *Third*, the obligation under Art. III of the 1967 treaty should be followed both in letter and spirit. *Fourth*, grave concern was expressed at the danger posed to all mankind by an arms race in outer space, and in particular, "by the impending threat of the exacerbation of the current state of insecurity of developments that could further undermine international peace and security and retard the pursuit of general and complete disarmament" (Resolution 42/33 of 30 December 1987). *Fifth*, while welcoming bilateral initiatives between the two major space-powers, the goal always has been towards multilateral negotiations and agreements for preventing an arms race in outer space. In this regard the Conference on Disarmament has a primary role in negotiating such international agreements. Of particular relevance is the special study published in 1986 by the United Nations Institute for Disarmament Research (UNIDAR) on military activities in space, in the framework of international law, limiting its use for military purposes and prohibiting the use of force in outer space.

In 1991, the Conference on Disarmament considered the report of its Ad Hoc Committee on Outer Space, the work programme of which included examining and identifying issues relevant to the prevention of an arms race in

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[50] Ibid. at 24.

[51] See, among others, resolutions 38/70 of 15 December 1983, 35/59 of 15 December 1985, 41/53 of 3 December 1986, 42/33 of 30 December 1987, 46/33 of 6 December 1991.

outer space, existing agreements and proposals and future initiatives. Four new documents submitted under the item included those submitted by Canada concerning a paper on satellites harming other satellites and studies on overhead imaging for verification and peacekeeping. It is important to note that although a large number of members, mainly non-aligned countries, thought it desirable to undertake negotiations for a multilateral treaty immediately, the United States remained opposed to such a move. Two aspects which figured prominently in 1991 were anti-satellite (ASAT) systems and verification of an ASAT ban and confidence building measures. The Ad Hoc Committee in its conclusions noted that there had been continued general recognition of the importance and urgency of preventing an arms race in outer space and of the significant role that the legal regime in that area was playing and the need to consolidate and enhance its effectiveness.[52]

Some pertinent developments in the Conference on Disarmament in 1992 may also be noted in this context. China and some other delegations pointed out that while repeated reiteration of the need for confidence building measures in the area of preventing an arms race in outer space was helpful, yet it should not "obstruct the creation of a substantive and legally binding treaty banning all space weapons". That apart, many delegations indicated that in the post-cold war period, preventing an arms race in outer space was one of the principal tasks facing the Conference on Disarmament. For this age of high technology and qualitative increases in weapons precision, outer space stood out as an environment vulnerable to militarization. They were of the view that the "weaponization of outer space was a political hazard to the space activities of mankind and the peaceful use of outer space. In their view it would be too late to set about once such weaponization became a fait accompli".[53]

Professor DIEDERIKS-VERSCHOOR rightly focused on the central issue of effective verification in regulating an arms control regime in outer space. Effective verification is absolutely essential to ensure compliance with any arms control treaty provisions and to assess the risk to the security of States arising from military activities. According to this distinguished Dutch jurist, verification is the key stumbling block on the road to a meaningful reduction of space-weaponry - a problem of great urgency.

The issue has been the subject of various comments in international legal circles. HE QIZHI (China) shares the opinion of many others in believing that

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[52] *Yearbook of the United Nations* 1991 at 65-67.

[53] BOGOMOLOV, loc.cit. n. 41 at 137-140.

verification is an indispensable condition for achieving an arms control agreement. Analyzing the capabilities of both military and civilian satellites, he suggests that by using well-calibrated equipment on board of military satellites, more consistent and well defined data could be gathered, so that the discovery of violations is more certain and concealment of such action more difficult. He also points out that in view of the crucial role played by satellites, protection has been granted to them in international agreements, particularly in bilateral agreements between the USA and USSR. However, HE QUIZHI recommends an international verification regime to replace the currently familiar national technical means (NTM). Of particular relevance in this context is the proposal of France in 1978 for an International Satellite Monitoring Agency (ISMA).[54] Although the French proposal could not be realised because the US thought the project too expensive, while the USSR gave no reaction, Professor DIEDERIKS points out an encouraging trend:

> "Much later, in October 1990, during a session of the Special Committee on the Charter of the United Nations, the USSR has proposed the establishment of a UN verification authority to monitor compliance with the terms of arms control agreements and those aimed at reducing international tensions."[55]

5. CONCLUSION

A regime of space without arms is based on the sound principle that, apart from interfering with the peaceful use of outer space by all countries, any development of new weapon systems for use in outer space will be highly vulnerable as they will constitute ideal targets in case of any future conflict, and can never serve to increase the security of the big powers. Hence the present developments disclose a disquieting and destabilising trend.

At a symposium held at McGill University, Professor DUPUY (France) appealed to the statesmen of the world to seize the golden opportunity of new dialogue and confidence-building between the two superpowers to encourage them to go beyond bilateralism and to make substantial progress in ensuring the peaceful use of outer space.[56] I fully share the sentiment. This is the only

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[54] DIEDERIKS-VERSCHOOR, op. cit. n. 21 at 129-130.

[55] Ibid. at 130.

[56] JOCHEN ERTER, 'Space Without Weapons', 17 *Journal of Space Law* (1989) 177-180.

way to ensure a peaceful space regime without weapons, a goal the United Nations has been striving to achieve for three decades.

The only way to guarantee the survival of such a multilateral regime is to ensure international monitoring by appropriate United Nations agencies. This will also help to prevent the proliferation of outer space weapons technology and relieve the big powers from their current self-imposed burden of assuming what General GALLOIS had described as 'the role of a world gendarme'.[57]

[57] Ibid. 179.

THE DECOLONIZATION OF NORTHERN IRELAND

Francis A. Boyle*

1. INTRODUCTION

Historically, the British government has been quite successful at defining the situation in Northern Ireland in accordance with its own national self-interests as it sees fit.[1] It has spent an enormous amount of resources on conveying to the world news media why its particular approach to the problem - whatever it might be at that particular moment in time - is the only correct approach.[2] I would submit, however, that there is certainly another way of looking at the situation in Northern Ireland. That other way of analyzing this conflict is from the perspective of international law, and in particular the United Nations Charter. Therefore, it is my task here to describe what I believe should be the appropriate policy of the world community of states toward the situation in Northern Ireland in accordance with the requirements of international law.

Article 1, paragraph 2 of the United Nations Charter provides that one of the 'purposes' of the United Nations Organization is to develop friendly

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[1] See generally G. BELL, *The Protestants of Ulster* (1976) 1-4.

[2] See WALKER, 'Irish Republican Prisoners - Political Detainees, Prisoners of War or Common Criminals?' 19 *The Irish Jurist* (1984) 189, 192-193, discussing the British government's policy of criminalizing Irish Republican Army (IRA) paramilitary activity:

> [A] policy of criminalisation [. . .] is more likely to maintain or increase public support for the State's counter-measures by emphasizing the criminal and violent aspects of terrorism rather than its political motivation. As a result the public is coaxed into taking a perception of the terrorists which corresponds to that of the State. In other words, the terrorists are viewed simply as criminals, so their treatment as such is acceptable. Depicting the IRA in this light in turn reinforces the official policy of resisting the breaking of the Union. . . . Thus, criminalisation is an important conditioning factor to be applied to the minds of the British public, and it is equally aimed at channelling world opinion. Movements denounced as criminal plots rather than freedom fighters are much less likely to receive moral or material support from third States.

See also T. BALDY, *Battle for Ulster* (1987).

Asian Yearbook of International Law, Volume 4 (Ko Swan Sik *et al.*, eds.;90-411-0872-6 © 1995 Kluwer Law International; printed in Great Britain), pp. 25-46

relations among nations based on respect for the principle of equal rights and self-determination of peoples.[3] This fundamental principle of self-determination for peoples can also be found in the two seminal United Nations Human Rights Covenants of 1966: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.[4] Both of these Covenants have been ratified by the British and Irish governments; and of course both states are parties to the United Nations Charter, as is true for most states of the world community.[5] Thus, both states are in basic agreement upon the fundamentality of the principle of self-determination of peoples and its integral connection to the maintenance of international peace and security.[6] The principle of self-determination of peoples has been a basic norm of international law and of world politics since it was first proclaimed by President WOODROW WILSON in his famous Fourteen Points Address of 1918.[7]

2. THE COLONIAL STATUS OF NORTHERN IRELAND

In 1960 the United Nations General Assembly took a monumental step toward implementing the right of self-determination of peoples throughout the world by means of adopting its Declaration on the Granting of Independence

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[3] UN Charter Art. 1, para. 2.

[4] The International Covenant on Civil and Political Rights, GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN doc. A/6316 (1966). The International Covenant on Economic, Social, and Cultural Rights, GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 49, UN doc. A/6316 (1966). Part I, Article 1 of both Covenants is identical:

(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

(3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

[5] See *infra* notes 32-36 and accompanying text. See also UNYB (1955), UN Sales No. 1956.I.20 pp. 454-55.

[6] See generally F. BOYLE, *Defending Civil Resistance Under International Law* (1987) 283-316.

[7] The Fourteen Points Address by President WOODROW WILSON, January 8, 1918, reprinted in 56 *Cong. Rec.* 680 (1918). See HARVEY, 'The Right of the People of the Whole of Ireland to Self-Determination, Unity, Sovereignty and Independence', 11 NYL Sch. JICL (1990) 167.

to Colonial Countries and Territories, Resolution 1514(XV) of 14 December.[8] I will not discuss all of its provisions here, but I would like to mention its most salient features. In the Preamble, the General Assembly "solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations."[9] It also declares in paragraph 1 that: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations, and is an impediment to the promotion of world peace and co-operation."[10] Likewise paragraph 4 provides that all armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territories shall be respected.[11]

Next, paragraph 5 requires that immediate steps shall be taken in trust and non-self-governing territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories without any conditions or reservations, etc.[12] Nevertheless, paragraph 6 makes it clear that the implementation of paragraph 5 cannot be undertaken in a manner that would aim "at the partial or total disruption of the national unity and the territorial integrity of a country."[13] To quote from the exact language of paragraph 6: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[14]

In addition, this basic principle of international law mandating the equal rights and self-determination of peoples has likewise been enshrined in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, which was adopted by the UN General Assembly on 24 October 1970 as Resolution 2625 (XXV).[15] In particular therein can be found the injunction: "Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country."[16] This Declaration was adopted by the General Assembly as a

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[8] GA Res. 1514, 15 UN GAOR Supp. No. 21 at 66, UN doc. A/4684 (1960).
[9] Ibid. at 67.
[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] G.A. Res. 2625, 25 UN GAOR Supp. No. 28 at 121, UN doc. A/8082 (1970).
[16] Ibid. at 124.

'consensus resolution', which means that the British government did not dissent from it.[17] Finally, this particular resolution was also treated by the International Court of Justice as enunciating rules of customary international law in its 1986 Judgment on the merits in the case of *Nicaragua v. United States*.[18]

Pursuant to the aforementioned Decolonization Resolution and the Declaration of Principles Resolution, the continuing partition of Ireland constitutes an illegal partial disruption of the national unity and territorial integrity of the state of Ireland, which violates the terms of the United Nations Charter and, in particular, the aforementioned right of the Irish People to self-determination.[19] From the perspective of international law, therefore, the entity which the British government calls 'Northern Ireland' is in fact and in law a 'colony' as that term has been classically defined.[20] I submit that this is precisely how the world community of states must proceed to think about the situation in Northern Ireland if it is to make any sense of what is going on over there, and more importantly, to determine what should be done to solve the problems of Northern Ireland.

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[17] Ibid.

[18] *Case concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. US), ICJ Rep. 1986, p. 14 (Judgment of June 27, 1986). The Court stated: "In determining the legal rule which applies to these latter forms, the court can draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) referred to above). As already observed, the adoption by the States of this text affords an indication of their *opinio juris* as to customary international law on the question." Ibid. at 101.

[19] See *supra* notes 8-18 and accompanying text.

[20] See, e.g., *Black's Law Dictionary* (rev. 4th ed. 1968) p. 331:

> COLONY. A dependent political community, consisting of a number of citizens of the same country who have emigrated therefrom to people another, and remain subject to the mother-country. *U.S. v. The Nancy*, 3 Wash. C.C. 287, Fed. Cas. No. 15,854.
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> A settlement in a foreign country possessed and cultivated, either wholly or partially, by immigrants and their descendants, who have a political connection with and subordination to the mother-country, whence they emigrated. In other words, it is a place peopled from some more ancient city or country. Wharton.

Irish Republican groups such as the IRA have justified their opposition to the union of Northern Ireland with Britain because of the right of the Irish People to self-determination and have called for the end to British colonial occupation. See WALKER, *supra* note 2, p. 189. See also, T. COOGAN, *The IRA* (3d. ed. 1987) at 685. See generally BELL, *The Irish Troubles* (1993).

3. THE UN DECOLONIZATION OF NORTHERN IRELAND

According to this UN Decolonization Resolution of 1960 and the two UN Human Rights Covenants of 1966, the British government is under an absolute international legal obligation to decolonize Northern Ireland in cooperation with the United Nations as expeditiously as possible and in the process to restore the territorial integrity of the whole state of Ireland.[21] In other words, Britain must remove the last vestiges of the colonial occupation it had imposed upon Ireland as a result of its so-called Treaty of Partition of 1921.[22] Here the United Nations Organization as a whole, including the Trusteeship Council, the Special Committee on Decolonization, as well as the United Nations General Assembly, have had an enormous amount of quite successful practice with respect to obtaining the peaceful decolonization of occupied territories by former colonial imperial powers - especially Great Britain - around the world.[23] It is to this wealth of experience, then, that the world community of states must look in order to obtain some useful precedents that could be applied to the peaceful resolution of the situation in Northern Ireland.

In this regard, when the British government sent troops to Northern Ireland in 1969 the Irish government sought to raise the question of "the six counties of Northern Ireland" before the United Nations Security Council, appealing for the "dispatch to the area of a United Nations peacekeeping force."[24] Due to threat of a British veto, however, the Security Council adjourned without taking a decision on whether or not to adopt the agenda.[25] The Security Council never again considered the question.

Nevertheless, Irish Ambassador CREMIN submitted an Explanatory Memorandum on the situation in Northern Ireland to the General Committee of the UN General Assembly requesting that this topic be included on the Assembly's agenda.[26] Following the proposal of Nigeria, the General Committee decided to defer a decision on whether or not to recommend the inclusion of this agenda item.[27] Since that time, however, representatives of successive Irish

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[21] See *supra* notes 8-14 and accompanying text.

[22] Treaty between Great Britain and Ireland, December 6, 1921, 26 LNTS 9. See generally N. MANSERGH, *The Unresolved Question* (1991).

[23] *United Nations Action In the Field of Human Rights* at 44, UN doc. ST/HR/2/Rev. 1, UN Sales No. E.79.XIV.6 (1980). See B. URQUHART, *Decolonization and World Peace* (1989).

[24] 24 UN SCOR Supp. (July-Sep. 1969) at 159, UN doc. S/9394 (1969).

[25] 24 UN SCOR Res. & Dec. at 8, UN doc. S/INF/24/Rev. 1 (1969).

[26] UNYB (1969) at 181, UN Sales No. E.71.I1.

[27] 24 UN GAOR (180th mtg.) at 4, UN doc. A/BUR/SR 180 (1969).

governments have reiterated the right to national reunification in addresses to the UN General Assembly.[28]

The situation in Northern Ireland clearly constitutes a threat to the maintenance of international peace and security. Therefore the United Nations Security Council has all the authorization it needs to act in whatever manner it deems fit to deal with Northern Ireland since the Security Council has "primary responsibility for the maintenance of international peace and security" under Charter Article 24.[29] Hence, some day a majority of nine members of the Security Council could decide to send a UN peacekeeping force to Northern Ireland. In this fashion, the decolonization of Northern Ireland could be initiated by the withdrawal of British troops and the emplacement of a UN peacekeeping force in their stead on a transitional basis. Witness, for example, the recently successful decolonization of Namibia (formerly Southwest Africa) under the auspices of a United Nations peacekeeping force (i.e., the UN Transition Assistance Group) organized under the authority of the United Nations Security Council.

To be sure, it has always been the case in United Nations practice that a peacekeeping force has never been dispatched against the will of the government with military control over the territory involved, irrespective of whether that government was legally entitled to be there or not.[30] So implementation of this UN plan would ultimately depend upon the British and Irish governments reaching some prior agreement on the peaceful decolonization of Northern Ireland and the reunification of Ireland as required by international law. Therefore, it should be a primary goal of the world community of states to encourage the British government (1) to publicly endorse the principle of decolonization for Northern Ireland, as well as (2) to negotiate in good faith with the Irish government on a reunification treaty. Thereafter, both states

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[28] See 7 *UN Monthly Chronicle* (1970) 69, where Irish Prime Minister JOHN M. LYNCH stated to the General Assembly: "Ireland has suffered much from war, and in the past two years there have been serious difficulties in the North of Ireland. Britain retained responsibility for that small part of Ireland when it retired from the rest. We believe that community will see that its future lies with Ireland." See also 8 *UN Monthly Chronicle* (1971) 165-6; 9 *UN Monthly Chronicle* (1977) 106; 15 *UN Monthly Chronicle* (1978) 93.

[29] UN Charter Art. 24, para. 1 states: "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."

[30] I. RIKHYE, M. HARBOTTLE & B. EYGE, *The Thin Blue Line: International Peacekeeping And Its Future 3* (1974). See, e.g., MYERS, 'A New Remedy for Northern Ireland: The Case for United Nations Peacekeeping Intervention in an Internal Conflict', 11 NYL Sch. JICL 1 (1990).

should work in cooperation with the UN Security Council, the UN Secretary General, and a UN peacekeeping force to accomplish these objectives.

4. THE PROTECTION OF HUMAN RIGHTS IN NORTHERN IRELAND

At this preliminary point in the analysis, no point would be served by speculating about what type of United Irish State might ultimately emerge from these reunification talks. It could be a confederal state organized along the lines of Switzerland, or a federal state consisting of two parts, or a unitary state, etc.[31] The selection of any one of these alternatives (or some other) would be for all of the people living on the Island of Ireland - whether Protestant or Catholic - to determine, subject to the final approval of the United Nations Organization.

From an international law perspective, however, the most important part of these reunification negotiations to be considered would be the protection of the basic fundamental human rights of Protestants living in Northern Ireland and the firm establishment of their right to continue to live and practice their religion as they see fit. The ability to do this has been made immeasurably easier by the fact that both the British government and the Irish government are parties to the two aforementioned United Nations Human Rights Covenants of 1966.[32] The British government signed both UN Covenants in 1968 and ratified them in 1976.[33] The Irish government signed both in 1973 and has recently ratified them.[34] Moreover, Ireland has also become a party to the 1966 Optional Protocol to the International Covenant on Civil and Political Rights giving competence to the United Nations Human Rights Committee to receive and consider communications from individuals claiming to be victims of a violation by that state party of any of the rights set forth in the Covenant.[35]

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[31] D. DOUMITT, *Conflict In Northern Ireland* (1985) 189. A number of solutions to the problem in Northern Ireland have been suggested. For example, Dr. GARRET FITZGERALD, former leader of the Fine Gael Party in the Republic suggested making Northern Ireland and the Republic a confederation. Ibid. See also *Report of the New Ireland Forum* (2 May 1984).

[32] See *supra* notes 4-5 and accompanying text.

[33] 1977 *Great Britain Treaty Series* No. 6 (Cmd. 6702).

[34] See POWER & QUINN, 'Ireland's Accession to the United Nations' Human Rights Covenants', 7 Ir. L.T.R. (1989) 36.

[35] GA Res. 2200, 21 UN GAOR Supp. (No. 116) at 59, UN doc. A16316 (1966).

In addition, both Britain and Ireland are parties to the European Convention on Human Rights.[36] And it would be necessary for a United Ireland to adopt domestic implementing legislation for all three of these seminal international human rights treaties as well.[37] In this manner, any Protestant residing in a United Ireland who believed that his or her rights had been abridged on grounds of religion or nationality would have direct and immediate access to a court of law on the basis of any one or more of these three treaties and their respective implementing legislation.

In all fairness, I should point out that this is not the case today for Irish Catholics living in Northern Ireland who allege discrimination against them on the grounds of religion or nationality. The British government has been quite clever at signing various human rights treaties, but then derogating from their provisions by proclaiming a public emergency with respect to Northern Ireland.[38] In addition, the British government has not adopted domestic implementing legislation for these three human rights conventions.[39] This then

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[36] European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 UNTS 221. The Convention was drafted by the member states of the Council of Europe and was opened for ratification on November 4, 1950. It entered into force in September 1953 after the deposit of ten instruments of ratification with the Secretary General of the Council of Europe. Ibid. at 222.

[37] Ireland has not adopted domestic implementing legislation for any one of these three treaties. Under Irish domestic law, following the British model, treaties are not deemed to be self-executing, and therefore cannot be relied upon to state a cause of action in domestic court without domestic implementation by Parliament. *McGimpsey v. Ireland*, 1988 I.R. 567, 581.

[38] See generally Amnesty International, *Human Rights Concerns in the United Kingdom* (June 1991) 56-60 ; BISHOP, 'The Right To Be Arrested', 11 NYL Sch. JICL (1990) 207, 208-11; Note, 'Terrorists and Special Status: The British Experience in Northern Ireland', 9 Hastings ICLR (1986) 481, 500. Furthermore, throughout the history of Northern Ireland, Britain has enacted special legislation to deal with so-called 'terrorist activity' there. The first was the Civil Authorities (Special Powers) Acts of 1922-23, 12 & 13 Geo. 5, ch. 5. These were replaced with the Northern Ireland (Emergency Provisions) Act, 1973, ch. 53, reprinted in 43 *Halsbury's Statutes of England* (3d ed. 1970) 1235. This was re-enacted without significant changes in 1978 and amended in 1987.

[39] According to British law, treaties are not deemed to be self-executing. See MCNAIR, *The Law of Treaties* (1961) 81, stating: "In the United Kingdom, as we shall see, with a very limited class of exception, no treaty is self-executing; no treaty requiring municipal action to give effect to it can receive that effect without the cooperation of Parliament, either in the form of a statute or in some other way." The British government has not ratified the Optional Protocol to the ICCPR. LEVIN & EDWARDS, 'The UK Human Rights Network', in *Human Rights in the United Kingdom* (1988) 138. It has not incorporated the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, BOYLE, 'Freedom of Expression', ibid. at 86; and neither has it incorporated the European Convention on Human Rights. SHAW, 'Prisoner's Rights', ibid. at 41. And the ICCPR has not been made part of UK domestic law. *R. v. Secretary of State for the Home Department, ex parte Weeks*, Q.B. (Crown Office List) CO/1338/87 (1988).

prevents Irish Catholics living in Northern Ireland from going into court and pleading a cause of action directly under these treaties in order to strike down the widespread discriminatory practices against Irish Catholics currently existing there. Moreover, even large segments of the British People themselves continue to lament the fact that they do not have a domestic constitutional equivalent of a Bill of Rights.

But just because the British government has tolerated and condoned widespread discrimination against Irish Catholics in Northern Ireland would provide absolutely no good reason for the Irish government to do the same against Protestants in a decolonized state of United Ireland.[40] Indeed, it has been the gross violation of the fundamental human rights of Irish Catholics in Northern Ireland – despite these solemn international treaty commitments to the contrary – that has produced the violent response by the Provisional Irish Republican Army (IRA) to the British occupation army, regime, and practices.[41] Hence, the world community of states must understand that the violence committed by the Irish paramilitary parties to this international conflict can be directly attributed to the continuation of the illegal British colony on the Island of Ireland, as well as to the concomitant gross violation of fundamental human rights perpetrated by the British occupation forces upon Irish Catholics.[42] For this reason, then, the Provisional IRA must be fit within the broader political, economic and legal context of an anti-colonial war.[43]

These phenomena are similar to those found in most other anti-colonial wars around the world where the indigenous people have risen up to throw off their colonial oppressors. In such cases, it has proven to be standard operating procedure for the colonial occupation power to play off one group of indigenous people against another, or settlers against the indigenous people; and then for the colonial power to attempt to portray itself as the 'peacekeeper' between the contending factions in order to justify the continuation of its colonial

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[40] See DOUMITT, *supra* note 31, at 71-94.

[41] Ibid. See also ABRAMOVSKY, 'The Political Offense Exception and the Extradition Process: The Enhancement of the Role of the US Judiciary', 13 Hastings ICLR (1989) 1 and 3. One of the most infamous events in Northern Ireland's history was 'bloody Sunday' when British armed forces in Londonderry killed thirteen Catholic demonstrators engaged in peaceful civil resistance activities on 30 January 1972. Ibid.

[42] See BELL, *supra* note 1, at 1. See also DOUMITT, *supra* note 31, at 152-57.

[43] *Accord* The Norwegian Helsinki Committee, *Irish Terrorism or British Colonialism? The Violation of Human Rights in Northern Ireland* (July 1990). See also Amnesty International, *United Kingdom: Political Killings in Northern Ireland* (February, 1994). Indeed the IRA has always claimed to be waging a war of national liberation on behalf of the Irish People against alien (British) rule. CONNELLY, 'Political Violence and International Law: The Case of Northern Ireland', 16 Den. JILP (1987) 79. See generally T. COOGAN, *The IRA: A History* (1993).

occupation.[44] This is precisely what has happened in Northern Ireland.[45] Despite pro-British news media accounts to the contrary, it is the continued presence of the British colonial army, occupation regime, and their military practices in Northern Ireland that have always been the primary source of bloodshed and violence there.[46]

5. CITIZENSHIP, NATIONALITY AND RESIDENCE

Another protection that could be afforded to Protestants in Northern Ireland would be for them to be able to retain their British citizenship while living in a United Ireland. They would also retain their British passports and could have the British Parliament guarantee as a matter of domestic law their right (and that of their descendants) to reside in Britain forever. Moreover, the British Parliament could enact legislation to permit British citizens living in a United Ireland to vote in British elections by means of an absentee ballot.

Protestants living in Northern Ireland should be entitled to claim citizenship in a United Ireland and thus become dual nationals if they so desire. On the other hand, Northern Ireland Protestants (and their descendants) should not be forced to accept Irish citizenship or nationality in a United Ireland if they do not want to. Nevertheless, such individuals (and their descendants) should still retain their right of permanent residence in a United Irish State.

To be sure, if such individuals choose to remain living in United Ireland as exclusively British citizens, then they would be bound to obey the laws of a United Ireland - just as is true for permanent resident aliens in any other country. Nevertheless, they would still be entitled to invoke all the protections of the international and domestic human rights regime outlined above. Moreover, since they are currently residents on the Island of Ireland, such individuals should have the basic right to participate in the drafting of a new Constitution for a United Irish State that would contain within itself a Bill of Rights protecting all the people who live in Ireland irrespective of citizenship and nationality, let alone religion.

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[44] J. HATCH, *The History of Britain in Africa* (1969) 197. See also, DOUMITT, *supra* note 31, at 208, stating: "The practice of dividing the conquered was a long established method of British rule."

[45] Ibid.

[46] See K. BOYLE, T. HADDEN, & P. HILLYARD, *Law and State - The Case of Northern Ireland* (1975) 29-36. See also DOUMITT, *supra* note 31, at 152-163.

Furthermore, under that new Constitution, such individuals should be permitted to vote in whatever type of Irish elections they so desire on the basis of their qualifications as permanent residents in United Ireland. In this way, communities in today's Northern Ireland that consist of a majority of Protestants could continue to maintain majority political control over local, municipal, and county-wide political bodies in United Ireland, subject to the non-discrimination regime mentioned above. Indeed, the new Irish Constitution should accord such permanent residents of a United Ireland all of the legal, political, and constitutional rights of Irish citizens without any distinction. These rights should include those of full and equal participation in voting, law-making, governance, administration, adjudication, public office-holding, education, etc. Of course such individuals would remain free to exercise or not exercise any one or more of these rights guaranteed to them by the new Irish Constitution. But for all functional purposes, there should be no constitutional or legal distinctions whatsoever drawn between these Protestant permanent resident aliens and citizens in a United State of Ireland.

No point would be served by continuing to spell out the multifarious constitutional, legal, political, and human rights protections that could be designed for Protestants - with their active participation - who would be living in a United Irish State. Suffice it to say here that enormous progress can be made in this direction by breaking down and distinguishing the rights pertaining to (1) citizenship; (2) nationality; (3) residence; (4) voting; and (5) governance in a United Ireland. Fortunately, all these questions will be made incredibly easy to handle and therefore quite flexible to negotiate because both Great Britain and Ireland are members of the European Union (EU) - formerly the European Economic Community (EEC) - and thus bound by the various protections and privileges afforded citizens of EU member states without discrimination.[47]

Admittedly, there might be a few hard-line Unionists in Northern Ireland who would refuse to live in a United Ireland even with exclusive British citizenship; a British passport; the rights to vote in both British and Irish elections; the right to hold any public office in a United Ireland; and the ultimate right of permanent residence for themselves and their descendants in Great Britain, etc. But I suspect that number would be very small. Such a small number of individuals should not be enabled to stand in the way of

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[47] Treaty Establishing the European Economic Community, March 25, 1957, 298 UNTS 11 (entered into force January 1, 1958). The original signatories were Belgium, France, Germany, Italy, Luxembourg and the Netherlands. Ibid. Denmark, Ireland, and the United Kingdom became members on January 1, 1973. See TOEPKE, 'The European Economic Community - A Profile', 3 *Northwestern Journal of International Law and Business* (1981) 640 and 643.

finally establishing a definitive peace between the British People and the Irish People. Such irreconcilable Unionists should be given the option of emigration to Britain if they so desire, with relocation assistance provided and full compensation to be paid for any property interests they might decide to relinquish in Northern Ireland. I suspect that number would be even smaller.

6. SELF-DETERMINATION FOR THE PEOPLES OF IRELAND AND BRITAIN

This observation brings the analysis to the heart of the British government's claim that it is really in Northern Ireland to protect the right of such irreconcilable Unionists to self-determination.[48] I find that argument to strain credulity. At one time or another, the British government has invaded, occupied and exploited over one-quarter of the known world community of states and peoples during the course of modern history, including substantial sections of Asia, Africa, the Middle East, and North America.[49] Yet now it is portraying itself as the upholder of the principle of national self-determination in Northern Ireland in order to justify its control over one of its last remaining colonial enclaves around the world. Yet, by comparison, in Hong Kong the world community of states saw the British government turn over five and one-half million people to the Communist government in Beijing with the stroke of a pen – against their wishes and without even bothering to consult

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[48] See WALKER, *supra* note 2, at 190, stating: "In reply to Republican apologists the official line likewise calls in the internationally hallowed principle of self-determination but this time on behalf of the separatist Loyalist 'people'." See also COOPER, 'Humanitarian Intervention: A Possibility for Northern Ireland', 12 Den. JILP (1983) 297 and 298, stating:

> The British Government also justifies its actions as a means of fulfilling a formal promise not to abandon Northern Ireland's one million Protestants. The pledge, 'the guarantee', as it is called, is a section of the 1973 Constitution Act, which reads: "It is hearby affirmed that in no way will Northern Ireland or any part of it cease to be part of Her Majesty's dominion and of the United Kingdom without the consent of the majority of people in Northern Ireland, voting in a poll.

[49] At its height during the late 19th and early 20th centuries, the British empire comprised about one quarter of the world's area and population. Over 600 million people were ruled from London. 4 *Oxford Illustrated Encyclopaedia World History From 1800 to the Present Day* (1988) 51. See also 19 *The New Encyclopaedia Britannica* (15th ed. 1988) 521; *The Times Atlas of World History, European Colonial Empires 1815-1914* (1979) at 244-55.

them.[50] So much for the British government's reputed concern for the principle of national self-determination.

With respect to Northern Ireland, under international law the principle of self-determination of *peoples* appropriately applies to the entire British People, not a small group of irreconcilable Unionists. In this regard, public opinion polls have repeatedly shown that only 25% of the British People want to remain in Northern Ireland.[51] It seems to me that the wishes of this substantial majority of the British People should – and ultimately will – be respected. For reasons explained more fully below, it is only a question of time before the British government will as a matter of fact and of law decolonize Northern Ireland.

As for those irreconcilable Unionists who are unwilling to live as Britons in a United Ireland under any circumstance, then of course they should be free to emigrate to Britain. If they do not want to remain British in a United Ireland, then by all means they should be permitted to be British in Britain. This option would fully implement whatever their self-proclaimed right of self-determination means, as well as the rights to peace and self-determination for everyone else involved in this conflict – the entirety of the British People and the entirety of the Irish People. The UN principle of equal rights and self-determination of *peoples* requires one and only one state for the British People (i.e., Great Britain) and one and only one state for the Irish People (i.e., Ireland). It does not sanction the continuation of an illegal British colony on the Island of Ireland.

7. THE ANGLO-IRISH AGREEMENT OF 1985

These latter observations bring the analysis directly to the Anglo-Irish Agreement of 1985.[52] It used to be the case that the British government had

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[50] Hong Kong's population at the time the treaty was signed was 5.5 million. See *New York Times*, 27 Sept. 1984, papr. 1, at 1, col. 3. Draft Agreement Between the United Kingdom of Great Britain and Northern Ireland, and the Government of the People's Republic of China on the Future of Hong Kong, White Paper (26 Sept. 1984), reprinted in 23 ILM 1366 (1984). See also MUSHKAT, 'The Transition from British to Chinese Rule in Hong Kong: A Discussion of Salient International Legal Issues', 14 Den. JILP (1986) 171.

[51] See DOUMITT, *supra* note 31, at 222.

[52] Agreement between the Government of the United Kingdom and the Government of Ireland, signed 15 November 1985, reprinted in 24 ILM (1985) 1582. The agreement was subject to ratification and was to enter into force on the date on which the two governments exchanged notifications of their acceptance. The Irish Parliament approved the agreement on November 21, 1985 and the British Parliament approved it on 27 November 1985. Notifications of acceptance

always argued that the situation in Northern Ireland was a 'domestic affair' or a matter of 'internal concern' invoking article 2, paragraph 7 of the United Nations Charter prohibiting UN intervention "in matters which are essentially within the domestic jurisdiction of any state."[53] This is similar to claims that have always been made by imperial colonial powers trying to keep the international community from dealing with a colonial situation in order to better hold onto the colony. Witness, for example, France's outlandish claim that the colonial situation in Algeria was part of the domestic affairs of France because France had annexed Algeria and treated it as an integral part of Metropolitan France, just like Paris.[54]

Illegal fictions to the contrary, however, Algeria was never part of France. And Northern Ireland has never been part of Great Britain. Northern Ireland has always been an integral part of Ireland.

Note, however, that after the signature of the Anglo-Irish Agreement at Hillsborough on 15 November 1985, the British government can no longer make that specious type of claim.[55] This recent Anglo-Irish Agreement giving the Irish government a voice in all matters relating to Northern Ireland represents the ultimate and definitive British capitulation on this point.[56] Whatever the situation was before the Anglo-Irish Agreement of 1985, thereafter, from the perspective of international law, any British claim that the ultimate legal status of, as well as the entire domestic situation in, Northern Ireland are merely matters of 'internal concern' would be completely groundless.[57]

This is because of the famous holding of the Permanent Court of International Justice in the *Tunis-Morocco Nationality Decrees Case* of 1923 to the effect that the moment a state concludes an international agreement on any subject, that subject is no longer a matter of exclusively internal concern but becomes a matter of international concern.[58] By signing the Anglo-Irish

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were exchanged on 29 November 1985. See 24 ILM (1985) 1579.

[53] UN Charter Art. 2, para. 7, stating: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

[54] See 19 *The New Encyclopaedia Britannica* (15th ed. 1988) 521.

[55] See *supra* note 51 and accompanying text.

[56] See Anglo-Irish Treaty, *supra* note 52, at 1583-84. The treaty gives Ireland a formal role in governing Northern Ireland for the first time since Ireland's partition in 1921.

[57] See also Note, 'Bridging The Irish Sea: The Anglo-Irish Treaty of 1985', 12 *Syracuse Journal of International Law and Commerce* (1986) 585 and 588.

[58] Nationality Decrees In Tunis and Morocco, 1923 PCIJ (ser. E) No. 1, at 195 (February 7).

Agreement with respect to Northern Ireland in 1985, the British government knowingly removed the entire legal status of, as well as the internal affairs in, Northern Ireland from its so-called domestic jurisdiction to become a matter of international law and world politics. Indeed, the Anglo-Irish Agreement of 1985 has been duly registered with the United Nations Organization in accordance with UN Charter Article 102.[59] For this reason alone, that aforementioned UN Charter Article 2, paragraph 7 prohibition can no longer be applied with respect to Northern Ireland.

8. SOVEREIGNTY OVER NORTHERN IRELAND

Quite obviously, no point would be served by attempting to engage in a detailed technical analysis of the 1985 Anglo-Irish Agreement on an article-by-article basis. Suffice it to say here that this interpretation of the Agreement can be substantiated simply by reference to Section A thereof:[60]

A

STATUS OF NORTHERN IRELAND

Article 1

The two Governments

(a) affirm that any change in the status of Northern Ireland would only come about with the consent of a majority of the people of Northern Ireland;

(b) recognize that the present wish of a majority of the people of Northern Ireland is for no change in the status of Northern Ireland;

(c) declare that, if in the future a majority of the people of Northern Ireland clearly wish for and formally consent to the establishment of a united Ireland, they will introduce and support in the respective Parliaments legislation to give effect to that wish.

In other words, this international treaty specifically purports to deal with the sovereign legal status of Northern Ireland. Hence, according to the *Tunis-Morocco Nationality Decrees Case*, the sovereign legal status of Northern

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[59] UN Charter Art. 102 states: "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it."

[60] See *supra* note 52, at 1583.

Ireland is no longer a matter of exclusive domestic concern with respect to Great Britain alone, but is now also officially and legally proclaimed to be the concern of Ireland as well. For that reason, Northern Ireland also becomes the concern of the entire world community of states, including the United Nations Organization and the European Union, *inter alia*.

Furthermore, by means of this treaty provision alone, the British government has effectively abandoned its claim to exercise exclusive sovereign control over Northern Ireland. The claim that a matter falls within the 'domestic affairs' of a state is another way of saying that the matter involves a question of that state's 'sovereignty'. By definition, 'domestic affairs' are a question of 'state sovereignty', and 'state sovereignty' means (in part) a state's exclusive control over its 'domestic affairs'. Under basic principles of international law, one state's conclusion of an international treaty on a matter of its alleged 'domestic affairs' with another state formally removes that subject matter from the exclusive sovereign control of the first state and endows the second state with the right to act upon that subject matter. In this case, the Anglo-Irish Agreement dealt explicitly with the sovereign "STATUS OF NORTHERN IRELAND" as both a juridical and a territorial entity, respectively.

9. NORTHERN IRELAND V. NEW MEXICO

If the British government truly believed that Northern Ireland was subject to its exclusive sovereign control, then it never would have concluded a treaty with Ireland over the sovereign legal status of Northern Ireland. Here a good historical analogy would be to the United States government signing a treaty with Mexico giving Mexico a consultative role with respect to both the legal status of, and the domestic affairs in, the North American state of New Mexico. The United States government would never sign such an agreement if it really believed that the legal status and domestic concerns of the state of New Mexico were subject to its exclusive sovereign control.

Moreover, I doubt very seriously that the United States government would ever sign a treaty with Mexico to the effect that if a majority of the people of New Mexico want to join Mexico, then of course the United States Congress would be prepared to pass domestic implementing legislation that cedes New Mexico to Mexico. Quite frankly, I could not envision any set of circumstances under which the United States of America would countenance the return of New Mexico to Mexico. Of course, if American citizens living in New Mexico want to be Mexicans, then they would have the perfect right under international law and the United States Constitution to go to Mexico and

expatriate themselves. To be sure, it might also be possible for many individuals who have dual Mexican-American nationalities to live in New Mexico. But even if someday the vast majority of people living in New Mexico were to become dual Mexican-American nationals, I doubt very seriously that the United States Congress would honor any vote by them for the retrocession of New Mexico to Mexico.

Conversely, if the United States government were to sign such a treaty with Mexico over New Mexico, then it would be a pretty good sign that at some particular point in time in the future, the United States would be prepared to countenance the reversion of New Mexico to Mexico. In any event, the conclusion of such a treaty would mean *ipso facto* that both the legal status of, as well as the domestic affairs in, its subject matter (i.e., New Mexico) were matters of international concern and jurisdiction that were no longer subject to the exclusive sovereign control of the United States of America, but henceforth involved Mexico as well as the entire international community, including the United Nations Organization. Today, whatever the legal situation was before 1985, these same principles of international law and world politics now hold true for Northern Ireland.

10. THE UNIONISTS ARE RIGHT

I submit that the British government knew full well that it was doing this when it signed the Anglo-Irish Agreement in 1985. In other words, the British government purposely, knowingly, willingly, and voluntarily surrendered its long-standing claim that Northern Ireland was a matter of purely internal concern subject to its exclusive sovereign control alone. I also believe that the British government did this for the express purpose of sending a signal to hard-line Unionists in Northern Ireland of its eventual intention to withdraw from (that is, to decolonize) Northern Ireland.

Thus, I believe that hard-line Unionists in Northern Ireland have performed the appropriate interpretation of the significance of the Anglo-Irish Agreement. This interpretation does not mean that the British government is going to leave Northern Ireland tomorrow. But it seems pretty clear from both the mere existence, as well as the actual contents, of the Anglo-Irish Agreement that the British government will eventually withdraw from Northern Ireland. This interpretation of the Agreement is also consistent with several public statements

made by British government officials to the effect that there is no way the Provisional IRA can be defeated militarily.[61]

Hence, the Hillsborough Agreement cannot properly be interpreted as a capitulation by the Irish government to the continued presence of a British colony in Northern Ireland. Even if the FITZGERALD government had attempted to do so in 1985, it had no authority to conclude such a treaty that would have expressly violated article 2 of the Irish Constitution: "The national territory consists of the whole island of Ireland, its islands and the territorial seas."[62] And under international law, the British government was charged with knowledge of this constitutional provision.

As a party to the Vienna Convention on the Law of Treaties, the British government realized full well that the Irish government had no authority to conclude an international agreement that contradicted Ireland's constitutional claim to Northern Ireland without obtaining a constitutional amendment to that effect, which obviously never occurred.[63] So according to this Vienna Convention provision, the Anglo-Irish Agreement can only be interpreted in a manner consistent with the Irish Constitution and its claim to sovereignty over Northern Ireland. From the perspective of international law, therefore, the Hillsborough Agreement cannot be interpreted as a surrender of the Irish claim to sovereignty over Northern Ireland, but rather, to the contrary, as an implicit British acceptance of that claim.[64]

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[61] See COOGAN, *supra* note 20, at 472. See also M. FARRELL, *Northern Ireland: The Orange State* (1976) 332.

[62] The Republic of Ireland Constitution Art. II. In this regard, Article 3 further provides: "Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstat Eireann and the like extra-territorial effect."

[63] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (came into force January 27, 1980). Part V, section 2 (dealing with invalidity of treaties), Article 46 provides as follows:

Article 46. Provisions of Internal Law Regarding Competence to Conclude Treaties

(1) A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

(2) A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

See also I. SINCLAIR, *The Vienna Convention on the Law of Treaties* (2d. ed. 1984) 159-97.

[64] But compare A. COUGHLAN, *Fooled Again?* (1986).

11. CONCLUSION

Commenting upon the reunification of Ireland, the Irish Nobel Peace Prize Winner and former IRA Chief-of-Staff SEAN MACBRIDE wrote an *Introduction* to BOBBY SANDS' autobiography *One Day In My Life* (1983). ROBERT SANDS, M.P., spent the last four and one-half years of his life in the H-Blocks of Long Kesh concentration camp near Belfast. He started a hunger strike on March 8, 1981 in order to protest the THATCHER government's refusal to extend prisoner of war status to captured members of the Irish Republican Army, and eventually died on May 5, 1981.

At the conclusion of his *Introduction*, SEAN MACBRIDE wrote approvingly:

> In the early stages of the last decade, Paul Johnson, one of Great Britain's most distinguished journalists, editor of the *Spectator*, and one of Prime Minister Margaret Thatcher's most ardent supporters, wrote in *The New Statesman*:
> In Ireland over the centuries, we have tried every possible formula: direct rule, indirect rule, genocide, apartheid, puppet parliaments, real parliaments, martial law, civil law, colonisation, land reform, partition. Nothing has worked. The only solution we have not tried is absolute and unconditional withdrawal. Why not try it now? It will happen in any event!

With public opinion polls consistently demonstrating that only 25% of the British People want to remain in Northern Ireland, this author is fully convinced that he will live to see the termination of British colonial occupation in Northern Ireland and the reunification of the Irish State. It is most tragic and unfortunate that SEAN MACBRIDE could not live to see that glorious day for whose realization he had worked an entire lifetime to achieve. But he died fully convinced of inevitable victory for the Irish People.

It is my opinion that over time the vast majority of the British People will manifest their intention to decolonize Northern Ireland. Hence my conclusion that the world community of states should be working now to encourage the British government to publicly adopt the position that it will decolonize Northern Ireland in cooperation with the United Nations Organization and the European Union, and with full and effective guarantees for the Protestants of Northern Ireland under the aforementioned treaties and implementing legislation, as well as under a Bill of Rights incorporated into a new Irish Constitution. Whenever that becomes the official position of the British government, I submit that most of the violence perpetrated by the IRA will terminate, the Irish economy could be reintegrated, and the United States

government (together with the EU) would then proceed to provide substantial economic assistance to a United Ireland in order to help it get upon its feet.

Pursuant to the proposals outlined above, every person living in a United Ireland - whether Protestant or Catholic, citizen, or resident alien - would have recourse to a domestic court of law and ultimately, to the European Court of Human Rights or the United Nations Human Rights Committee, to assert his or her rights recognized by three seminal international human rights treaties as well as by a constitutionally protected Bill of Rights. Indeed, these substantive and procedural protections would constitute a dramatic step forward toward the progressive liberalization of the human rights situation for the people living in today's Republic of Ireland as well. In other words, under the aforementioned proposals, everyone currently living on the Island of Ireland - whether Protestant or Catholic - would have significantly more substantive and procedural rights in a United Ireland than they possess today in either Northern Ireland or the Republic of Ireland.

In this fashion, a United Ireland could become a 'win-win' solution for everyone living there. The concretization of that prospect could provide a substantial incentive for all people currently living on the Island of Ireland to work toward the reunification of the Irish State. There is an enormous amount of work toward progressive reunification that can be done by people of good faith on all sides of this dispute irrespective of the feeble steps toward peace that have been taken by the two governments involved.

The Irish People (whether Protestant or Catholic) living on both sides of this artificial border must no longer allow themselves to remain captives to their respective governments' shortsighted policies. The problems of Northern Ireland have been created and perpetuated by both governments - though, to be sure, to different degrees and in different ways. For the most part, the two governments are the problem, not the solution, to the so-called 'troubles' that have plagued Northern Ireland for the past seventy years.

It is time for all the people living on the Island of Ireland to stop looking toward the two governments to produce a solution to the problems of Northern Ireland. Rather, they must look to each other. They must reach out to each other in fraternal solidarity with the full realization that they share more in common with each other than they do with either one of the two governments involved. They must transcend these two governments in order to work toward peaceful reunification on the basis of the 'functional-integration' of their inescapably interconnected lives.[65] As the arch-realist himself, HANS MORGENTHAU once said: "Thus the future of the civilized world is intimately

[65] See, e.g., D. MITRANY, *The Functional Theory of Politics* (1975).

tied to the functional approach to international organization."[66] The same can be said for the Island of Ireland.[67]

12. POSTSCRIPT

On 15 December 1993 British Prime Minister JOHN MAJOR and Irish Prime Minister ALBERT REYNOLDS concluded the so-called Downing Street Declaration on Northern Ireland. Once again, no point would be served here by analyzing this lengthy document on a line-by-line basis. Suffice it to say that from the perspective of international law and politics, the primary significance of this Declaration was that for the first time ever the British government formally and publicly acknowledged the right of the Irish People to self-determination on the Island of Ireland. The critical passage from the Declaration is as follows:

> . . .
>
> The British Government agree that it is for the people of the island of Ireland alone, by agreement between the two parts respectively, to exercise their right of self-determination on the basis of consent, freely and concurrently given, north and south, to bring about a united Ireland, if that is their wish.
> They reaffirm as a binding obligation that they will, for their part, introduce the necessary legislation to give effect to this, or equally to any measure of agreement on future relationships in Ireland which the people living in Ireland may themselves freely so determine without external impediment.
>
> . . .

To be sure, the Downing Street Declaration built upon the Anglo-Irish Agreement of 1985. Nevertheless, putting aside its ambiguities and obfuscations, the Downing Street Declaration represented a major conceptual breakthrough for the British government: after 800 years of colonial occupation in Ireland, the British government finally recognized the right of the Irish People to self-determination over the Island of Ireland.

Of course, this basic concession on a matter of fundamental principle by the British government was long overdue. But at least and at last it was finally made. This fundamental concession by the British government paved the way

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[66] See MORGENTHAU, 'Introduction' to D. MITRANY, *A Working Peace System* 7 (1966) at 11.
[67] See e.g., HOUSE, 'The Border That Wouldn't Go Away: Irish Integration in the EC', 11 NYL Sch. JICL (1990) 229.

for the decision by the Irish Republican Army to announce "a complete cessation of military operations" as of midnight, Wednesday, 31 August 1993. It is hoped that these developments will gradually lead to the creation of a free and United Ireland where Protestants and Catholics can live and work together with peace, harmony, justice, equality, and prosperity for all.

SEPARATE SPHERES: PROTECTIVE LEGISLATION FOR WOMEN IN PAKISTAN

S. Mullally*

1. INTRODUCTION

A large part of the legislation in Pakistan relating specifically to the employment of women is protective in nature. The 1973 Constitution assumes that women are in need of protection.[1] This assumption is reflected in the labour legislation and in the international labour standards that have been adopted by Pakistan. Under this 'protective' approach, the identity of the woman who moves beyond the domestic sphere does not alter. For the purposes of legal regulation, she is still identified as a mother or mother *in potentia*, protective legislation frequently being justified on the ground of 'protection of the function of maternity'.[2] The public interest in the protection of the physical well-being of women workers and the protection of the role of motherhood has been held to justify, *inter alia*, prohibitions on night work for women workers, exclusion from underground work and other work deemed potentially hazardous and compulsory post-natal leave. This study engages in an analysis of state practice in the regulation of women's employment in the public sphere[3] in Pakistan. Gender-specific protective legislation is examined both in the light of the constitutional guarantee of non-discrimination on the basis of sex (Article 25) and the international labour standards that have been

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[1] Cf. *Shrin Munir v. Government of Punjab,* PLD 1990 SC 295, per SHAFIUR RAHMAN J. p. 312.

[2] See, for example, the ILO Maternity Protection Convention (Revised) 1952, No. 103.

[3] In this paper the concepts of public and private spheres serve to distinguish between paid employment in the formal sector and employment which is outside the scope of legal regulation, in particular, home-work, domestic service and women's unpaid economic activities. This paper does not examine women's economic activities in the informal sector. A detailed analysis of this area would be beyond the scope of this paper. For a useful overview of the issues relating to the regulation of home-work, see G. SCHNEIDER DE VILLEGAS, 'Home work: A case for social protection', in 129 *International Labour Review* No. 4. (1990). See also ILO, 8 *Conditions of Work Digest: Home work* No. 2 (Geneva, 1989) and *Technical Background Document*, Meeting of Experts on the Social Protection of Homeworkers (Geneva, 1-5 October 1990).

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adopted by Pakistan. It becomes clear from this analysis that the protective approach, prevalent in the early legislation adopted by the International Labour Organisation (ILO), remains firmly entrenched within the domestic legal framework.

2. COMPETING MODELS OF EQUALITY: INTERNATIONAL LEGISLATION REGULATING WOMEN'S EMPLOYMENT

The prevalence of the ideology of 'separate spheres'[4] at the turn of the century is reflected in the early gender-specific protective legislation adopted, in particular by the International Labour Organisation. This protective approach to women's employment in the public sphere has given way to an equal treatment approach and more recently to attempts to render such gendered differences as continue to exist, 'costless' to the individual women and men involved, that is, though differences between the sexes may yet exist, those differences do not, in themselves, give rise to disadvantaged economic and social conditions.[5]

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[4] The ideology of separate spheres recognises a woman's legal personhood but assigns her a place different and distinct from that assigned to men. One of the best known expressions of the separate spheres ideology is Justice BRADLEY's concurring opinion in an 1873 U.S. Supreme Court case, *Bradwell v. Illinois*, which begins with the observation that, "Civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman" and concludes that the "paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother", 83 U.S. 130, 141 (1873). Within Pakistan it has been used to justify 'special measures' for the protection of women (cf. Article 25 of the Constitution) and the different legal status of women under Islamic laws of evidence, see, for example, the Qanoon-e-Shahadat (Law of Evidence Order) 1984, Ordinance LIV of 1984 or Criminal Law (Third Amendment) Ordinance, 1984.

[5] In outlining what would be required by an approach that would make gender differences 'costless', CHRISTINE LITTLETON looks at the cultural constructions of the 'warrior' and the 'mother' arguing that they are 'gendered complements'. The 'cult of motherhood', she argues, resembles the 'glory of battle' in a number of ways: both occupations involve a lot of unpleasant work, along with a real sense of commitment to a cause beyond oneself .... Both involve danger and possible death. And, of course, the rationale most frequently given for women's exclusion from combat is their capacity for motherhood, C. LITTLETON, 'Reconstructing Sexual Equality' (1987), reprinted in K. BARTLETT and R. KENNEDY (eds.), *Feminist Legal Theory: Readings in Law and Gender* (1991). To make this gender difference 'costless' then, LITTLETON argues, could mean requiring the government to pay mothers the same wages and benefits as soldiers, or it could also mean encouraging the use of motherhood as a recognised qualification for governmental office.

2.1. Protection

The early legislation adopted by the ILO reflects the belief that women's special needs and uniquely female characteristics necessitated the enactment of gender-specific protective legislation in three distinct areas: firstly, night work; secondly, underground and other potentially hazardous work; and thirdly, maternity.

2.1.1. Night Work

At the first session of its General Conference in 1919, the ILO adopted the Night Work (Women) Convention (No. 4). This was revised and modified in 1934 and 1948. Under the Convention, women are prohibited from working, in any public or private industrial undertaking, other than one in which only members of the same family are employed, between the hours of 10.00 p.m and 7.00 a.m. Exceptions are created for (a) women holding responsible positions of a managerial or technical character; and (b) women employed in health and welfare services, not ordinarily engaged in manual work.[6] The need to protect the welfare of the family unit was one of the main arguments put forward at the time of the enactment of the Convention. It was also argued that women suffered the negative effects of night work to a greater extent than men because of their additional roles as housewives and mothers.[7]

2.1.2. Underground and other hazardous work

Also at its first session, the General Conference adopted the Lead Poisoning (Women and Children) Recommendation, 1919 (No. 4), urging the prohibition of the employment of women and young persons in a number of specific processes and the regulation of their employment in other processes. These restrictions were justified on the basis that such work would involve a danger to the 'function of maternity'. Various other ILO instruments regulate the employment of women, particularly pregnant and nursing women, in specific processes. These include the 1921 White Lead (Painting) Convention

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[6] Article 8.

[7] See generally, G.A. JOHNSTON, *The International Labour Organisation* (1970) 224 and Report of the ILO Committee of Experts, *Equal Opportunities and Equal Treatment for Men and Women in Employment* (Geneva, 1985).

(No. 13); the 1960 Radiation Protection Recommendation (No. 114); the 1967 Maximum Weight Convention (No. 127) and the 1971 Benzene Convention (No. 136). The 'arduous character' of underground work and the 'abuse in the employment of women in mines' led to the adoption in 1935 of the Underground Work (Women) Convention (No. 45), prohibiting the employment of women underground. Again a woman's perceived 'special needs' and presumed physical incapacities were held to justify her exclusion from particular types of work.

2.1.3. Maternity

A consideration of the problem of maternity benefits by the General Conference at its first session gave rise to the 1919 Maternity Protection Convention (No. 3). It provided a number of important benefits for pregnant women and nursing mothers, regardless of marital status. These included paid leave before and after childbirth, including compulsory postnatal leave of no less than six weeks (Articles 3 and 4), job protection during such leave (Article 6) and nursing on the job "at times prescribed by national laws or regulations" (Article 3). The original Convention was expanded and modified in 1946 and again in 1952. The revised Convention (No. 103) is wider in scope as it applies also to women employed in non-industrial and agricultural occupations, women wage earners working at home and to domestic workers.[8]

The prevalence of the 'special treatment' approach can be seen here in the treatment of pregnancy as a unique biological condition and in the concern for the protection of the role of motherhood through the imposition of compulsory postnatal leave of at least six weeks, regardless of individual women's actual needs or requirements following childbirth.

2.2. Equal Treatment

The adoption of the Discrimination (Employment and Occupation) Convention (No. 11) in 1958 appeared to mark a movement away from the earlier protective treatment approach. Under the terms of the Convention, each member agrees to declare and pursue a national policy designed to promote

[8] The 1921 Maternity Protection (Agriculture) Recommendation (No. 12) had invited member states to take measures to ensure to agricultural workers protection before and after childbirth similar to that provided for women employed in industry and commerce.

equality of opportunity and treatment. However, gender-specific protective legislation does not fall within the scope of discrimination as defined by the Convention.[9] Article 5, paragraph 1 of the Convention states: "Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labor Conference shall not be deemed to be discrimination". This provision endorses, without qualification, the protective measures earlier adopted by the ILO.[10] While the definition of discrimination contained in Article 1 suggests the adoption of an equal treatment approach, the provisions that follow recall the protective spirit of earlier ILO standards without any precise limitation being set on the nature of protective measures considered to be permissible. In addition, paragraph 2 of Article 5 states, "Any member may [. . .] determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination". The underlying assumption, again, is that women are in need of special protection because of their 'particular requirements'. Even more disturbing, however, is the reference to reasons such as "family responsibilities, or social or cultural status" as justifying the enactment of gender-specific protective measures. The very pervasiveness of social and cultural assumptions concerning women's proper roles and responsibilities that serve to hinder women's participation in the workplace, and which it is the stated objective of this Convention to eliminate, is held to justify further restrictions on women's employment.

The last fifteen years or so, however, has seen substantial inroads being made into the protective approach so prevalent in early legislation regulating women's employment. The ILO Workers with Family Responsibilities Convention (No. 156) and Recommendation No. 165 adopted in 1981, tackle the particlar problems of workers with family responsibilities. Both the Recommendation and the Convention recognize the need to alter the structure of the market-place in order to render any differences that may arise as a result of family responsibilities 'costless' to the individual women and men involved. The need for a reallocation of burdens and responsibilities within the familial sphere to enable women to participate on an equal footing with men in the marketplace is also admitted. Differences between workers are perceived as

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[9] Article 1 defines discrimination as, "[. . .] any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".

[10] See, for example, the 1948 Night Work (Women) Convention (No. 89) and the 1935 Underground Work (Women) Convention (No. 45) discussed above.

arising from the family responsibilities of both women and men, rather than as inhering in women themselves, because of the 'uniqueness' of their procreative functions or the primacy of the role of motherhood. The adoption of the Convention represents a significant advance beyond the earlier Employment (*Women* with Family Responsibilities) Recommendation (1965, No. 123).

Criticisms of the prohibition on night work for women eventually led, after a great deal of acrimonious debate, to the adoption by the ILO of the Protocol of 1990[11] which sought to bring greater flexibility to the standards governing night work for women. The Protocol allows for variations in the duration of the night period and for exemptions from the prohibition for night work. However, no variation or derogation is permitted during a period of at least 16 weeks before and after childbirth, of which at least eight weeks must be before the expected date of delivery. The Protocol is a compromise between the conflicting opinions expressed by states. Under the present legal framework those states wishing to maintain the prohibition on night work for women may do so, although greater flexibility in the application of the prohibition is expected, while those wishing to remove the prohibition may proceed, with certain provisos concerning the health and safety of workers.

The adoption in 1979 of the UN Convention on the Elimination of All Forms of Discrimination Against Women further accelerated the demise within international law of the protective approach to women's participation in the public sphere. The requirement in Article 5 of the Convention that States Parties take steps "to modify social and cultural patterns of conduct of women and men" recognizes that differences are often created by contingent social and political structures rather than inhering in women and men themselves. The adoption of "temporary special measures" aimed at correcting inequalities that may have arisen because of such contingent social structures is permitted under Article 4. Indeed, the Convention has been interpreted by some commentators as imposing a duty on States Parties to take special measures or to create affirmative action programs.[12] The Committee on the Elimination of Discrimination Against Women which was established to monitor the implementation of the Convention, has reiterated the importance of this obligation in its general recommendations. In particular, it has recommended that States Parties:

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[11] Protocol of 1990 to the 1948 Night Work (Women) Convention (Revised).

[12] See, for example, A. BAYEFSKY, 'The Principle of Equality or Non-Discrimination in International Law', 11 *Human Rights Law Journal* (1990) at 27.

> "[. . .] make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment."[13]

This is in line with the position adopted by the Human Rights Committee under the ICCPR that " [. . .] as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant".[14] Special measures for the protection of maternity are also permitted under the Convention. However, strict limitations are placed on the scope of their permissible operation. The Preamble to the Convention explicitly states that the role of women in procreation should not be a basis for discrimination. This is reiterated in Article 11 paragraph 2 which addresses itself specifically to discrimination on the grounds of marriage or maternity. States Parties are required to make provision for maternity leave and to take such measures as are necessary for the health and safety of women workers during pregnancy. However, such measures must be reviewed periodically in the light of scientific and technological knowledge and revised as necessary. States are also required to safeguard the reproductive capacities of male workers. Article 11.1 (f) refers to the right to protection of health and to safety in working conditions, including "the safeguarding of the function of reproduction", thus highlighting the arbitraryness of gender-specific protective legislation which seeks only to protect women's reproductive functions. The reference in the Preamble to the great contribution of women to the welfare of the family and to the need for a "proper understanding" of maternity as a "social function" represents a move towards a positive valuation of the work and roles traditionally undertaken by women without attempting to restrict women's access to the public sphere on that basis. The requirement in Article 11.2(c) that adequate child care facilities and supporting social services be provided is an attempt to ensure that whether or not child care responsibilities continue to be divided along gender lines, those responsibilities should not restrict women's participation in the workforce.

Pakistan is party to the 1948 ILO Night Work (Women) Convention (Revised) and the 1935 Underground Work (Women) Convention. The Convention on Maternity Protection, however, has not yet been adopted. Although Pakistan has ratified the 1958 Convention on Discrimination in Employment and Occupation, later standards which move away from the protective

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[13] 7th session, 1988, A/43.38 (1988) 109.

[14] CCPR/C/21/Rev.1/Add.1 para.10, adopted by the Human Rights Committee under Article 40(4) of the ICCPR at its meeting of 21 November 1989 and reproduced in its Annual Report A/45/40.

approach to women's employment in the public sphere have not been adopted. It has not yet signed the Protocol of 1990 providing for greater flexibility in women's participation in night work, neither is it a party to the 1981 Workers with Family Responsibilities Convention or the 1979 UN Women's Convention.[15] The failure to follow the trend in international law towards equal treatment is also reflected in the protective approach to women's participation in the workforce prevalent in constitutional doctrine and domestic labour legislation.

3. EQUALITY AND NON-DISCRIMINATION UNDER THE 1973 CONSTITUTION

Competing and often conflicting models of equality are found within the 1973 Constitution. While on the one hand, exhorting the State to take steps "to ensure full participation of women in all spheres of national life" (Article 34), on the other hand, it clearly entrenches within the legal sphere, the notion of 'separate spheres' for women and men, presuming that women and not men are in need of protection when they enter into the public sphere. Article 25 is a general guarantee of "equality before law" and "equal protection of the law" for all citizens.[16] It is an autonomous or free-standing equality norm, which means that equality before the law and equal protection of the law are guaranteed in themselves and not merely in the context of a threat to other fundamental rights enshrined within the Constitution. According to PIRZADA, equality before the law is a "somewhat negative concept implying the absence of any special privilege in favour of an individual and the equal subjection of all classes to the ordinary law", whereas "equal protection of the laws is a more positive concept implying equality of treatment in equal circumstances".[17] Both phrases are aimed at the prohibition of arbitrary distinctions only. Not all differences in treatment will be held to be discriminatory and equal treatment does not mean that all persons should be treated in the same manner. As KAIKUS J. has put it, "All law implies classification for when it applies to a set

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[15] India, which has an almost identical constitutional guarantee of equality, has signed (on the 30th July 1980) but not yet ratified the UN Women's Convention. Neither has it adopted the 1981 Workers with Family Responsibilities Convention or the 1990 Protocol on Night Work for Women.

[16] Clause (1) of Article 25 is identical to Article 15 of the Constitution of 1962 and clause (1) of Article 5 of the 1956 Constitution. Clauses (2) and (3) of Article 25 are new.

[17] SYED SHARIFUDDIN PIRZADA, *Fundamental Rights and Constitutional Remedies in Pakistan* (1966) 365. See also *Hiralal Sutwala v. State*, AIR 1953 Nag. 58.

of circumstances, it creates thereby a class, and equal protection means that this classification should be reasonable".[18] Thus the doctrine of reasonable classification has developed in response to the need to distinguish those differences in treatment that may be justified from those which are 'palpably arbitrary'.[19] In *Jibendra Kishore v. Province of East Pakistan*,[20] MUNIR C.J. argued that classification of persons or things is in no way repugnant to the equality doctrine provided the classification is not arbitrary or capricious, is natural and reasonable and bears a fair and substantial relation to the object of the legislation.[21] The doctrine of reasonable classification then, has two key requisites: (a) The classification must be reasonable and should not be arbitrary or capricious; and (b) there must be a reasonable relationship of proportionality between the object of the legislation and the classification employed to attain it. This definition of "reasonable classification" is in keeping with the line drawn by international law between unjustified and justified distinctions. The preliminary point is made, by both the European Court of Human Rights and the Human Rights Committee, that not all differences in treatment are discriminatory or that equal treatment does not mean the same treatment.[22]

The question relevant to us here is whether classification on the basis of sex may be deemed to be "arbitrary or capricious". The question is pre-empted somewhat by the wording of Article 25 itself. Article 25(2) prohibits discrimination on the basis of sex alone. However, the very next clause (3) substantially qualifies the preceding paragraphs. It provides that, "[n]othing in this article shall prevent the State from making any special provision for the protection of women and children". Thus, it creates an exception in favour of women and children, inasmuch as any special provision for their protection

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[18] *Progress of Pakistan Co. Ltd. v. Registrar, Joint Stock Companies,* Karachi, PLD 1958 Lah., p. 906.

[19] *Abdul Akbar Khan v. D.C. Peshawar*, PLD 1957 Pesh. 100.

[20] PLD 1957 SC 9.

[21] Ibid., at 38.

[22] In the Belgian Linguistics Case, decided in 1968, the European Court of Human Rights stated: "[T]he principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference in treatment in the excercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 [the prohibition of discrimination on any ground, including, inter alia, sex, race, colour etc.] is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized" (Case *Relating to Certain Aspects of the Laws on the Use of Education in Belgium* (Merits), 23 July 1968, Volume 6, Series A, European Court of Human Rights, paragraph 10).

may not be interpreted as gender-based discrimination.[23] Special measures for the protection of women then, are permissible. This raises two issues: (1) What constitutes a special measure consistent with the principle of equality or non-discrimination; and (2) Are special measures for the protection of women mandatory or is paragraph (3) merely an enabling clause?

(1) In *Shrin Munir and others v. Government of Punjab*,[24] a case concerning the use of quotas for girl students applying for admission to medical college, SHAFIUR REHMAN, J. argued: "While the difference on the basis of sex can be created and maintained, it shall be done only in those cases where it operates favourably as a protective measure for and not against women and children".[25] The test to be applied to determine the constitutionality of protective legislation for women is whether it operates favourably for women. No clear criteria are suggested to assist in the determination of this question. However, SHAFIUR REHMAN does state that it is dangerous to proceed on the basis of "general nebulous assertions" and "factual" conclusions unsupported by scientific study or appropriate data.[26] It would seem from the judgement given by Justice SHAFIUR REHMAN, that in making such an assessment relevant scientific studies and appropriate data would have to be taken into account. This would be in line with the requirement in the Women's Convention that all protective legislation applying to women be reviewed in the light of up-to-date scientific knowledge and technical changes.

(2) MUHAMMAD MUNIR argues that the fundamental rights contained in the 1973 Constitution of Pakistan, which are expressed by a negative command (the State shall not make any law), must be interpreted only as restrictions on legislation.[27] In contrast, however, he argues that the Principles of Policy that have mostly been stated in a positive form, ought to be considered as positive objects of legislation and thus principles of law-making.[28] Of particular

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[23] MUHAMMAD AFZAL LONE J. explains the import of Article 25 thus:

> Article 25(1) [. . .] is a general equality clause, which negates arbitrary power and extends Fundamental Right of equality before law and equal protection of law to all citizens. Sub-Article (2) prohibits discrimination on the basis of sex alone, to which sub-Article (3) creates an exception in favour of women and children, inasmuch as any special provision for their protection, is not an affront to gender-based discrimination [. . .]

Government of Punjab (Health Dept.) v. Naila Begum, p. 358.

[24] PLD 1990 Supreme Court 295.

[25] Ibid., 309.

[26] Ibid., 312.

[27] M. MUNIR, *Constitution of the Islamic Republic of Pakistan* (1975) 64.

[28] Ibid., 216.

relevance to us here are Articles 34, 35 and 37(e). Article 34 provides that, "Steps shall be taken to ensure full participation of women in all spheres of national life", suggesting a positive duty on the State to establish affirmative action programs. Articles 35 and 37(e) provide respectively that: the State shall protect the marriage, the family, the mother and the child; and the State shall make provision for securing just and humane conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment, suggesting a positive duty on the State to take special measures for the protection of women. The Principles themselves, however, are not rules of law, their true position having been determined by Article 30 which provides that the validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy and no action shall lie against the State or any person on such ground.[29] Thus, while these provisions clearly mandate the existence of an ongoing process of development, objective scrutiny of any such process is excluded. The Principles of Policy then, may be interpreted as guiding principles only, directive in nature and always "subject to the availability of resources" (Article 29(2)). Neither Article 25 nor the Principles of Policy may be interpreted as imposing a strict legal obligation on the State to take special measures for the protection of women workers or to create affirmative action programs. Rather, they are enabling provisions only, conferring on the State a discretionary power to take action. At best, the Principles of Policy may be interpreted as imposing an obligation of conduct on the State, that is, an obligation on all organs of the State and all persons acting on behalf of the State to keep the principles in view while so acting.[30] This falls far short of the interpretation given to the equality guarantees in both the Women's Convention and the ICCPR, where States are held to have a duty to adopt special measures to eliminate *de facto* inequalities between women and men.

The test of the constitutionality of any legislation specifically affecting women is whether or not it operates in their favour. This, however, does not exclude claims that women's 'natural' sex differences or different sex roles necessitate special measures regulating their participation in the workforce and given that protective measures are specifically sanctioned by Article 25 and by the international labour conventions to which Pakistan is a party, it is unlikely

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[29] See *Muhammad Saddiq v. Commissioner, Lahore Division*, PLD 1962 Lah. 999.

[30] In the words of A.K. BROHI: "These provisions then constitute the manifesto of the policies and programs of the State [. . .] and are required to be kept in view by subsequent generations so as to secure continuity in the maintenance of a homogeneous and consistent policy in the matter of handling the affairs of the State". A.K. BROHI, *Fundamental Law of Pakistan* (1958) at 313.

that protective legislation would be held in violation of the constitutional guarantee of equality.

4. DOMESTIC LEGISLATION RELATING TO WOMEN WORKERS

Domestic legislation referring specifically to women's participation in paid employment is highly protective in nature. Much of it is a legacy of the colonial period and reflects the concerns of the early factory movement to protect women's roles within the domestic sphere and, in particular, to protect the actual and possible offspring of women workers. In line with international labour standards, protective measures have been adopted in relation to night work, underground and other potentially hazardous work and maternity.

4.1. Night Work

Night work for women in Pakistan is regulated by the 1934 Factories Act.[31] Under the Act women may only be employed in factories[32] between the hours of 6.00 a.m. and 7.00 p.m.[33] The stated purpose of section 45 of the Factories Act was to secure a night rest of not less than 11 hours for women, in accordance with the recommendations made in the 1931 Report of the Royal Commission on Labour in India[34] and the international labour standards laid down in the 1919 Night Work (Women) Convention (No. 4). However, although the Commission had taken the stance that factory working

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[31] Act No. XXV of 1934.

[32] The definition of factory as given in the 1934 Factories Act is as follows: "Factory means any premises, including the precincts thereof, whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily carried on, but does not include a mine subject to the operation of the Mines Act, 1923".

[33] Factories Act 1934 section 45, sub-section (1)(b). Section 45 replaced section 24 of the 1911 Factories Act (Act XII) which provided that, "(a) no woman shall be employed in any factory before half-past five o'clock in the morning or after seven o'clock in the evening; (b) no women shall be employed in any factory for more than eleven hours in any one day".

[34] See the Statement of Objects and Reasons and Notes on Clauses, *Gazette of India* Part V (1933) 178. The Royal Commission was appointed in 1929 in order to enquire into and report on the existing conditions of labour in industrial undertakings and plantations in British India and, in particular, to report on the health, efficiency and standard of living of the workers. *Report of the Royal Commission on Labour in India* (Whitely Commission Report, 1931), extracts reproduced in PREM NATH CHADHA and ASHOK KUMAR KUBA (eds.), *Encyclopedia of Labour Laws and Industrial Legislation*, Vol. 1 (1955).

hours were excessive, it concluded that to restrict women by law to shorter hours than men would lead to the "highly undesirable situation" whereby male workers would be substituted for women workers in many factories. The better policy, wherever possible, they argued, was to fix hours that were reasonable for adults of both sexes. Thus, it was hoped to avoid a course of action which would be likely to unnecessarily prejudice the work of women and to disorganise industries where the processes performed by men and those performed by women were interdependent. It is interesting to note how similar the opinion of the Commission is, to the recent standard setting measures on night work taken by the ILO. The Commission proposed to extend the period within which factories could employ women from thirteen and a half to seventeen hours, although the period within which any individual woman could be employed was to be reduced from 13 and a half to 13 hours. Although the latter part of the proposal was accepted[35] the recommendation to extend the period within which women could be employed was strongly criticized and was not incorporated into the 1934 Act.[36]

Exceptions to the prohibition on night work are permitted where the factory is a seasonal one or "where the employment of women beyond the said hours is necessary to prevent damage to or deterioration in any raw material".[37] The prohibition on night work is narrower in its scope of application than that contained in the 1948 Night Work (Women) Convention.[38] Whereas under domestic law, night work is prohibited only in factories specifically defined as "any premises [. . .], whereon twenty or more workers are working", an "industrial undertaking" as defined in the Convention does not specify any minimum number of workers. Greater flexibility in the implementation of the prohibition is permitted by the Convention. Night, for example, is defined as a period of at least 11 consecutive hours, including an interval of at least seven consecutive hours, falling between 22.00 p.m. and

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[35] A new section 45 (1) was inserted providing that the Provincial Government could, by notification, vary the limits laid down in clause (b) to any span of thirteen hours between the hours of 5 a.m. and 7.30 p.m. (this was subsequently amended by section 6 of the 1946 Factories (Amendment) Act.

[36] See Notes on Clauses (Factories Act 1934) loc. cit. n. 34.

[37] Factories Act 1934 section 45 sub-section (2). Under the Export Processing Zones (Control of Employment) Rules a general exemption from the provisions of the Factories Act, including the prohibition on night work for women, has been granted to all Export Processing Zones. See Export Processing Zones (Control of Employment) Rules, in *Gazette of Pakistan*, Extra (Islamabad), 10 October 1982, Part II. See generally, D.M. DROR, 'Aspects of labour law and relations in selected export processing zones', 123 *International Labour Review* No. 6 (1984) at 705.

[38] Pakistan ratified the Convention on 2 February 1951.

07.00 a.m. (Article 2), thus allowing for greater flexibility than domestic law which specifically prohibits women from working between the hours of 7.00 p.m. and 6.00 a.m. Article 6 of the Convention is a catch-all provision permitting the night period to be reduced to ten hours on sixty days of the year in industrial undertakings that are influenced by the seasons and in all cases where "exceptional circumstances" demand it (Article 6). The variations permitted by domestic law are clearly in line with those permitted by the Convention although the sixty day limit imposed is not reproduced. An additional variation, not found in domestic law is the provision in Article 7 of the Convention that in countries where the climate renders work by day "particularly trying", the night period may be shorter than that prescribed if compensatory rest is accorded during the day. The attempt by the ILO to introduce further flexibility into the regulation of night work by enacting the Protocol of 1990 has not yet been followed by Pakistan. However, given the compromising stance taken in the Protocol, its adoption by Pakistan would not necessarily require any changes in domestic legislation.

4.2. Hazardous to Health

A woman's perceived special needs and presumed physical incapacity is held to justify her exclusion from types of employment deemed hazardous to health. The 1934 Factories Act prohibits the employment of women on or near machinery in motion,[39] and further prohibits the employment of women in any part of a factory for pressing cotton in which a cotton-opener is at work.[40] It also contains an enabling clause permitting Provincial Governments to enact rules prescribing the maximum weights that may be lifted, carried or moved by adult women, adolescents and children.[41] Under the 1963 Hazardous Occupation Rules the employment of women is prohibited in a number of specific processes involving, inter alia, the use of lead, rubber, chromium, and

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[39] Section 27(2) provides that, "no woman or child shall be allowed in any factory to clean, lubricate or adjust any part of machinery while that part is in motion, or to work between moving parts or between fixed and moving parts of any machinery which is in motion". This provision is repeated in the 1978 Punjab Factories Rules (Appendix III, Rule 134, section 31), the 1975 Sind Factories Rules (Appendix III, Rule 121, section 31) and also in the 1975 NWFP Factories Rules (Appendix III, Rule 131, section 31).

[40] 1934 Factories Act section 32.

[41] Section 33-F, sub-section 2. See section 78 of the 1978 Punjab Factories Rules which prescribes the maximum weights that a woman, adolescent or child may lift.

sand-blasting.[42] A blanket prohibition on the employment of women "in any part of a mine that is below ground" was introduced by the 1973 Mines (Amendment) Act.[43] Exemptions are permitted in respect of women holding positions of a managerial or technical character or employed in health and welfare services and not ordinarily performing manual work. This provision is slightly narrower in scope than that contained in the corresponding ILO Convention which includes female students engaged in training underground within the scope of possible exemptions (Article 3). Otherwise domestic law conforms to the requirements of the Convention.

4.3. Maternity

Maternity Protection for women is governed by:

(i) the West Pakistan Maternity Benefit Ordinance, 1958[44] (hereinafter the MBO);
(ii) the West Pakistan Maternity Benefit Rules, 1961[45]; and
(iii) the Provincial Employees Social Security Ordinance, 1965 (hereinafter, the PESSO). The PESSO makes provision for maternity benefit but does not contain general provisions relating to protection during maternity.

The laws governing maternity protection apply only to specific categories of female employees and are of much more limited scope than the 1952 ILO Convention on Maternity Protection. The MBO is applicable only to factories, as defined by the 1934 Factories Act,[46] including places declared to be factories under section 5 of the Act,[47] but not including seasonal factories.

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[42] See: the 1963 West Pakistan Hazardous Occupations (Lead) Rules, section 5; the 1963 (Rubber) Rules section 3; the 1963 (Chromium) Rules, section 3; the 1963 (Sand Blasting) Rules section 4 and the 1963 (Petrol Gas Generating Plant) Rules, section 3.

[43] Act XLV of 1973, section 23-C.

[44] West Pakistan Maternity Benefit Ordinance No. XXXII of 1958.

[45] See *Gazette of West Pakistan* Extr. 10 June 1961, p. 1505. The West Pakistan Maternity Benefit Rules, 1961 include provisions: (a) delineating the powers of the Director of Labour Welfare and of Inspectors; (b) prescribing the method of payment of maternity benefit; and (c) outlining the procedures governing appeals to the Director of Labour Welfare.

[46] Op. cit. n. 31.

[47] Section 5 of the Factories Act, 1934, provides:
the Provincial Government may, by notification, declare that all or any provisions of this Act may apply to any place wherein a manufacturing process is being carried on or is ordinarily carried on whether with or without the use of power whenever five or more workers are working therin or have worked therin on any one day of the twelve months immediately preceding.

This legislation suffers from the restricted scope and level of protection typical of employers liability measures. The PESSO is specifically designed for gradual application and applies, therefore, only to "such areas, classes of persons, industries or establishments, from such date/dates and with regard to the provisions of such benefits" as are notified by the Federal Government.[48] Women employed in agricultural occupations or wage earners working at home are outside the scope of maternity protection.

The requirements regarding maternity leave contained in the ILO Convention are the same as those laid down under domestic law, that is twelve weeks maternity leave at least six of which must be taken as post-natal leave. The concern for the protection of the role of motherhood is again evident in the imposition of compulsory post-natal leave.[49]

Little or no provision is made for nursing mothers. The Factories Act contains only an enabling clause permitting provincial governments to enact rules requiring that a suitable room be reserved for the use of nursing children under the age of six and prescribing the health and safety standards for such rooms, in any specified factory wherein more than fifty women are ordinarily employed.[50] No specific provision is made for nursing mothers to interrupt their work for the purpose of nursing. This falls short of the ILO Maternity Protection Convention which states that times should be specified in national laws or regulations to allow nursing mothers to interrupt their work.

Both the MBO and the PESSO make provision for the payment of cash benefits for a twelve week period.[51] However, eligibility for maternity benefit is restricted. Under the MBO a woman is only entitled to maternity benefit if she has been employed in the factory of the employer from whom she is claiming for a minimum period of four months immediately preceding the date of delivery.[52] The PESSO provides that a "secured" woman[53] is entitled to

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[48] Export processing zones have been specifically excluded from the provisions of the PESSO. Neither are they subject to the provisions of the Maternity Benefit Ordinance.

[49] MBO section 3 & section 4; PESSO section 36.

[50] 1934 Factories Act, section 33-Q. See also section 94 of the 1975 Sind Factories Rules; section 92 of the 1978 Punjab Factories Rules and section 92 of the 1975 NWFP Factories Rules, all of which have been enacted pursuant to section 33-Q.

[51] PESSO section 36.

[52] MBO section 4. The four month period was substituted for nine months by the West Pakistan Act No. XVIII of 1967.

[53] PESSO section 2(25); 'secured person' means a person in respect of whom contributions are or were payable under this Ordinance. Contributions are payable in respect of all employees defined in section 2(8) as, "any person working, normally for at least twenty-four hours per week, for wages, in or in connection with the work of any industry, business, undertaking or establishment, under any contract of service or apprenticeship [. . .]".

receive maternity benefit if contributions in respect of her were paid or payable for not less than one hundred and eighty days during the twelve calendar months immediately preceding the expected date of her confinement. Although this is common practice in many states no such minimum requirement is laid down by the ILO Convention. Apart from the requirements laid down in the PESSO, no provision is made for medical benefits for pregnant women. The PESSO imposes a duty on employers to provide pre-natal and post-natal medical care not only to women entitled to maternity benefit, but also to any woman in respect of whom contributions were paid or payable, for not less than ninety days during the six calendar months immediately preceding a claim.[54] No mention of medical benefits is found in the MBO. This falls far short of the Convention which imposes an obligation on all employers to provide pre-natal and post-natal care by qualified midwives or medical practitioners as well as hospitalisation where necessary (Article 4).

Only limited protection is provided under the ILO Convention: dismissal during the period of maternity leave is prohibited (Article 6), however, no express reference is made to dismissal on grounds of pregnancy. Similarly under domestic law, although a notice of dismissal may not be served on a female employee while she is on maternity leave,[55] again, no express reference is made to dismissal on grounds of pregnancy. A notice of dismissal given "without sufficient cause" to a female employee, within a period of six months before the date of delivery, cannot have the effect of depriving her of any maternity benefit to which she would otherwise have been entitled.[56] Dismissal on grounds of pregnancy is not itself recognised as giving rise to any other cause of action. Neither is there any clear guarantee of a right to return to work after maternity leave.

Under the MBO any woman who engages in work for which she receives payment, in cash or kind, during the twelve week period of maternity leave, may be subject to a fine.[57] She may also forfeit her right to any maternity benefit not already paid to her. Any employer found to be contravening the MBO may be subjected to a fine.[58] A court may order the whole or any part of any such fine to be paid as compensation to the woman concerned, where the contravention in question has resulted in her being deprived of maternity benefit.[59]

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[54] Ibid., section 38.
[55] MBO section 7(1)(a).
[56] MBO section 7(1)(b).
[57] MBO section 8.
[58] MBO section 9.
[59] Ibid.

Concern to protect the role of motherhood is evident in the imposition of compulsory postnatal leave and in the existence of a penalty to be imposed on women working during the period of compulsory leave. This clearly reflects a concern not to protect the welfare of women workers but to impose a specific allocation of responsibilities within the domestic sphere. It goes much further than the provision made for compulsory post-natal leave in the ILO Convention which does not countenance the possibility of a penalty being imposed on a woman working during that period.

4.4. Other 'protective' legislation

The presumption that women are in need of protection is further reinforced by the provisions on distribution of compensation contained in the 1923 Workmen's Compensation Act,[60] which provide that any payment of a lump sum as compensation "to a woman or a person under legal disability" must be deposited first with the Commissioner.[61] It also provides that where any lump sum deposited with the Commissioner is payable to a woman, such sum may be invested, applied or otherwise dealt with for the benefit of the woman, in such manner as the Commissioner may direct.[62] A woman is perceived as being 'disabled' within the male world of the marketplace and hence in need of the protection of the State, here appearing in the guise of the Commissioner of Workmen's Compensation. This protective approach and the ideology of separate spheres that underlies it, have been reinforced by the measures taken in the name of 'Islamisation'. Although they have not directly targeted women's participation in employment, they have led to a diminution in the legal status of women, "stifling women's voices in the public arena and pushing back the boundaries of social visibility".[63] The Islamisation process

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[60] Act No. VIII of 1923.

[61] The term Commissioner here refers to all persons appointed by the Provincial Government as Commissioners of Workmen's Compensation under section 20 of the Act. In accordance with section 23 of the Act, Commissioners posess all the powers of a civil court.

[62] Workmen's Compensation Act, 1923 section 8 sub-sections (1) and (7).

[63] AYESHA JALAL, 'The Convenience of Subservience: Women and the State of Pakistan', in D. KANDIYOTI (ed.), *Women, Islam and the State* (1991) 77. The first laws introduced by ZIA-UL-HAQ in the process of Islamisation were the Hudood Ordinances. Of particular relevance is the Offence of Zina (Enforcement of Hudood) Ordinance, (Ordinance VII of 1979) concerning the crimes of rape, adultery, abduction and fornication. Section 4 of the Ordinance provides that a man and woman commit 'zina' if they wilfully have sexual intercourse without being validly married to each other. Under the Ordinance the evidence of the complainant of rape, or any medical evidence is not admissible. The question of consent on the part of a complainant assumes

received a new impetus under General ZIA. On the assumption of the office of Chief Martial Law Administrator in July 1977, ZIA-UL-HAQ suspended the fundamental rights contained in the 1973 Constitution, ordered that the 1973 Constitution was in abeyance and proclaimed that Islamisation was his prime objective. In particular, he promised to restore the sanctity of the *chador aur chardiwari*, that is, woman veiled and within the four walls of her house. Control over female sexuality and the preservation of women's modesty was equated with the maintenance of cultural integrity. Thus the struggle over women's autonomy was placed at the centre of the Islamisation process. As one commentator noted, establishing Islamic credentials through retrogressive legislation primarily affecting women was a logical step in a context where the control of women and of their appropriate conduct had long been used to demarcate the identity and boundaries of the Muslim community in the Indian sub-continent.[64]

The Qanoon-e-Shahadat Order of 1984[65] directly impinges on women's participation in the workforce. Art. 17(1) of the Order provides that

> "In matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly."

The original draft had required the testimony of two men or of one man and two women on all matters. However, following widespread protests from women's rights groups and others, the original provision was watered down and is now applicable only to financial transactions reduced to writing.[66] Here

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particular significance. If the court finds that the complainant consented to sexual intercourse, the charge may be converted from one of rape ('zina-bil-jabr') to one of 'zina' (sexual intercourse outside marriage) and the complainant herself becomes the accused. See, for example, NLR 1985 SD 145 Safia Bibi, and PLD 1983 FSC 110 Shabbir Ahmed.

While the Hudood laws do not directly target women in employment, they have greatly contributed to a diminution in the legal and social status of women. For further reading on the Hudood Ordinances, see ASMA JAHANGIR and HINA JILANI, *The Hudood Ordinances: A Divine Sanction?* (1990) and C.H. KENNEDY, 'Islamisation in Pakistan: Implementation of the Hudood Ordinances', 18 *Asian Survey* No. 3 (1988) 307-316.

[64] D. KANDIYOTI, op. cit. n. 62, p. 6.

[65] Loc. cit. n. 4.

[66] The justification for section 17 purports to have its basis in verse 282:2 of the Quran, which says: "[. . .] believers, when you negotiate a debt for a fixed term, draw up an agreement in writing [. . .] and have two of your men to act as witnesses; but if two men are not available, then a man and two women you approve, so that in case one of them is confused the other may remind her".

again, a woman's inherent weakness and presumed tendency to forgetfulness is invoked to justify the enactment of protective legislation.

5. CONCLUDING REMARKS

An analysis of state practice reveals a highly protective approach to women's participation in paid employment, an approach that is clearly sanctioned by constitutional doctrine. Domestic legislation referring specifically to women workers is almost exclusively protective in nature. Although Pakistan is a party to the 1958 ILO Discrimination (Employment and Occupation) Convention, as yet no legislation on equal treatment or equal pay within the workforce exists. Neither has any legislation been enacted to give effect to the constitutional norm of non-discrimination on the basis of sex. The development of international law in this field has had very little impact within Pakistan. The movement away from gender-specific protective measures within international law has not been followed by Pakistan, and the international legislation which has been ratified by it allows this protective approach to remain intact. The existence of gender-specific protective legislation has not encountered much opposition. Indeed more stringent enforcement measures have been demanded.[67] This arises from the desire to reduce the incidence of exploitative and objectionable work practices. As BEATRICE WEBB so succinctly put it when writing on nineteenth century protective legislation in the UK, "Not exclusion but exploitation is the problem here".[68] Securing women's formal equality by abolishing protective legislation merely yields to the prevailing male norms of the workplace and severely disadvantages women, pregnant women in particular, who do not 'fit' easily into existing structures. A preferable approach would be to improve the position of all workers by extending the cover of protective legislation to male as well as female

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Section 17 of the Law of Evidence Order 1984, has been strongly criticised as being a misinterpretation of the Quranic verse, as the latter relates only to monetary notes or debt notes. Its suggestions for witness requirements are recommendatory only, not mandatory, and it provides no justification for widening the ambit of section 17 of the Evidence Order to include financial or future obligations. Further, there is a jurisprudential debate as to whether the Quranic verse, emanating from the Medina period, has been superseded by other verses relating to the competence of men and women to give evidence, which were revealed at a later date.

[67] See generally, *Proceedings of the Workshop on Women and Employment Legislation in Pakistan* organised by the British Council in collaboration with the Ministry of Women Development, Lahore, 1993.

[68] B. WEBB (ed.), *The Case for the Factory Acts* (1901).

employees,[69] following the approach adopted by the UN in the Women's Convention, while at the same time strengthening the present system of maternity protection to ensure security of employment for pregnant women and greater control and decision-making powers for women within that system. This would tackle the gender-specificity of protective legislation without ignoring the potential for exploitation within the workforce.

[69] Much of the trade union support for factory reforms in the UK in the late nineteenth century was based on the hope that protections already won for women and children would eventually be extended to cover male workers also. As the WEBBS so shrewdly commented, "The battle was fought from behind the women's petticoats". SIDNEY and BEATRICE WEBB, *History of Trade Unionism* (1894; 1907 edition) 297.

ICSID INVOLVEMENT IN ASIAN FOREIGN INVESTMENT DISPUTES: THE AMCO AND AAPL CASES

M. Sornarajah*

1. INTRODUCTION

Almost all states of the Asian region are parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[1] States in the region were cautious in becoming parties to the Convention. The *travaux preparatoires*[2] show that the Asian states participating in the conferences that led to the drafting of the Convention indicated reservations to the Convention based largely on the fear that it would insulate foreign investment from domestic control by subjecting it to the jurisdiction of a foreign tribunal formed under the auspices of a body controlled by the capital-exporting countries - the World Bank. There was a general fear that international arbitration was inclined to favour the capital exporters to the detriment of the capital importing states and that it would impede the making of economic decisions by the states.[3] At the time the Convention came into force in 1966, Asian states were still smarting under the colonial experience. They saw the effort to create an international tribunal to deal with foreign investment disputes as an attempt to continue with a situation

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[1] The major exceptions are Myanmar and India. See 3 AsYIL (1994) 226. The People's Republic of China ratified the Convention in 1993. India is reconsidering its stance, consistent with its new policy of liberalization towards foreign investments.

[2] The International Centre for the Settlement of Investment Disputes, *Convention on the Settlement of Investment Disputes: Analysis of Documents concerning the Origin and Formulation of the Convention* (1970), 4 volumes.

[3] For the view that this perception may be changing, see J. PAULSSON, 'Third World Participation in International Investment Arbitration', 2 *ICSID Review* (1988) p. 19. But, for the view that there has been no change, see M. SORNARAJAH, *International Commercial Arbitration* (1990), Chapter One.

Asian Yearbook of International Law, Volume 4 (Ko Swan Sik *et al.*, eds.; 90-411-0872-6 © 1995 Kluwer Law International; printed in Great Britain), pp. 69-98

of economic imperialism through foreign investment.[4] In the 1970s, there was a perception of multinational corporations as harbingers of new forms of economic dependence and as threats to newly won independence.[5] There was a general developing country stance which emerged as a result of the attempts to formulate a New International Economic Order in which the Asian states participated vigorously. In the area of foreign investment, a principal purpose of these attempts was to ensure that a state had control over the whole process of foreign investment.[6] But, the hostility that was generated in the 1970s has been progressively muted as a result of shifts in the foreign investment policies of leading Asian states.

There has been a dramatic shift in perceptions towards foreign investment in recent times. The United Nations undertook a study on multinational corporations as a result of the fears expressed by states as to the role that these corporations play in internal economic affairs and politics of states. The conclusion of the Committee of Experts that multinational corporations could be harnessed to the economic goals of developing states and that, if properly controlled, they could contribute to development, led to changes in attitudes to foreign investment. The report of the Committee identified the harmful practices of multinational corporations and methods of eliminating them through control. In the 1980s, a large number of Asian states, inspired by the example of the newly industrialising states of Asia,[7] changed their attitudes to

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[4] The few Asian states that participated in the conferences that led to the formulation of the Convention expressed these sentiments. See in particular the views of Mr. R. WANASUNDERA of Ceylon (Sri Lanka), in op. cit. n. 2.

[5] The fear was triggered off in Europe where American multinationals were seen as dominating the European economy. See J.J. SERVAN-SCHREIBER, *The American Challenge* (1969). But the view that economic sovereignty of developing states was undermined by these corporations was stated in BARNETT and MUELLER, *The Global Reach*. Another principal contribution to the debate was R. VERNON, *Sovereignty at Bay*. In Latin America, the *dependencia* school saw the multinational corporations as integrating the economy of developing states into the central economies of the developed states in a situation of permanent dependence. The *dependency* school does have influence in Asia as well. Generally see M. SORNARAJAH, *International Law on Foreign Investment* (1994), Chapter Two.

[6] The vigour of participation differed from state to state. Some states, like Singapore and Thailand, for example, did not subscribe to the view in Article 2(2)(c) of the Charter of Economic Rights and Duties of States that compensation for nationalization was a matter entirely for the nationalizing states to decide. These states were committed to a strategy of development led by foreign investment and did not wish to frighten away investment by taking intransigent stances.

[7] The principal newly industrialising states were Hong Kong, South Korea, Taiwan and Singapore. These were later joined by the South East Asian states of Malaysia, Thailand and Indonesia. China began an open door policy and India has begun to liberalize its foreign investment regime. Vietnam and other socialist states in South East Asia have also joined in the moves to attract foreign investment.

foreign investment and sought development led by foreign investment. Contrary to popular thought, the newly industrialising countries did not permit free access to foreign investment but employed judicious methods of controlling them through several means. The foreign investment laws of Asia came to be fashioned on the basis of achieving economic development without too much of an erosion of sovereignty. The employment of screening mechanisms to permit entry only to investments which are considered desirable from a developmental point of view is widespread. This has resulted in the heavy use of administrative techniques for the regulation of foreign investment. The use of joint ventures as the preferred method of permitting foreign investment entry maximises control while at the same time ensuring that skills and technology flow to the local partners of the ventures.[8]

The aims of the ICSID Convention must be reassessed in the light of these developments. There is little doubt that the basic aim of the Convention is to remove the settlement of disputes relating to foreign investment to a forum outside the state, acceptable to the foreign investor. The premise of the Convention is that this would promote the flow of foreign investments into developing countries. But the developing countries resent the idea that the adjudication of disputes arising between them and foreign investors will amount to a loss of control over foreign investors operating within their states. This loss of control over resolution of disputes concerning foreign investment assumes even greater significance at the present time now that the Asian states have instituted administrative measures of control over foreign investment. The ICSID Convention encapsulates this conflict. Its success will depend on the extent to which tribunals created under it will be able to resolve these mutually inconsistent interests, in a manner that is satisfactory to both the foreign investors and the developing states concerned.

The two ICSID awards involving Asian states must be examined in the light of the resolution of this fundamental conflict. After describing the disputes and the awards, the issue as to whether the two awards are a satisfactory reconciliation of the conflict of interests will be returned to. The two cases referred to are *Amco (Asia) Corporation* v. *The Republic of Indonesia* and *AAPL* v. *The Republic of Sri Lanka*. One purpose of this article is to state the main issues involved in these disputes and to critically examine the manner in which they were dealt with by the tribunals.[9] Another is to examine the major

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[8] See M. SORNARAJAH, *The Law of International Joint Ventures* (1992), Chapter 6 in which relevant Asian laws are surveyed.

[9] In a superficial sense, the applicants in the two disputes were also from Asia. Both applicants were subsidiaries of foreign companies which operated from Hong Kong. They acquired Hong Kong nationality through incorporation in Hong Kong.

issues involved in the arbitration of foreign investment disputes. Success of foreign investment arbitration depends on finding a satisfactory method of reconciling the interests of state sovereignty and control over foreign investment with those of the foreign investor(s). The latter would include: to ensure that the dispute is arbitrated in accordance with external norms that provide stability to his investment, by a tribunal in which he has confidence.

In this respect, the two arbitrations under review may both be disappointing, as will be explained below. *Amco* v. *Indonesia* had a tortuous passage through the whole procedure available for annulment and review under the ICSID Convention. The final result produced will not be considered satisfactory by the state party. *AAPL* v. *Sri Lanka* involved issues unsuitable for settlement by a foreign investment tribunal and raises the question whether such issues should be dealt with by tribunals which may not have expertise to deal with situations involving damage caused during hostilities. Both awards have a general significance for the international law on the settlement of foreign investment disputes.

2. AMCO (ASIA) CORPORATION V. INDONESIA

Amco(Asia) was a Hong Kong subsidiary of an American company. It entered into a joint venture with Wisma Kartika, an Indonesian corporation, for the building of a hotel complex, the Kartika Plaza, in Jakarta. Joint venture was the principal form of entry for foreign investment in Indonesia after the Foreign Investment Act, 1967. Pursuant to this legislation, Indonesia also established administrative mechanisms to screen the influx of foreign investment. It took various measures to ensure that the benefits of foreign investment to Indonesia were maximized. One such measure was to require that capitalization of the share of the joint venture by the foreign investor would take place with funds brought from outside Indonesia.[10] Indonesia had previously terminated foreign control over its economy through nationalizations aimed principally at the property of the Dutch. Indonesia had been a colony of the Dutch and secured its freedom through an heroic armed struggle. As a result, Indonesian nationalism has a vigourous element which may be absent to the same degree in other states of Asia. Another feature was the role that

[10] The aim of the measure was to prevent locally formed capital savings from being diverted into the venture and also to ensure that foreign funds would come into the country. Indonesia supervised this regulation through its central bank, Bank Indonesia. Certificates issued by the Bank were the only method of proof of such capitalization having taken place.

the army played in securing independence; it continues to play a dominant role in the political life of Indonesia. Indonesian political life has so far been controlled by men who fought in the wars to secure independence from the Dutch.[11] A large amount of the shares in Wisma, the Indonesian company which was a party to the joint venture, was held by an army pension fund.

By early 1980 a dispute broke out between the parties to the joint venture resulting in a take-over of the control of the Hotel Kartika Plaza by Wisma, with the assistance of members of the Indonesian armed forces. The administrative authorities overseeing the project also had complaints against the foreign party to the joint venture. Sometime prior to the dispute, a Hong Kong businessman became the major shareholder in Amco without the knowledge or consent of the Indonesian authorities.[12] There were also allegations that capitalization was not in accordance with the plan approved by the Indonesian authorities and that the foreign investor had committed other irregularities. As a result Amco's investment was revoked in July, 1980.

When the dispute was not settled through negotiations, the foreign party invoked the arbitration clause submitting the dispute to ICSID arbitration.[13] The applicants included not only PT Amco, the Indonesian subsidiary which had formed the joint venture with Wisma, but also its parent company Amco Asia Corporation, the Hong Kong subsidiary which controlled it, as well as Pan American Development Limited, to which Amco Asian shares had subsequently been sold.

2.1. The Award of the First Tribunal

The dispute was referred to an ICSID tribunal consisting of Professor BERTHOLD GOLDMAN, Mr. ISI FOIGHEL and Mr. EDWARD RUBIN. The tribunal first made an award on the issue of jurisdiction raised by Indonesia.

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[11] An interesting historical survey of factors which shaped Indonesian attitudes to foreign investment can be found in C. HIMAWAN, *The Foreign Investment Process in Indonesia* (1980).

[12] The tribunal, however, found that there was knowledge of the transfer on the part of Indonesia as there was a letter, which the authorities knew of, in which Mr. TAN (the Hong Kong party who later took over) was asked to "assist Max in this project". From this the inference of the knowledge of the existence of an interest of Mr TAN in the planned investment was made (Para. 14 of the 1983 award). The weakness of this inference is obvious. When the inflow of investment was controlled by the state, the identity of the investor should have been more clearly disclosed.

[13] Difficult questions arise as to whether the Hong Kong investor succeeded to the right to invoke the arbitration clause. This matter was, however, not raised in the award.

2.1.1 The Award on Jurisdiction[14]

2.1.1.1. Objection to jurisdiction: corporate nationality

Indonesia objected to the jurisdiction of the tribunal. The major issue raised was that the joint venture company was a corporate national of Indonesia and that a dispute that arose between a national and his/her state was not subject to ICSID jurisdiction[15], as ICSID was created to deal with disputes between states and nationals of other states. This jurisdictional dispute raised interesting points of corporate nationality. The issue had been previously raised in *Holiday Inns* v. *Morocco*[16] where an ICSID tribunal had refused jurisdiction on the ground that once there had been incorporation of the foreign investor's venture under the laws of the host country, the venture became a corporate national of the host state, making a dispute between such a corporate national and the state a matter beyond the jurisdiction of ICSID. The rule is in accordance with the traditionally accepted principles of international law on corporate nationality.[17] Article 25(1) of the ICSID Convention itself states that there must be a clear waiver of the issue of corporate nationality in the case of a foreign owned but locally incorporated corporation for ICSID to be seized of a dispute involving the corporation and the state of incorporation. ICSID has drafted a model clause the inclusion of which will enable it to exercise jurisdiction over a dispute between a foreign controlled but locally incorporated company and a host state. It seems that in the absence of such a clause, ICSID tribunals will not assume jurisdiction.

But, conventional wisdom was cast aside in rejecting this jurisdictional objection.[18] In doing this, the tribunal contorted logic in seeking avenues of escaping the application of the conventional principles. The main argument used by the tribunal was that Indonesia was well aware that the applicant was a foreign company and that the papers associated with the processing of the

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[14] 25 Sep. 1983. The texts of all the awards referred to can be found in 89 ILR (1992) pp. 366-662.

[15] Under Indonesian law, a foreign company can only operate after being incorporated as an Indonesian company. T.M. RADHIE, S. HARTONO, J. BARMAWI and N. YASUDA, *Corporation and Law in ASEAN Countries - With Special Reference to Indonesia* (1986) pp. 52-56.

[16] For some reason yet unknown, the award is not available. However, it is described in J.F. LALIVE, 'The First World Bank Arbitration (*Holiday Inns v. Morocco*): Some Legal Problems', 61 BYIL (1980) p. 123. On issues of corporate nationality in foreign investment arbitration, see M. SORNARAJAH, *International Commercial Arbitration* (1990) pp. 173-183.

[17] *Barcelona Traction Case*, ICJ Rep. (1970) p. 1.

[18] See discussion in paragraphs 20-25 of the first award.

application for entry indicate this awareness. The eventual identity of the true controller of the foreign interests was held to be irrelevant.[19]

The tribunal also found that the arbitral clause must be interpreted in the light of Indonesian legislation seeking to attract foreign investment into the country. Looked at in this context, the arbitration clause assumes a significance which does not depend on a profound examination of the issue of corporate nationality. In such situations the consent to waive the corporate nationality issue required by Article 25(1) of the Convention did not apply. While the ICSID recommends the inclusion of a model clause for the waiver of an argument based on corporate nationality, the tribunal was prepared to hold that the written formula required for a waiver need not be "expressed in a solemn, ritual and unique formulation".[20] Some writing from which an inference of waiver could be drawn would be sufficient. The tribunal scoured hard to find such writing and used the arbitration clause itself as such a waiver. If that be sufficient writing for waiver, the question arises as to why ICSID had to recommend a model clause in the first place. The attitude of the tribunal that is evidenced shows an extreme eagerness to assume jurisdiction over the dispute.

2.1.1.2. Objection to jurisdiction: transfer of control of party

Indonesia objected to the jurisdiction over the claim of Pan American on the ground that it was not a party to the original contracts containing the arbitration clause. This objection was rejected by the tribunal on the ground that the transfer of the shares of Amco Asia Ltd to Pan American was communicated to the Indonesian authorities who had approved it.[21] The tribunal's view was that the right to arbitration was attached to the investment as represented by the shares and was transferred with the shares, provided there was approval by the government that the transferee should acquire all the rights attached to the shares. But, this formulation is followed by a looser formulation in the next paragraph that such government approval is not necessary as the transfer will include the right to invoke the arbitration clause as well. This looser formulation must be rejected. It is inconsistent with the fact that arbitration is a consensual process. There cannot be such a consensual relationship between any transferee and the original party. It would mean that

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[19] Such a holding was necessary to get over the fact that the controlling interests had passed into the hands of the Hong Kong businessman. The undermining of the intent of Article 25(2)(b) was continued in *Klöckner v. Cameroon*, 1 JIA (1984) p. 145.

[20] Paragraph 23 of the award.

[21] Paragraphs 30-31.

the obligation to arbitrate, that is assumed by a party, can be multiplied several times over after the obligation is created by one party deciding to sell shares to a large number of others. Such a technique could be abused in international business as it could be used to bring into the dispute parties with whom the state did not wish to engage. Besides, it defeats the very purpose of a state instituting screening legislation which seeks to ensure that only carefully selected investors are permitted access to operate in the country. It should not be open to a foreign investor to disperse the privileges conferred on him by the state through transferring shares to others. Besides, as a matter of company law, the view taken by the tribunal is of doubtful validity. The arbitration agreement was concluded with the company as a legal person.[22] The idea that all shareholders acquire rights under contracts concluded by the company is one for which support cannot be found in company law systems. The tribunal would have done well to have pegged its view on its finding that the transfer of control was approved by the Indonesian government and stopped at that, instead of straying into an area which it had not handled with any degree of acceptability. Such essays merely reinforce the suspicion that tribunals in foreign investment disputes are usually in favour of the foreign investor and seek to articulate principles in broad terms so as to favour the foreign investor.

After dismissing the objections to jurisdiction, the tribunal found jurisdiction and rendered an award on the merits of the dispute.

2.1.2 First Award on Merits[23]

Applicable law: the issue of the applicable law was not argued before the tribunal. The tribunal interpreted Article 42 of the ICSID Convention which deals with applicable law and held that Indonesian law applied but also "that appropriate rules of international law are to be applied by the Tribunal".[24] The tribunal did not concern itself with the relationship between Indonesian law and international law. The parties themselves were happy to argue the case on the basis that Indonesian law applied in general.

Issue of taking: one preliminary issue was whether the taking of the property by the army from Wisma could be attributed to the Indonesian

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[22] The tribunal had concluded that the Indonesian 'Perusahaan' is akin to a company (paragraph 10). This conclusion appears to be correct in the light of the writings of Indonesian lawyers.

[23] 20 Nov. 1984, 24 ILM (1985) 1022, 89 ILR 405.

[24] Paragraph 147.

government. The tribunal held that though there was a close relationship between Wisma, the army and the government, this link by itself would not be sufficient to attribute the act to the government.

The tribunal, however, relied on the fact that the army had assisted a private party to deprive an alien of property. This situation, according to the tribunal, called for the application of the rules of state responsibility in international law. Under these rules, there is a duty on the part of the state to protect aliens and their property. This duty was not satisfied when the army and police participated in the deprivation of the property of Wisma. That there is such a rule in international law is not subject to doubt. But, the issue is whether the rules of state responsibility for failure to render protection to an alien are independent of the contract of foreign investment which created jurisdiction in the tribunal and therefore fell outside the jurisdiction of the arbitration tribunal. The arbitration clause in a contract creates jurisdiction in the tribunal over matters arising from the contract. Here, the issue concerned a matter of general law of state responsibility and not a matter which arose from the contract itself. Hence the question was whether the tribunal could have jurisdiction over a matter relating to the foreign investment even though it did not directly arise from the contract on the basis of which the foreign investment was made. This is a matter that was not raised or considered by the tribunal. Ordinarily, under the rules of state responsibility, the acts of the army of a state will be attributed to the state.[25] This would be so, particularly in a situation where there was subsequent omission on the part of the state to disown the acts of the army and make reparation to the alien. Whether responsibility arising from these rules of state responsibility can be applied by an arbitration tribunal which is given jurisdiction by contract, as well as by the convention creating it to deal with disputes arising from the foreign investment, remains a moot point.

One writer has expressed the view that the tribunal erred in applying the rules of state responsibility to the case. TOOPE stated his objections in the following terms:

> There is no doubt that such a seizure would *prima facie* amount to an internationally wrongful act, but the responsibility for such an act is engaged, it must be remembered, *vis-à-vis* the national state of the expropriated party. By using the terminology of state responsibility, without caveat, in the context

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[25] I. BROWNLIE, *System of the Law of Nations: State Responsibility* (Part I, 1983) p. 160. The issue of state responsibility arising from the activity of groups under the control of the state was discussed in many awards of the Iran-US Claims Tribunal.

> of an arbitration between a state and a foreign private party, the Tribunal muddled the true relationship of the parties. [. . .] Under the basic principles of international law, the remedies for a private investor will typically arise solely from its contractual relationship with the host state. The private party cannot invoke the principles of state responsibility directly.[26]

An arbitral tribunal obtains jurisdiction from the arbitral clause in the foreign investment contract. It has jurisdiction to deal with disputes arising from the contract. An issue of state responsibility which concerns the host state and the home state of the foreign investor can hardly be said to arise from the contract. It should be a matter settled by the two countries concerned and not at the behest of the foreign investor to whom the responsibility is not due in terms of international law.

Use of Pacta Sunt Servanda: the tribunal emphasized the doctrine of *pacta sunt servanda* and its application to foreign investment contracts. One feature of investment protection after the Second World War was built up around the notion of contractual sanctity. The rule of treaty law, *pacta sunt servanda*, was taken over to give the false impression that the foreign investment contract amounted to a treaty when in strict theory it cannot be so for the simple reason that it is concluded with a foreign corporation, an entity which lacks personality in international law. The rule was also imported into this area of the law as a general principle of law, again a shaky basis to build up a proposition which is intended to have universal validity. Besides the fact that general principles are very weak sources of law, it will be difficult to establish contractual sanctity as an inflexible proposition of the law in modern contracts jurisprudence. The progress in modern contract law has been achieved through a movement away from contractual sanctity as recognized in nineteenth century contracts law, towards notions which seek to stress the need for equality in bargaining strengths. The tribunal used nineteenth century case law to establish contractual sanctity.[27]

The tribunal also cited arbitral awards made in disputes involving Middle Eastern states and oil corporations to support the proposition that *pacta sunt servanda* is a 'principle of traditional Islamic law'. The relevance of Islamic

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[26] S.J. TOOPE, *International Mixed Arbitration* (1990) p. 243.

[27] Paragraph 258. The two cases cited are from common law jurisdictions. *Printing and Numerical Registering Co* v. *Samp* (1875) LR 19 Eq. 465 and *Stees* v. *Leonard* (1874) 20 Minn. 494. The text on contract law by FARNSWORTH, *Contract* (1982), is referred to but this text only mentions the proposition as a starting point of the discussion. No civil law discussion is entered into although Indonesian law is civil law-based.

law to the dispute is unclear. Indonesia is predominantly Islamic but professes a political ideology which does not emphasize any single religion. The first case referred to, *Saudi Arabia* v. *Arabian American Oil Company* hardly supports the proposition for there it was held that general principles were being applied because Islamic law, which would otherwise have applied as the law of the host state (Saudi Arabia), did not contain any principles applicable to sophisticated contracts like oil concession contracts. The other awards cited did not discuss Islamic law, but decided that there was a principle of contractual sanctity which could be derived from general principles of law.[28]

There was a need to transfer the rule of *pacta sunt servanda* developed in the context of oil concessions to foreign investment contracts generally. The transference which the tribunal seeks to make is contained in the drawing of an analogy between the concession and the granting of rights to invest in the case of ordinary foreign investment contracts. The tribunal observed:

> "[. . .] even if the relationship here in dispute does not constitute, properly speaking, a concession contract, nor derives from such a contract, it remains that there is a significant resemblance between these two legal structures: indeed, when authorizing a company to invest, the State grants it rights to create and operate local economic enterprises. This a State also does by a concession contract [. . .]"

The analogy is inappropriate. The concession contracts were made with absolute rulers of the Middle East, bartering away rights to exploit oil for a long period of time in exchange for royalties on oil produced. The control of investment by a modern state is entirely different. Most states have established administrative machinery for the screening of foreign investment to ensure that the foreign investment which enters their states does not engage in practices harmful to their economies. Indonesia is no exception. By its foreign investment law enacted in 1967 it established an entity, the BKPM, to screen the entry and operation of foreign investment in Indonesia. The function of this body is administrative. It does not make contracts as the oil sheikhs did. It acts in the public interest to ensure that foreign investment is attracted to Indonesia but that the foreign investment so attracted is of the right variety and would mesh in with the development goals of the Indonesian state. The foreign

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[28] *Texaco Overseas Petroleum Company* v *Libyan Arab Republic* 53 ILR (1977) 422. Among the Libyan awards, the view that *pacta sunt servanda* constituted a proposition of Islamic law was discussed by Arbitrator MAHMASSANI in *Liamco v Libya*. But, reference to Islamic law in the case under review is puzzling. Indonesia does not apply Islamic law to contracts as the Middle Eastern states involved in the oil concession disputes do.

investment contract is never made with the BKPM in Indonesia but with some state entity or private company. This is so in any other state which has a similar screening mechanism and legislation, requiring authorization by the mechanism prior to entry of foreign investment. The authorization could be conditional. The screening mechanism performs a purely public law function. To assimilate its authorization procedures to the making of concession agreements is an error. The tribunal failed to see the transformation that was introduced into the process of foreign investment as a result of the active participation of the state through its regulatory machinery. Whereas in the case of the concession there was a two-way contractual relationship, with the Middle-Eastern ruler being a passive and satisfied partner as long as he received sufficient royalties, the modern foreign investment process is a continuous three-way relationship. It is a dynamic relationship through which the state seeks to achieve its goal of economic development. There may be an initial contract between the foreign investor and a local entity but interposed on it is the public law function of the regulatory body which oversees the process of foreign investment. It is the failure to see this change which led to the facile reasoning of the tribunal that the new type of foreign investment relationship could be assimilated to the concession agreement. Modern arbitrators seem unwilling to give up the notions of foreign investment protection devised in a past age of protectorates and oil sheikhs, simply because they are more comfortable with the ideas devised by their predecessors imposing a system of property protection.

The arguments which had been made earlier to assimilate the foreign investment contract to administrative contracts under French law were dismissed in the same manner as they had been dismissed in earlier awards on the basis that the French system of administrative contracts is a peculiarity of the French law. This view has been consistently challenged and it has been pointed out that the French doctrine that government contracts are defeasible in the larger public interest is to be found in all legal systems.[29] But, such a

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[29] Thus, the French professor BERNARD AUDIT, to whose "enlightening explanations" the tribunal referred to in another context (paragraph 266), has disagreed with the Tribunal's view. Referring to the argument that administrative contracts are a peculiarity of French law, he observed: "These arguments make the form unduly prevail over the substance. Comparative law indicates that everywhere contracts concluded by public authority are not altogether governed by the same regime as purely civil contracts", B. AUDIT, *Transnational Arbitration and State Contracts* (1988) p. 108. Also see the view of the Greek jurist A.A. FATOUROS, to the effect that the administrative contract is not peculiar to French law. A.A. FATOUROS, *Government Guarantees to Foreign Investors* (1962) pp. 197-200. In the *Texaco Arbitration* 53 ILR (1979) 389, which was decided by the French jurist Professor DUPUY, administrative contracts were regarded as a peculiarity of French law.

position is hostile to the building up of a doctrine based on contractual sanctity is consequently dismissed with the sophistry that the doctrine is peculiar to French law. Where arbitration tribunals make such partial choices, the whole system of international arbitration will attract contempt and distrust. The consideration of the view that the foreign investment contract is akin to administrative contracts is long overdue especially in view of the changes that have taken place in the structure of the foreign investment relations in most host state legislation.

Requirement of due process: Indonesia argued that it had revoked the license as requirements imposed upon entry concerning the capitalization of the venture through funds brought in from outside Indonesia had not been met. Since capital flows is one of the presumed advantages of foreign investment, host states require that such flows must take place by insisting that capital is brought into the country by the foreign investor and not raised on the local capital markets. Financing the venture through capital raised on local markets would deprive local entrepreneurs of the funds and enable the foreign investor to repatriate profits he had made through the use of locally existing funds without in any way adding to the capital resources of the host state. Hence, host states emphasize the importance of capitalization of ventures through money raised from foreign sources.

Indonesia alleged that the capitalization measures that were required of Amco had not been satisfied. The best evidence that could have been given against this allegation was that the capital that was brought in had been registered as required with the Bank Indonesia, the central bank of the country. There was no proof of such registration of capital by Amco. One would think that if there had been a fraudulent intention not to fulfil the requirements, entry had been secured by fraud and there would have been a nullity. If the requirement had not been satisfied subsequently as required, then the permission or license which was given on condition that there be such capitalization was revocable on the ground that the condition had not been satisfied. In the case of Amco, there was little doubt that the license was revocable at the least, as capitalization requirements imposed by the regulatory body had not been met.

The tribunal, however, got over this point by pointing out that there had been procedural irregularities in the manner in which Indonesia had handled the matter. There was an assumption that no lawful right existed in the Indonesian government to terminate the contract. Even if the fact that the contract involved was a public law agreement is put aside, the issue still remains as to whether there had been fulfilment of the contractual duties of the foreign party. The imposed capitalization requirements certainly form part of

the agreement, if an agreement can be construed with the foreign investor. These requirements had not been met. There had been a prior breach of the agreement on the part of the foreign investor in not fulfilling what could be construed to be essential terms of the agreement. The tribunal did not consider this factor. It was more intent on finding a breach by the Indonesian government. According to the award the procedural irregularity implied withholding due process and amounted to denial of justice, involving state responsibility. The finding of denial of justice in these circumstances is unwarranted. As a later tribunal also based its decision primarily on the issue of denial of justice, discussion of this issue is postponed until later.

Remedy: the tribunal granted damages, presumably on the basis of denial of justice but the exact basis was not clearly identified in the award. Damages were awarded for the loss suffered (*damnum emergens*) as well as for expected profits which were lost (*lucrum cessans*). Justification for this was sought both in Indonesian law as well as in international law. It was also suggested that these principles were common to all legal systems.

The tribunal used the *Chorzow Factory Case*[30] in support of its view that actual loss as well as future profits may be granted as damages in the event of an unlawful taking of foreign property. But, it has been pointed out by numerous scholars that the *Chorzow Factory Case* does not support such a wide proposition. It concerned a taking in violation of treaty obligations and the methods of awarding damages used by the Court must therefore be confined to takings which are illegal. The relevance of the *Chorzow Factory Case* to modern interferences with property must be doubted for the case was decided at a time when the legal attitudes to state takings were different. In modern times, it is not questioned that the taking by a state is lawful, provided it is for a public purpose and is not discriminatory.

Calculation of damages: the tribunal used the discounted cash flow method of assessing damages. It took the net value of the investment and deducted the discounted cash value of the property to arrive at the sum that was to be awarded as damages. It suggested that this method ensured that the damages came "as close as possible to the full compensation prescribed by international law". Issues of valuation of property are secondary to the standard of compensation which should be paid. The tribunal obviously had concluded that the standard of compensation was full compensation. Again, the conclusion is

[30] 1928 PCIJ, Ser. A no. 17.

one that is contestable in view of the movements away from the standard of full compensation, among others in scholarly opinion.

2.2. The Annulment Proceedings

Indonesia then sought annulment of the award under Article 52(2) of the ICSID Convention on the basis of five grounds: (1) that the tribunal had exceeded its powers in deciding that the revocation of Amco's license was not material; (2) that it had erred in not considering all grounds justifying the revocation of Amco's licence; (3) that it had not stated reasons for holding that Indonesia had violated due process in revoking the licence of Amco; (4) that the tribunal had not stated reasons for holding that Indonesia incurred state responsibility for failure to afford sufficient protection to a foreign investor; (5) that no reasons were given for deciding on the compensation.

The annulment tribunal, which bore the official name of '*ad hoc* committee', consisted of Professor I. SEIDL-HOHENVELDERN, an Austrian professor who has written much on international economic law[31], Dr. FLORENTINO FELICIANO, a distinguished international lawyer and judge from the Philippines[32] and Professor ANDREA GIARDINA, an Italian academic who has written widely on issues of foreign investment. The main points of interest to arbitration and international law found in the award of the annulment tribunal will be examined below.[33]

(1) *The applicable law:* in the absence of an express choice of law by the parties, the tribunal followed the direction in Article 42 in determining the law applicable. It found that the provision required it to apply Indonesian law, subject to the dual role permitted to international law. The first role is that lacunae in the applicable domestic law could be filled by resorting to principles of international law. This presupposes the existence of rules of international law amounting to a comprehensive code on foreign investment, more exhaustive than that which is provided by domestic legal systems. Such a body of rules does not exist in international law. Hence, the role for international law contemplated by the tribunal cannot be satisfied by that system. The

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[31] Professor SEIDL-HOHENVELDERN is the author, among other works, of the following books: *Corporations in and under International Law* (1987); *Principles of International Economic Law* (1990).

[32] Among Dr. FELICIANO'S publications is *Law and Minimum World Public Order* (with M.S. MCDOUGAL, 1961).

[33] Decision of 16 May 1986, 89 ILR 514.

second role is that international law rules have precedence if domestic rules are in collision with them. Here again, the difficulty is in identifying these rules of international law for there is little consensus among states as to what they are. Such identification must at best depend on the personal preferences of arbitrators and other decision-makers as to what these rules are, rather than on rules that will satisfy the standards for recognition of rules in public international law. The tribunal, however, gave an explanation for using international law as a validating and overriding system. The reasoning was that the award of ICSID was binding and enforceable in all states and this result could not come about unless there was a body of overriding principles to which all states subscribed. This theoretical justification may be acceptable only if it can be established that there is in fact such a body of overriding principles which have been accepted by all states. The absence of any concrete rules of international law on foreign investment, apart from the existence of state responsibility for wrongful treatment, continues to defeat the claim that validity of national standards is assessable on the basis of international standards.

(2) *The nature of the annulment procedure:* the tribunal also considered the nature of the annulment procedure, having regard to earlier precedent. The annulment proceedings took place immediately after the annulment of the award in *Klöckner* v. *Cameroon* and served as an embarrassment to the ICSID system, for an arbitral system which did not lead to quick and effective disposal of disputes will prove to be unattractive.[34] The tribunal concluded that all ICSID awards should contain "sufficiently pertinent reasons" and that the supporting reasons for the award should "constitute an appropriate foundation for the conclusions reached through such reasons".[35] The appellate nature of the annulment proceedings is evident.

(3) *The issue of state responsibility:* the annulment tribunal found that the finding on the merits, that the conduct of the Indonesian army and police in interfering with Amco's possession and control of the enterprise was a violation of Indonesian law, was sound. It found a duty to confer such protection in Article 21 of the Indonesian Foreign Investment Law. Having done so, the tribunal refused to pronounce on the issue whether there was a duty in public international law to confer protection upon foreign investment

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[34] A. REDFERN, 'ICSID: Losing its Appeal?', 3 *Arbitration International* (1987) 98.

[35] Paragraph 43; the tribunal relied on *Klockner* as well as the decision of the ICJ in *Honduras v. Nicaragua*, ICJ Rep. (1960) 216, though the tribunal said that these decisions were not binding on it.

and that failure to do so gives rise to state responsibility. The tribunal noted that the existence of such a duty in public international law "was at best a controversial matter" as a considerable number of states rejected such a notion. The annulment tribunal was unhappy with the attribution of responsibility to the Indonesian state though it did not feel called upon to pronounce on this issue in view of its finding that Indonesian law had been violated[36]. This is an indication of the fact that the much vaunted role of international law as supplemental and supervisory to domestic law is one that that system is inadequately equipped to fulfil. The rules of international law on foreign investment, if any in fact exist, are hazy and contested. A tribunal which can conclusively declare a proposition of international law on foreign investment will find itself accused of partiality. No universally accepted rule of customary law exists in the field of foreign investment protection. Nor are there substantive rules which have been created by treaties.

(4) *Exhaustion of local remedies:* the tribunal dismissed the argument of Indonesia that there was no prior exhaustion of local remedies on the ground that under the ICSID Convention such resort to local remedies was unnecessary.

(5) *Errors on findings:* The Indonesian government argued that the first tribunal had committed two errors relating to its finding that the revocation was unlawful. It pointed out that the first error was the finding that BKPM's revocation was not a supportable one. The facts showed that AMCO had assigned the management of the hotel to third parties without prior approval from BKPM. This constituted sufficient ground for revocation of the license. The second error was that insufficient consideration was given to the fact that Amco had not capitalised the joint venture in accordance with its original arrangement with BKPM. This impropriety in capitalisation was an independent ground for the termination of the foreign investment. This was not appreciated by the tribunal.

The rejection by the first tribunal of the relevance of the transfer of the management of the hotel to third parties was approved by the *ad hoc* committee. The reasoning behind the approval is unclear. The management had been transferred nine years prior to any adverse reaction by the state authority. The initial transfer was to a consortium which involved Garuda, the state-controlled airline. The facts could give rise to a presumption of knowledge and

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[36] Paragraph 60.

condonation of this transfer by the state. There may have been an estoppel operating against the state taking up this issue.

The *ad hoc* committee took a different attitude on the significance of the fact that Amco had not satisfied up to one sixth of the capitalization requirements. It pointed out that only investments registered with the Bank of Indonesia amounted to investments under Indonesian law and that the amount of qualified investments under Indonesian law could be proved only by the determination of the Bank of Indonesia. The *ad hoc* committee found that the sum of foreign capital registered with the Bank of Indonesia as required by the law amounted to only US $983,992. It held:

> The Tribunal in determining that the investment of Amco had reached the sum of US $2,472,490 clearly failed to apply the relevant provisions of Indonesian law. The ad hoc Committee holds that the Tribunal manifestly exceeded its powers in this regard and is compelled to annul this finding.[37]

The computation of the amount of Amco's legitimate investment by the tribunal by including loan capital in the amount was regarded as a manifest excess of power. The annulment of the award was based on this ground.

2.3. The Final Tribunal

2.3.1. Decision on Jurisdiction[38]

The case was resubmitted to a fresh tribunal which had Professor ROSALYN HIGGINS as its Chairperson and Messrs. LALONDE and MAGID as its members. The tribunal considered the issues of jurisdiction presented to it. The principal issue at this stage was the *res judicata* effect of the annulment decision. The award on jurisdiction contains a contribution to the law on the subject of *res judicata* effect of previous tribunals which had considered the dispute. Its essential finding was that, while the decision of the annulment tribunal on issues raised was binding on a subsequent tribunal seized of the same dispute, the reasoning used did not have any binding effect.[39]

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[37] Paragraph 95.

[38] Decision of 10 May 1988, 89 ILR (1992) 552.

[39] Relevant literature was published on this ruling of the tribunal, discussing the accuracy of this view. See W. REISMAN, *Systems of Control in International Adjudication and Arbitration* (1992); A. BROCHES, 'Observations on the Finality of ICSID Awards', 6 *ICSID Review* (1991) 78; W. REISMAN, 'Repairing ICSID's Control System', 7 *ICSID Review* (1992) 196.

2.3.2. Award on Merits: Resubmission[40]

The salient points in the award of the last tribunal are analyzed below.

Applicable law: there was no issue on the question of applicable law raised before the first tribunal or the *ad hoc* committee. Yet, the final tribunal made a pronouncement on the subject after indicating that there was a disagreement between the earlier tribunals which had considered the Amco dispute. The counsel for Indonesia had maintained that international law was only relevant to the resolution of the dispute if there was a lacuna in the Indonesian law or if the law of the host state was incompatible with international law, in which case the latter prevailed. The *ad hoc* committee had agreed with this view that international law was "supplemental and corrective" of the law of the host state. But, the first tribunal had given co-equal status to both legal systems. Referring to this conflict, the final tribunal observed:

> This Tribunal notes that Article 42(1) [of the ICSID Convention] refers to the application of host-state laws and international law. If there are no relevant host-state laws on a particular matter, a search must be made for the relevant international laws. And, where there are applicable host state laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as "only" "supplemental and corrective" seems a distinction without a difference. In any event, the Tribunal believes that its task is to test every claim of law in this case first against Indonesian law, and then against international law.[41]

This formulation goes even further than the formulation of the first tribunal in that it makes international law superior to the host-state law, for the assumption is that if a result from the application of international law to any point in issue differs from the result of the application of the host state's law, the former result should prevail. This conclusion is one which can hardly find support in the *travaux preparatoires* of the ICSID Convention. Such expansive claims to the role of international law will result in hesitation on the part of host states to accept ICSID arbitration.

The revocation of the license: the tribunal did not pay much attention to the interference with management rights of Amco as a result of the take-over of

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[40] Decision of 31 May 1990, 89 ILR 580.

[41] Paragraph 40.

the hotel by the army. It found that there was no evidence to show that the entitlement of Amco to profits had been lost as a result of the intervention.

Much of the discussion of the law centred on procedural illegality attached to the revocation of the license of Amco by BKPM, the administrative body responsible for licensing foreign investment in Indonesia. Amco's contention was that, although there was a power in BKPM to revoke the license in situations where the foreign investor had not acted in accordance with the approved investment plan, the revocation of the license in its case was not done in accordance with the requirements of due process. Amco raised the interesting point that even if BKPM's revocation was substantively valid, damages would be due for the procedural violations. The tribunal reformulated this issue as requiring a determination as to:

> "whether there exists a generally tainted background that necessarily renders a decision unlawful, even if substantive grounds may exist for such a decision. This background includes, but is not limited to, the question of procedural irregularities."

Such a reformulation again widened the scope of the inquiry of the tribunal. A preliminary question would be whether the state party ever intended to give such a wide jurisdiction to the tribunal to scour around the whole process of the investment in order to determine whether or not the transaction was tainted. Another issue is whether the inquiry as to the taint should be restricted to the state party and whether the errors of the foreign investor are not relevant. Again, the formulation introduces factors that are partial to the situation of the foreign investor and not to the host state. There is also no indication in the ICSID Convention or in its *travaux preparatoires* as to whether ICSID tribunals are to be vested with jurisdiction to inquire into responsibility for the conduct of administrative authorities in the host state or whether their jurisdiction is to be confined to the issue of whether or not the foreign investment contract has been wrongly breached.

Having formulated the issue in such wide terms, the tribunal then went on to deal with the history of the dispute between Amco and Wisma, the intervention of BKPM and the manner in which BKPM dealt with the allegations made by Wisma against Amco that Amco had acted in violation of the investment plan relating to capitalization and other matters. The officer investigating the matter for BKPM had, in the tribunal's view, acted in haste, had not done a thorough examination of relevant matters and had relied on inaccurate infor-

mation.[42] The errors of the officer had not been rectified by the superior authorities who reviewed his findings.

The finding of the officer that there was no capitalization according to the investment plan was supportable as a matter of fact for there was no Bank of Indonesia certification as to the required capitalization. Such certification, as has been pointed out previously, was the only method of proof of capitalization under Indonesian law. But, the tribunal held that it was not concerned with the substantive correctness of the decision of the BKPM, "but rather the background to its decision and the climate in which it was made."[43] Again, the question is whether an arbitral tribunal which draws its jurisdiction largely from the contract of the parties can go into the whole 'climate' in which the investment was made. Such a course would enable the arbitration tribunal to go into matters such as the political and economic conditions of the state while the state party to the contract could not have intended to give the tribunal such a wide jurisdiction. Neither is there any indication in the Convention that the ICSID tribunals are to be vested with such wide and arbitrary powers. The approach of the final tribunal may have been in excess of its jurisdiction.

The tribunal considered other instances of alleged misconduct on the part of Amco, such as falsification of accounts and failure to file investment reports, but found that the revocation of license was tainted by bad faith. It did, however, state that the "evidence also reflects discreditably on Amco" but that this discreditable conduct could not justify BKPM's approach to the question of revocation. On the basis of the findings that the manner of revocation of the license by BKPM was improper, the tribunal considered the responsibility of Indonesia.

The application of the law to the findings: the tribunal considered the legal consequences of its findings under both Indonesian and international law. It found that "Indonesian law does not clearly stipulate whether a procedurally unlawful act *per se* generates compensation or whether a decision tainted by bad faith is necessarily unlawful".[44] The tribunal then examined the international law authorities on the point and found that the writings of publicists cited had not discussed the situation in which there was procedural illegality

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[42] The Tribunal said: "The manner in which Mr USMAN prepared his summary must be described as rushed, over-reliant on Wisma's characterizations, factually careless and insufficiently based on detailed and independent verification with the authorities concerned. This is so whether or not any of the charges were in fact sustainable." (paragraph 83).

[43] Paragraph 88.

[44] Paragraph 121.

but such illegality had not lead to any loss or diminution of the substantive rights of the affected party.

The tribunal considered three arbitral awards as relevant to the issue before it.[45] The tribunal found that in these awards the emphasis was on denial of justice. The tribunal stated that not every procedural unfairness amounts to a denial of justice but, using the words of the International Court of Justice in the *ELSI Case*,[46] it said that a procedural error which shows "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety" will amount to a denial of justice. The tribunal also held that although in the cases discussed liability for a denial of justice arose from the conduct of judicial bodies, there could be liability arising from the misconduct of administrative bodies as well. The tribunal was making obvious extensions to the law. An administrative tribunal is hardly a final disposer of any matter in a state and the idea that state responsibility could arise from the activities of a subordinate body sits uneasily with the law that has been developed thus far. Under the international law of state responsibility, there could be responsibility for the acts of the highest judicial tribunal or of lower tribunals in cases where appeals to a higher tribunal would have proved illusory. But, there is no authority for the view that responsibility could arise from the acts of an administrative tribunal. The tribunal concluded that "although certain substantive grounds might have existed for the revocation of the license, the circumstances surrounding BKPM's decision make it unlawful".[47]

The finding of a denial of justice is a major step to take against a state. A simple miscarriage of justice will rarely be seen as an internationally wrongful act. There must be a "serious and intentional perversion of justice as a result of malicious and false evaluation of the evidence or determination of the law".[48] It is difficult to find such circumstances where the substantive rights of the affected party would remain the same despite the administrative error. In this dispute, the rights of Amco were revocable the moment undercapitalisation was established but the quarrel was about the manner of revocation. The

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[45] The *Idler Case (US v Venezuela)* decided by a Claims Commission in 1898 (discussed in para. 130); *Chattin Case*, 4 AD (1927) 248 (decided by a Mexican Claims Commission); *Walter Fletcher Smith Case*, 5 AD (1929) 264.

[46] *Electronica Sicula SpA (ELSI) (USA v. Italy)*, ICJ Rep. (1989) 1.

[47] Paragraph 139.

[48] *Encyclopedia of Public International Law*, Vol.1 (1992) 1008, or Installment 10 p. 98. Also see A.O. ADEDE, 'A fresh look at the meaning of denial of justice under international law', 14 CanYIL (1976) 73.

procedure followed was not acceptable but it is debatable that there was in fact a "serious and intentional perversion of justice".

Valuation of damages: having found that there was a denial of justice, the tribunal proceeded to state the principles on which damages should be assessed. In doing this, the tribunal used principles which had been used for calculating damages for the taking of foreign property. Thus a mental leap was made here from a procedural irregularity to a denial of justice and then a massive leapfrog into the taking of foreign property. The philosophy behind this magical leap is difficult to fathom. If substantive rights had not been affected, it is difficult to determine what was in fact taken. If what was taken away was only the right to a fair hearing, compensation should have been accordingly.

But, the tribunal found that what was taken was the whole of the package of rights involved in the foreign investment. Thereafter, the tribunal followed a predictable course and calculated damages on the basis of an unlawful taking of property. Thus, a new category of unlawful takings was created, the category being takings of any of a bundle of rights associated with the investment without a proper hearing. Any revocation of the rights of the foreign investor, except in accordance with an internationally existent procedure, will amount to a taking even in circumstances where the rights of the foreign investor are properly terminable. This creates a new category of takings of foreign property. There is hardly any precedent for such a category in the literature of international law. The great weakness of the award is that it is establishing a connection between procedural irregularity, denial of justice and taking of property.

Compensation: the tribunal held that the purpose of compensation was to put Amco in the position it would have been in had it received the profits of the contracts. Future profits of the hotel were taken into account in assessing damages. The tribunal rejected the book value method of assessing compensation and used the discounted cash flow (DCF) as the more flexible and appropriate method of calculating damages.

2.3.3. Evaluation of the final award

The final award is based on several unsupportable hypotheses. Firstly, there is the assumption that procedural irregularity of an administrative tribunal will result in damages, even if the decision arrived at by the administrative tribunal is inevitable on the facts of the case. This assumption is a difficult one to establish in the systems of administrative law of most states, let alone a

developing state like Indonesia. Quite apart from assuming that there are universally applicable standards of administrative efficiency enforceable through notions of denial of justice in international law, the tribunal plucks out a standard out of thin air, without exploring whether there is adequate basis for it, at least, in general principles of administrative law. In the past, arbitral tribunals resorted to the subterfuge of finding that there was a general principle of law before applying a principle. The final tribunal does not even seek to engage in such a subterfuge.

If one would examine the English system of administrative law (with which at least two of the members who sat on the tribunal would have had some familiarity), it were difficult to establish that procedural irregularities assumed the significance which the tribunal thought they had, in circumstances in which substantive rights were not affected.

The term "due process" which the final tribunal used is a term of American administrative law. There is a marked resemblance between due process in American law and natural justice in English law, although there are also differences.[49] It is sufficient to consider English administrative law which has wide currency within the Commonwealth. Even within English law, the content of natural justice did not remain constant. In times of war, the content of natural justice was slim and the concept achieved a degree of cogency long after the end of the Second World War.[50] Even in its modern form of the doctrine of fairness, the rules of natural justice have a variable content depending on the nature of the function that was exercised, the wording of the statute that created the function and the exigencies of the circumstances in which the decision had to be made.[51] The law is unclear in England as to what the position would be where a fair hearing would have made no difference to the eventual outcome of the substantive rights of the parties, though even in these circumstances a fair hearing is advisable.[52]

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[49] The best study is B. SCHWARTZ and H.W.R. WADE, *Legal Control of Government: Administrative Law in Britain and the United States* (1972) 245.

[50] English texts contrast the decision in *Nakkuda Ali* v. *Jayaratne*, AC (1951) 66 with the decision in *Ridge* v. *Baldwin* AC (1964) 40. The latter decision considerably widened the scope for natural justice by introducing the new notion of fairness and doing away with the old dichotomy between administrative and quasi-judicial acts. Under the older law, hearings had to be held only if the decision was made in the course of an exercise of a quasi-judicial power. For the transformation in English law, see H.W.R. WADE, *Administrative Law*, 5th ed. (1982) 475.

[51] *Durayappah* v. *Fernando* 2 AC (1967) 337; D. FOULKES, *Administrative Law* (1990) 270; P. CRAIG, *Administrative Law* (1989) 223.

[52] H.W.R. WADE, *Administrative Law* (1982) 475.

Given this situation in English administrative law, the certitude of the application of due process which the final tribunal showed is amazing.[53] The tribunal purported to apply international law. There was not even a modicum of effort made to show that there was indeed a universally accepted standard of due process and that that standard of due process applied equally to developed and developing states. In a world in which there are varied types of governments and varied styles of administration, is it indeed possible to demonstrate that there is a uniform standard of public administration?

Assuming that there is a due process requirement in international law, the next step taken by the final tribunal that the failure to afford due process results in a denial of justice even though the substantive rights may not be affected by the irregularity is even less tenable. The authority used to support this proposition is slim. Denial of justice by a state is to be assumed in the most serious of instances. It is unlikely that there is authority for such a denial of justice to be assumed in circumstances where Amco was acting in a manner which the tribunal itself considered disreputable. In any event, where there is a procedural illegality, the result is that the decision of the administrative officer is invalidated. Compensation is provided, if at all, for the right that was suspended as a result of the improper decision and for the period it would take for the right to be cancelled through regular means. Where the substantive right could properly be cancelled this is the obvious result, for the administration had an accrued power to cancel the right of the holder due to his non-satisfaction of the conditions attached to the exercise of the right. This was the position of Amco. Its right to enter Indonesia and function as a foreign investor was conditional on several factors, including the capitalization of the approved venture in accordance with the plan as submitted to BKPM. That right became defeasible when capitalization was not made in accordance with the plan. BKPM was within its rights in terminating the investment, for the only method of proving capitalization through certification by Bank Indonesia was not available. The only quarrel was with the manner of termination. On this analysis, at best, if damages were to be granted, it could be granted for the period of time it takes for the BKPM to terminate the investment in accordance with proper procedure.

Instead of such an analysis, the tribunal drew the startling conclusion that the procedural irregularity amounted to an unlawful taking for which restitution should be made. There could be little support for such a conclusion even in the

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[53] The position of an alien foreign investor is very much akin to any other alien. On the question of the protection of the rights of aliens, the English administrative system has been weak. English courts have traditionally required little or no hearing for interference with the rights of aliens, until intervention by the European Court of Human Rights.

literature of foreign investment disputes which has so far been partial to the foreign investors. There was justification for a taking in this situation, as the tribunal itself admitted. The substantive rights of the foreign investor were not affected, for BKPM could have properly terminated the foreign investment. The question of an unlawful taking was not relevant at all.[54] The award justifies cynicism. It indicates that arbitral tribunals are prone to contort the law in order to ensure that the foreign investor comes out best, whatever the situation.

It also indicates an inability on the part of the law relating to foreign investment protection, which has hitherto been developed in the context of contractual principles and an emphasis on contractual sanctity, to come to grips with increasing state intervention in the foreign investment process. Whereas the old arbitral tribunals developed the law on the basis of the initial contract and the notion of *pacta sunt servanda*, these ideas have now become irrelevant to the foreign investment process in developing countries which is constantly subject to administrative review to ensure that it ties in with the development goals of the state.[55] The modern investment contract is very much a public law instrument with the state as a silent partner from the very inception of the foreign investment. Entry of foreign investment has to be approved. Conditions are imposed upon the manner of operation of the foreign investment in the host state. There is constant supervision of accounts, export targets, performance requirements and other matters by administrative bodies. The BKPM was performing such a function in Indonesia. The old, contract-based law on foreign investment protection could not cater to this development. A new strategy had to be thought out. What the final tribunal did was to think out a strategy based on state responsibility for denial of justice, in circumstances where the administrative organs supervising the foreign investment did not adhere to standards of procedure. There are great difficulties with this strategy. There is no universally accepted standard of administrative procedure. It is difficult to establish that such standards form part of public international law. It is equally difficult to establish that failure of an administrative tribunal to afford due process amounts to a denial of justice. The final tribunal falls flat on its face in trying to establish a theory for which there is no theoretical

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[54] It is not impossible that full damages arise for consequences of an improper administrative decision. Thus, in the English case of *Cooper* v. *Wandsworth Board of Works* where a house was demolished as a result of a wrongful administrative decision, full damages was ordered. But, in the case at stake, the right had become defeasible the moment capitalization was not made according to the plan.

[55] This change in the approach of developing states is discussed at greater length in M. SORNARAJAH, *International Law on Foreign Investment* (1994) Chapter Two.

support. The award of the final tribunal in *Amco* v. *Indonesia* furnishes yet another example of the trend to create international law that is favourable to foreign investment protection without taking the interests of the host state into account.

3. AAPL V. SRI LANKA

The second ICSID award involving an Asian state is *AAPL* v. *Sri Lanka*.[56] A unique aspect of the award is that it was the first time an ICSID tribunal assumed jurisdiction over an investment dispute on the basis of a bilateral investment treaty. The award has received wider commentary than *Amco* v. *Indonesia* within a short time.[57]

The Facts: Asian Agricultural Products Limited (AAPL) was a Hong Kong company which had started a prawn farm in joint venture with Serendib Seafoods Limited, a Sri Lankan public company, on the east coast of Sri Lanka. The farm was destroyed by Sri Lankan security forces while they were conducting operations against Tamil guerrillas. The government contended that the action was made necessary, as the guerrillas (known as the Tigers) had used the farm as a sanctuary. The claimant, however, contended that the destruction and the killing of civilians on the farm was caused by a "murderous overreaction" by the security forces. The tribunal considered the issues on the basis of these facts.

The applicable law: the tribunal pointed out that it was the first case where the ICSID was seized of jurisdiction over a dispute on the basis of a bilateral investment treaty and not on the basis of an arbitration clause or agreement between the parties. The tribunal concluded that both parties had agreed to use the bilateral investment treaty as the *lex specialis* which applied to the dispute.

An argument of AAPL based on the treaty was that the requirement that the investments of one of the contracting parties "shall enjoy full protection and security in the territory of the other contracting party" went beyond the minimum standard protection given in customary international law and created

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[56] For reports see 17 *Yearbook Commercial Arbitration* (1992) 106.

[57] The comments on the award so far are negative. See C.F. AMERASINGHE, 'Prawn Farm Arbitration', *Sri Lanka Journal of International Law* (1992) 98, who questions the composition of the tribunal and its competence to decide on issues of international law. S.C. VASCIANNE, 'Bilateral Investment Treaties and Civil Strife: The APPL/Sri Lanka Arbitration', 29 *Netherlands International Law Review* (1993) 332, is also critical of the award.

absolute liability in circumstances of damage to the property of the foreign investor. AAPL relied on the provision of the treaty which provided for compensation where destruction was caused during war or civil disturbance. AAPL also argued that the exemption for liability provided in the treaty for destruction caused during war or civil disturbance was not applicable to its case as the act was not caused in combat action but amounted to the wanton destruction of property and the cold-blooded killing of its staff.

The government rejected the strict liability interpretation of AAPL. Instead, it argued that, for responsibility to arise it must be shown to have acted without due diligence and that there was nothing to suggest that this duty had not been satisfied. It argued that the burden was on AAPL to show that the security action was avoidable.

The tribunal's findings: after an essay on the interpretation of treaties, the tribunal rejected the notion of absolute or strict liability contended for by AAPL. It then found that Article 4(2) of the bilateral investment treaty, which imposes responsibility for damage arising from wars or civil unrest, did not provide relief to AAPL as the conditions necessary for the operation of the article did not exist. The evidence did not show that the government troops were responsible for the destruction. There was a combat action and the acts were necessary in the circumstances. The tribunal held that responsibility could not arise under this provision of the treaty. But, the tribunal also held that Article 4 (1) of the treaty makes reference to the standards of treatment of the foreign investor both under domestic law as well as international law.

The tribunal then discussed the standard of protection that AAPL is entitled to under international law. After an examination of the authorities the tribunal concluded that international responsibility arises from a failure to observe the duty to exercise due diligence towards the foreign investor.

AAPL's case was that the type of action taken by the security forces of the government was unnecessary. It had involved the wholesale destruction of the farm and the murder of 21 of the employees at the farm. The tribunal examined the evidence and found that the allegations as to destruction and murder were proved. The government claimed that there were suspect elements among the employees of the farm and that the action was necessary to root them out. But, the tribunal felt that there were other less risky means of getting these elements out of the farm, particularly in view of the fact that the management of the farm was prepared to cooperate with the security forces.

The tribunal also adverted to the existence of an objective standard of investment protection. The tribunal observed:

> [. . .] contemporary international law authorities noticed the sliding scale, from the old subjective criteria that take into consideration the relatively limited existing possibilities of local authorities in a given context towards an objective standard of vigilance in assessing the required degree of protection and security with regard to what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern state.[58]

Though there was no evidence that the security forces were directly responsible for the damage, the tribunal suggested that the issue was whether under the circumstances the forces were capable of providing protection to the foreign investor. The entire area was under the control of the government forces and such protection could have been given. Liability arose for the failure to provide such protection. The tribunal awarded damages based upon the discounted cash flow method of valuation.

The dissent: there was a dissent by the arbitrator appointed by the respondent state. The main thrust of the dissent was that there should not have been resort to general principles of international law in situations where there was a bilateral investment treaty, the treaty containing an exhaustive statement of the responsibilities of the parties. In any event, the dissent pointed out, there was no clear responsibility in customary international law for damage caused during civil strife.

Analysis: the award was novel in that jurisdiction of the tribunal arose from the provisions of a bilateral investment treaty. The range of uses to which such treaties can be put to have yet to be fully explored. Here, an issue of state responsibility arising from the conduct of security operations came to be raised before what is essentially a foreign investment tribunal meant to deal with contractual matters dealing with foreign investment, and not with state policy and the laws relating to the conduct of war. The competence of the tribunal to deal with such issues must be raised. It was never intended by the creators of ICSID that ICSID tribunals should have jurisdiction to deal with general areas of state responsibility.

It is also a pity that a situation involving a violation of human rights arises before an international tribunal only in an indirect fashion. Obviously, innocent lives were lost. It is a sad commentary on international law that while it has succeeded in creating institutions for the protection of property of foreigners,

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[58] Paragraph 79.

the compensation for the loss of lives can be made only where it is accompanied by the destruction of foreign property.

4. CONCLUSION

The two awards made by ICSID involving Asian states have unsatisfactory features which will make Asian states wary of ICSID arbitration. The award in *Amco* failed to face up to the fact that foreign investment is well integrated into the economy of the host state through administrative machinery and has ceased to be a pure contract. The earlier tribunals dealing with the dispute used old and outdated principles of contract law to deal with the problem. The final tribunal realized the importance of the change that had taken place but sought to retrench the position of the foreign investor by using notions of denial of justice which were inappropriate to the context of the situation. The *AAPL* decision had novel features. It indicated that the use which could be made of bilateral investment treaties is yet unascertained and that the host state may have made itself responsible for a range of liabilities it had never contemplated at the time of the agreement. Both awards will make developing states wary of ICSID arbitration. The award involving Sri Lanka has already met with disapproval from academic commentators. The award involving Indonesia has surprisingly escaped attention but the assumptions on which it rests are no less weak.

ACCESS TO INFORMATION: A NEW HUMAN RIGHT. THE RIGHT TO KNOW*

C.G. Weeramantry**

1. INTRODUCTION

The expression 'the right to know' is now well-entrenched in legal literature[1] but much work still lies ahead in working out its status in international law and in domestic legal systems. What are its legal foundations, its constitutional and other limitations and its conflicts with the public interest? What areas or knowledge are covered?

Freedom of speech, it will be remembered, was one of the four freedoms formulated by President Roosevelt in his famous declaration of 6 January 1941 laying down the conditions required for future peace. Yet it was some time

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* Based on a presentation given at the 10th Commonwealth Law Conference, Cyprus, 3-7 May 1993.

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[1] The following illustrative examples from a mass of literature show the variety of areas covered: THOMAS I. EMERSON, 'Legal Foundations of the Right to Know', *Washington University Law Quarterly*(1976); LEON R. YANKWICH, 'Legal Implications of and Barriers to the Right to Know', 40 *Marq. Law Review*(1956)3; JAMES C. GOODALE, 'Legal Pitfalls in the Right to Know', *Washington University Law Quarterly* (1976) 29 JERRY T. BERMAN, 'The Right to Know: Public Access to Electronic Public Information', 3 *Software Law Journal* (1989) 491; B.J. NARAIN, 'Confidentiality, National Security and the Right to Know: the Spycatcher Decision', 39 *Northern Ireland Law Quarterly* (1989) 73; 'Employees' Right to Know: Should the Federal Government or the States Regulate the Dissemination of Hazardous Substance Information?', 19 *Suffolk University Law Review* (1985) 633; 'Whatever Happened to the Right to Know? Access to Government Controlled Information since *Richmond Newspapers v. Virginia*', 73 *Virginia Law Review* (1987) 1111; KATE MCILWAINE, 'Privacy versus the Right to Know', *Australian Insurance Law Bulletin* (1991) 33; FRANCIS WILLIAMS, *The Right to Know: The Rise of the World Press* (Longman, 1969); HAROLD L. CROSS, *The People's Right to Know* (Random House, 1973); JOHN CRISPO, *The Public Right to Know: Accountability in the Secretive Society* (McGraw-Hill Ryerson, 1975); J.D. MCATEER, *Chemical Hazards: A Guide to the New Hazard Communication Standards: How to Use Your Right to Know* (Pilgrim Press, 1986); SHEILA MCLEAN, *A Patient's Right to Know: Information Disclosures, the Doctor and the Law* (Aldershot, 1989); S.G. HADDEN, *A Citizen's Right to Know: Risk Communication and Public Policy* (Westview Press, 1989).

Asian Yearbook of International Law, Volume 4 (Ko Swan Sik *et al.*, eds.; 90-411-0872-6 © 1995 Kluwer Law International; printed in Great Britain), pp. 99-125

before the related concept of freedom of information came to be articulated with any degree of definiteness.

Freedom of information as a fundamental human right began to take shape out of the mists as early as the first session of the General Assembly. Resolution 59(I) of 14 December 1946 asserted its importance in terms that "Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated". The General Assembly went on to stress that it was "an essential factor in any serious effort to promote the peace and progress of the world".

With these formulations we began to tread on firmer ground but yet, following this spirited initial formulation, the concept ran into rough weather from time to time as problems surfaced in charting out the limitations of the doctrine and in clarifying its conceptual basis.

2. BASIC FORMULATIONS

Article 19 of the Universal Declaration of Human Rights provides that:

> "Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

The International Covenant on Civil and Political Rights of 1966 reinforced the right, by Article 19, in terms that: "Everyone shall have the right of freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers". Another provision which has significantly developed the concept is Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers [. . .]".[2]

In these formulations there seems to be somewhat of an emphasis on the political aspect of access to information. However, an examination of the right to information will reveal at once that there are numerous facets of this vast

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[2] See also Article 13 of the Inter American Convention of Human Rights recognising the freedom to seek, receive and impart information and ideas of all kinds.

topic which range beyond the purely political, into the realms of social, economic, cultural and technological information. On the one hand it touches the question of national sovereignty and the protection of sensitive defence and classified information, transborder data flow, satellite broadcasts, the New World Information Order and international protection of intellectual property. At the other end it deals with such matters as the right of individual consumers and government employees, and touches academic records, professional confidences, and medical and insurance data. Numerous cases, especially before the European Court of Human Rights, have in recent years illustrated the vast variety of individual rights thus covered, such as the right of accused persons to information regarding the charges against them, the right of prisoners to issue and receive correspondence, the right to interpretation in criminal proceedings, the right of access to one's personal case records and a right to know the reasons which have swayed public officials enjoying legislative or judicial discretions to determine matters concerning individuals.

3. CONCEPTUAL BACKGROUND

Such a range of applications leaves us with the feeling that we are exploring a boundless territory and renders it difficult to deal even in outline with this right in a single paper or to decide upon a point of entry into the subject. The subject is perhaps best placed in its entire context by considering preliminarily the conceptual underpinnings of the right.

1. My first conceptual approach is a three-tier analysis focusing on the different levels at which the right is relevant and seeking to argue that at every level a given human right is accompanied by an ancillary right, to know:

(a) At the highest level, world peace depends upon international goodwill which in its turn is dependent upon public opinion within the several nation states that are members of the world community. The citizens of these countries make up their minds on global and international affairs on the basis of the information they receive relating to global happenings. Distorted or incomplete information results in distorted or unbalanced attitudes and from these result tensions which disturb international harmony and may eventually lead to breaches of international peace. In many cases of international tension, inadequate or distorted information is often demonstrably the cause. At this level, if peace is a human right, it can be argued that the necessary information, on which peace itself depends, is also a human right. The right to peace is incomplete without it.

(b) At the next level, the level of domestic or national government, democracy rests upon the consent of the governed. Consent is never real consent unless it is informed consent. If citizens have a right to participate in the government of their country, as they undoubtedly have, they have a right to the information which is necessary to enable them to make up their mind on matters pertinent to government.

At the national level, if self-government is a human right it can therefore be similarly argued that access to the information on which self-government depends is likewise a human right.

(c) Moving to the next level, the level of individual rights such as the right to health, there must correspondingly be a right to information relating to such matters as food additives or damage to the environment by whomsoever caused. A right to seek and receive such information is necessary to the proper exercise of the right in question. The right to a fair trial likewise is dependent on information relating to the charges against the accused and the evidence on which they are based. Whatever human right one picks out from the vast catalogue of recognised rights, it is clear that it must be accompanied by ancillary rights to the information necessary for the exercise of the right in question.

2. If there is reality in human rights at any level it must necessarily follow that access to the information appropriate to the exercise of that right becomes a right in itself. To deny this would be to contradict and indeed render nugatory the basic right which is under examination.

3. Another important conceptual basis applicable at all levels, is that with the current dramatic increase in our ability to collect and store data, we are moving deeper each day into a social environment based on information. The industrial society of the previous generation is yielding to the information-based society of our time, in which information means power. When we are dealing with the flow of information we are in fact dealing in a sense with power in a variety of forms, some of these of extreme complexity.

Where power exists, it must be responsibly used, and information power cannot be responsibly used except in the context of a right to full information, on which that power depends.

4. The right to communicate and the right to know are opposite sides of the same coin. The right to know is invariably formulated as a corollary of the right to communicate. The different conceptual bases of the right to communi-

cate are considered in a later part of this article. Corresponding to those theories there would be different bases on which to rest the right to know.

5. Libertarian or liberalist theories, as discussed below, concentrate on the right of the speaker. Neo-liberalist theories concentrate on the right of the audience. In the context of our particular topic we need to stress that a right to information is not merely a right to such partial or incomplete information as a speaker may choose to communicate but a right to whatever information there is on the topic which is available within the constraints of law and practicality.

6. While the right to communicate is generally an individual right, the right to receive information is in general a collective right, though of course it would often be sought to be exercised by individuals.

7. The right to know is a right exercisable not only against governments but also against other entities, public and private, collective and individual.

4. NECESSARY LIMITATIONS

While giving due importance to this conceptual structure, we must of course proceed to note the limitations that must necessarily be placed upon the absoluteness of such a right to information. These limitations arise from a variety of circumstances too numerous to catalogue. Among these are: Public security, National interest, Military secrecy, High technology data protection, Privacy and sensitive personal data protection, Legal professional privilege, Medical confidentiality, Intellectual property rights, Business confidences.

5. INTERNATIONAL CONFERENCES

The conceptual and structural foundations of the right have been the subject of numerous international conferences and resolutions.

An early conference was the United Nations Conference on Freedom of Information which met at Geneva in March-April 1948. This Conference prepared three draft Conventions: on the Gathering and International Transmission of News, on the Institution of an International Right of Correction, and on Freedom of Information. At its twenty-ninth Session in 1960 the Economic and Social Council adopted a draft Declaration on Freedom of

Information (Resolution 756(XXIX) of 21 April 1960) recommending that the following principles be promoted:
Article 1 recognises the right to know and the right freely to seek the truth as "inalienable and fundamental rights of man".
Article 2 requires governments to assure the right to seek and transmit information within and across frontiers.
Article 3 requires governments to desist from controls over media which will prevent the existence of a diversity of sources of information or will deprive the individual of free access to such sources.
Article 4 places on those who disseminate information the duty to strive in good faith to ensure the accuracy of the facts reported and respect the rights and dignity of nations and of groups and individuals without distinction as to race, nationality or creed.

These articles show the widening scope of the right as it was then being developed. It will be noticed that the subject matter on which the truth should be known is not in any way circumscribed but covers all facts in general and that the right is described as one of the inalienable and fundamental rights of man. The recognition of the duty of fairness on the part of the communicator will also be noted.

6. THE WORK OF UNESCO

The work of UNESCO in developing the right has been outstanding. Over the years UNESCO has played an important role in expanding the concept so as to cover facts and information which are not of a politically related nature. Thus four of the instruments drawn up by UNESCO deal with facilitating the international circulation of visual and auditory materials of an educational, scientific or cultural character, the importation of educational, scientific and cultural materials, the international exchange of publications and the exchange of official publications and government documents between States. The right thus broadens out into the area of all educational, cultural and scientific information and of all publications generally.

This section would be incomplete without reference also to the series of regional inter-governmental conferences on communication policies organised by UNESCO, in particular the San José Conference of 1976 on Communications Policies in Latin America and the Caribbean, the Kuala Lumpur Conference of 1979 on Communications Policies in Asia and Oceania and the Yaoundé Conference of 1980 on Communication Policies in Africa. Important Declarations followed from these Conferences. The San José Declaration, for

example, dealt *inter alia* with the duty to use all means of communication for peaceful purposes, the Kuala Lumpur Declaration with the New World Information Order as a manifestation of the ideals of justice, independence and equality between individuals and nations and the Yaoundé Declaration with the right of every nation to become the subject and originator of its own communication activities.

It is only possible for present purposes to select a few specimen areas for examination, mindful that for each selected example there would be varied categories and numerous other instances that require considered attention. We shall consider a few selected examples from each category - the global, the national and the individual - but before doing so it would be necessary to say a few words to set the problem against its historical and legal background.

7. HISTORICAL OVERVIEW OF FREEDOM OF EXPRESSION

Historically, a variety of conceptual foundations have underpinned political and legal attitudes to questions of press freedom.

The authoritarian theory was the oldest and could in a sense be traced back to PLATO who stipulated in *The Laws* the requirement of a submission by writers of their works to the magistrates who would decide whether these contributed to or militated against the general good. After the invention of printing the Church throughout Europe kept strict control over the printed word. The death penalty was imposed in 1535 by FRANCIS I of France for the unauthorised printing of books and Queen ELIZABETH's Star Chamber could fine an author £ 10,000, sentence him to life imprisonment, slit his nose and cut off his ears for publishing material obnoxious to the Government.

Until 1695 the Licensing Acts were so stringent in England that

> "authorised printers of obnoxious works were being quartered, mutilated, exposed in the pillory, flogged or simply fined and imprisoned according to the nature of the offence, and the works themselves were burned by the common hangman".[3]

No mention of press liberty found a place in the Bill of Rights of 1689. In the US likewise as late as the early eighteenth century the attitude towards press freedom of such figures as Governor COSBY of New York and the celebrated ZENGER trial caused memories of repression to smoulder in the American mind

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[3] TASWELL-LANGMEAD, *English Constitutional History,* 11th ed. (Sweet and Maxwell, London, 1960) 663.

and hardened it against the faintest suggestions of interference with free publication.[4] Colonial attitudes in Australia were no different, and several editors - HALL, BENT, MELVILLE and ROBERTSON - were imprisoned for their criticism of repressive administrations. Australia's first newspaper, the *Sydney Gazette and the New South Wales Advertiser* was subject to strict censorship.

Such was the authoritarian attitude, which had the advantage of continuing to draw upon a rich body of philosophical writing including the work of HOBBES, NIETZSCHE and the positivists of the nineteenth and twentieth centuries.

The antithesis of the authoritarian theory, the libertarian theory, rests upon the theoretical basis that the individual represents the highest social and legal value. Such thought harks back to Aristotelian as opposed to Platonic values and has been directed against censorship by Church and State. MILTON's stout defence of free expression will always be remembered through his comparison of censorship to "that gallant man who thought to pound up the crows by shutting his park gate".[5] MILTON's view was that Truth would always surface after the clash of argument.

LOCKE's powerful theoretical base for the libertarians was carried over to the French and American revolutions. IMMANUEL KANT added enormous strength to this view through his formulation of a universal standard of conduct in the shape of his categorical imperative. KANT's view has worked its way into political and judicial thinking ever since and in particular has been relied upon in America to enlarge the scope of individual liberty.

ERSKINE's defence of TOM PAINE who was prosecuted for his publication of the *Rights of Man* and JOHN STUART MILL's extolling of the importance of free expression even where one individual had an opinion contrary to that held by the rest of mankind were other tributaries feeding the growing stream of the libertarian theory. The theory reached a highwatermark of recognition when the First Congress met after the adoption of the American Constitution and JAMES MADISON offered amendments to it, observing the need to remove in members of the community any apprehension that there were among their countrymen any "who wish to deprive them of the liberty for which they valiantly fought and honourably bled".[6]

In the American tradition THOMAS JEFFERSON and OLIVER WENDELL HOLMES were among the great names that added strength to the concept, the latter especially through the notion of 'the marketplace of ideas' as explained

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[4] See POUND, *The Development of Constitutional Guarantees of Liberty* 69.

[5] *Areopagitica,* 1644.

[6] HUDON, *Freedom of Speech and Press in America* (Public Affairs Press, Washington, 1963) 17.

in *Abrams v. United States.*[7] The role of academics, particularly ZECHARIAH CHAFEE JR., the Harvard Law professor, and ROSCOE POUND was significant in moulding the thinking of HOLMES and other judges.[8]

The libertarian theory and the principle of freedom of expression thus have a long and distinguished history of struggle against temporal and religious authoritarianism and it gives no cause for surprise to see the fierce dedication with which supporters of this theory rush to its defence at the slightest suggestion that it is under attack.

This developing stream, now augmented into a torrent through its enrichment by modern human rights concepts, is perhaps the central theory relating to free communication and the related concept of freedom of information, which must engage the attention of any researcher.

Yet the matter does not end there, for a deep problem exists, which SAMUEL JOHNSON formulated for us in his usual resonant and authoritative manner:

> "The danger of [. . .] unbounded liberty and the danger of bounding it have produced a problem in the science of government, which human understanding seems hitherto unable to solve. If nothing may be published but what civil authorities shall have previously approved, power must always be the standard of truth; if every dreamer of innovations may propagate his projects, there can be no settlement; if every murmur at government may produce discontent, there can be no peace; and if every sceptic in theology may teach his follies, there can be no religion".[9]

These two theories, then, the authoritative and the libertarian, stood in stark opposition to each other. Inevitably they gave birth to a third theory, the theory of social responsibility. The growing power of the print media, whether used by governments or the private sector, the new technologies that enabled distribution on an unprecedented scale, the growing centralisation of media empires, the enormous capital needed to hold one's own in the media world, the subordination of truth to sensationalism - all of these fertilised this new theory in its emergence. It moved to a new level of official recognition when the US Commission on Freedom of the Press brought out a series of publications after World War II aimed at generating a sense of social respon-

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[7] 250 US 616, 630, 1919, HOLMES J. dissenting.

[8] See STEVEN HELLE, 'Whither the Public's Right (Not) to Know? Milton, Mills and Multicultural Speech', *University of Illinois Law Review* (1991), 1077 at 1083.

[9] SAMUEL JOHNSON, *Lives of the English Poets,* ed. G.B. HILL Vol. 1 (Clarendon Press, Oxford, 1905) 107-8.

sibility on the part of the media. Such an approach came of the realisation that the theoretical background furnished by MILTON, LOCKE and KANT was no longer adequate. It was becoming increasingly evident that a liberty originally meant to save the community from despotism could itself degenerate, in the hands of powerful media conglomerates, into a form of despotism over the community.

This problem was succinctly formulated by JULIUS STONE:[10]

> Moreover, as we have just seen, the modern instruments of mass propaganda tend to become concentrated in a few hands. If those hands are private hands, enormous power, going far beyond the traditional scope of liberties of free speech, free press and free opinion, becomes available for private and possibly anti-social ends. If the hands are official, an equally dangerous situation exists of the manipulation of opinion to support power, instead of that control of power by opinion which both Savigny's theory and that of democracy presuppose.

The clear implication here is that the consumer of the information thus handed out has a right to a free flow of information rather than to information which is tainted at its source and selectively channelled to suit the interests of the information supplier.

The increasing evidence of the need for some limitations upon untrammelled freedom or licence became evident in perhaps the most comprehensive of the publications generated by the US Commission - popularly known as the Hutchins Report[11] which listed five requirements of a press in a free society.

But if this meant state regulation of the media, this was unthinkable, and a long step towards totalitarianism. The only solution was for the media to control themselves. This resulted in various journalism reviews setting out such ethical standards and in the setting up of a National News Council in August 1973 to hear complaints against the media. Press Councils in other parts of the common law world similarly appeared, as manifestations of the mechanisms prompted by the Social Responsibility Theory.

There are other theories of the media as well, which we do not need to dwell on here. Communist theories of the press, most of them extensions of the authoritarian theory, do not all follow one rigid pattern. The New Left Movement has brought to the fore a number of issues relating to the responsibilities attendant on freedom of expression. HERBERT MARCUSE has drawn

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[10] *Social Dimension of Law and Justice* (Maitland, 1966) 162.

[11] *A Free and Responsible Press: A General Report on Mass Communication* (1947) 5.

attention pointedly to the way in which the theory of free expression has over the generations since the Industrial Revolution turned back upon itself to destroy the rationale on which it was built.[12] MARSHALL MCLUHAN has shown how freedom of communication may in fact be impaired by the media environment in which we all live, making us "preconditioned receptacles of long standing". We need not detain ourselves overly with these theories, except to observe that there are insights in all of them that will be pertinent to a full consideration of the right to know, for the right to communicate and the right to know are corollaries of each other.

8. LEGAL OVERVIEW OF THE INTERNATIONAL RECOGNITION OF THE RIGHT TO INFORMATION

Among the sources of international law authoritatively recognised and spelt out in Article 38 of the Statute of the International Court of Justice, the right to information can find a place in more than one category. I would suggest that it falls clearly at least under the heads of international agreements, judicial decisions and the teachings of publicists. It is also arguable that it falls within the rubric of customary international law.

(a) International agreements

In regard to the first of these categories, reference has already been made to the Universal Declaration and the Covenant on Civil and Political Rights. The increasing recognition the Universal Declaration commands has in the opinion of most jurists elevated it to the status of international law although the declaration itself imposes no affirmative *obligations* upon nations but only sets out a series of aspirational standards. The Covenant carries this recognition forward from aspirational to treaty status, thus imposing obligations that are binding in international law.

It will be noticed that the formulation of freedom of information as a human right in the Universal Declaration is in the widest of terms, thus conferring a broad conceptual basis on the general principle. It is not limited to any specific types of information or any particular fora where it may be asserted. It provides a secure foundation of general international acceptance on which more specific formulations can be built. The same degree of generality is evident in the formulation contained in the Covenant. This recognition of the

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[12] See generally WILBUR SCHRAMM, *Four Theories of the Press* (University of Illinois Press, 1972) 105.

right in categorical terms thus brings it within the first category of sources of international law. In addition it is law for those regions of the world such as the European and the American which have enshrined it in binding regional agreements such as the European (Article 10) and American (Article 13) Conventions on Human Rights.

(b) Judicial decisions

International judicial decisions are another source. Increasingly, the judgments of authoritative international tribunals give recognition to this right. These recognitions are not merely based upon the regional or specific agreements under which the right is considered, but also display a regard for the international nature of the right, many of the discussions going back all the way to the Universal Declaration of Human Rights. Indeed a considerable body of jurisprudence has grown up around the right to know, particularly through the jurisprudence of the European Court of Human Rights. A few of these decisions will be cited later in this article as illustrative examples.

(c) Writings of publicists

The third source, the writings of publicists, is one of growing volume and importance. One has only to scan the international legal literature to realise that both at national and international level the right is attracting constructive attention from the international juridical community. At the national level writing is abundant in several jurisdictions and the right is built also into domestic bills of rights structures. At the international level the writing is copious.[13]

(d) Customary international law

It is also arguable that the right finds a place under customary international law through its clear recognition in the Universal Declaration and the acceptance of that document as a formulation of principles now commonly accepted by the world community. That alone might be sufficient to give it this status, but when it is manifested also in a series of regional conventions such as the European and American Conventions on Human Rights, in several multilateral treaties and in numerous UN Declarations, its status under this head is greatly reinforced. It is true it does not enjoy the support of universal state practice but a large number of states – an increasing number at this point in global affairs – give it recognition as a human right.

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[13] See the writings noted in footnote 1.

All this is perhaps sufficient to give the right to know the status of a human right in international law. Two other features also lend it strength.

There has thus been sufficient development of the concept for us to discern that what we are dealing with here is a *right* to information rather than a mere privilege. Its concepts and procedures have yet to be developed considerably but the first broad brush strokes delineating the right have appeared on the canvas of human rights. It remains also to show that the right to information lies not merely against governments but, subject to legitimate exceptions, against all those who withhold information which an individual is entitled to receive – be they governments, corporations, quasi-governmental agencies or individuals.

If such rights are to be assertible against governments, what roadblocks exist in traditional international law impeding such a result?

The traditional attitude of international law that looks upon individuals as objects and not subjects of international law has been overtaken by modern human rights doctrine. A second traditional objection, that state sovereignty interposes a wall between external inquirers and the subject matter of their inquiry has also been steadily overcome by the increasing international acknowledgment of the penetrability of that wall to human rights concerns. A third objection, based on the principle of non-interference, grounded in Article 2 of the UN Charter, which does not authorise UN intervention in matters essentially within a state's domestic jurisdiction, has been met by the argument that international monitoring of the observance of human rights agreements does not constitute intervention under Article 2.[14]

This historical and legal background has been set out to show the complexities of the problem we are addressing and the strength of current trends towards the recognition of this right. At the same time there cannot be a recognition of a right to free expression in absolute terms without regard to the social interest. The two have to be balanced in fine scales and there is work ahead here for the jurist – both international and national.

Against this background the discussion proceeds now to a consideration of a few representative illustrations (by no means exhaustive of the field), of the right to know at the three levels formulated earlier, the global, the national and the individual.

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[14] See H. LAUTERPACHT, *International Law and Human Rights* (1968) 420-1.

9. THE MACRO OR GLOBAL LEVEL

9.1 Information regarding the activities of the United Nations

At the very commencement of a discussion of the right to information at a macro level it is appropriate to refer to the recognition of the right to information regarding the working of the UN itself and of its organs and related agencies.

The general policy of the UN is to make information available to the world public regarding its activities, subject to necessary claims of confidentiality of certain types of proceedings. Reference should be made to Resolution 314(IV) of 21 October 1949 of the General Assembly, by which all states members of the UN were urged to grant news personnel of all countries which had been accredited to the UN or to the specialised agencies, free access

(a) to countries where meetings of the United Nations or specialised agencies or any conferences convened by them take place, for the purpose of covering such meetings; and

(b) to all public information sources and services of the United Nations and the specialised agencies and to all meetings and conferences of the United Nations or of the specialised agencies which are open to the Press, equally and without discrimination.

9.2 Foreign radio transmissions

The problem of deliberate interference with the reception of radio signals originating beyond a country's territorial frontiers was the subject of a very early resolution of the General Assembly – Resolution 424(V) of 14 December 1950. This resolution condemned such measures as a denial of the *right* of all persons to be fully informed concerning news, opinions and ideas regardless of frontiers. All governments were invited by this resolution to refrain from such interference with the right of their peoples to freedom of information. At the same time the resolution invited all governments to conform strictly to ethical conduct in the interest of world peace by reporting facts truly and objectively.

From that early beginning there has been much discussion over the decades of this right, with all the complications arising from new technologies such as satellite broadcasts. Considerations of space prevent a discussion of these developments.

9.3 The use of broadcasting in the cause of peace

The League of Nations, perceiving the rapidly growing power of broadcasting as a means for promotion of peace or war had worked out an International Convention Concerning the Use of Broadcasting in the Cause of Peace,

1936. This Convention was referred to in Resolution 841(IX) of 17 December 1954 as constituting an important element in the field of freedom of information. In Resolution 1903(XVIII) of 18 November 1963 the General Assembly has listed this Convention as one which might be of interest for accession by additional states. Much work has yet to be done in this area in view of the exponentially expanding importance of electronic transmission.

9.4 Information concerning the global environment

The linkage of human sustenance and survival to the global environmental condition has rendered imperative the diffusion of knowledge relating to global pollution. The state of the ozone layer, the pollution of the rivers, lakes and seas, of the atmosphere and of the soils, deforestation and desertification are all global issues. Everyone is entitled to knowledge on these matters, as they relate to the health of every person upon the planet and health is an acknowledged human right.

No one can say to what extent each individual is capable of making a contribution once he or she knows the facts but the potential always exists. Some may be stirred into greater activity or even a leadership role once the information is available, but every individual can contribute something if his or her sensitivity is heightened. Accessibility of the information is the vital first step and this is one of the areas where an acknowledged human right could be reduced to a cypher if the necessary information is withheld.

Large commercial entities, semi-government corporations and sometimes governmental agencies themselves have an interest in casting a smoke screen around this area of information. One of the greatest sources of pollution is the armaments industry itself which is often in a state of symbiotic relationship with the armed forces and defence bureaucracies. There is thus a powerful vested interest in keeping this information from the public, and the right to information as a human right needs special emphasis in this area.

The UN Secretary-General BOUTROS BOUTROS GHALI, speaking at the Earth Summit in Rio in June 1992 drew attention to the need to create a new global awareness of 'the fragility of our planet'. He stressed the importance of innovative ways being found to promote dialogue among scientists, politicians and other decision-makers regarding the search for sustainable development consistent with the earth's ecological needs.

Commenting on this speech, *Development Forum,* the journal of the Joint United Nations Information Committee (July-August 1992, Vol.20, No.4) pointed out that in this vast endeavour the media "have their own role to play to inform, educate and motivate public opinion to help set our planet on a new track". Public awareness and understanding were stressed as being vital to this project, the challenge being a challenge to environmental literacy. It noted that

individuals can only begin to think and act upon the environmental effects of every decision they take and to draw the distinction between luxury and necessity, if they are provided with these facts.

If the survival of our means of sustenance requires such care and informed attitudes, the importance of a steady flow of information to the individual cannot be overstressed. If health and survival are human rights, the environmental information on which they depend is no less a part and parcel of those human rights.

As one instance of the importance of a free flow of information reference may be made to the survey by the UN Centre on Transnational Corporations (UNCTC) prepared for the Earth Summit at Rio. The study surveyed the environmental practices of over 200 of the world's largest and most environmentally innovative transnational corporations. Less than half of these corporations coordinated their environmental policies internationally or published a formal international environmental policy. It was even found that many of these firms were unaware of the nature or existence of particular international guidelines and that even corporate headquarters lacked basic information regarding the firm's environmental activities. Moreover, a majority of the firms were disposing waste outside the country of origin.[15] The importance of information not only among themselves but to the global public cannot be overemphasised, having regard to the important environmental impact of their activities and to the fact that populations outside their headquarters were often the most intimately concerned with their environmentally related activities.

9.5 The new world information order

This is one of the most vital areas of applicability of the right to information on the global scene, and perhaps the area which has provoked the deepest differences of opinion. The New World Information Order raises in acute form the question whether the right to know is a human right recognised in international law. What is probably most significant is that in the debates on this concept, the free flow of information has been widely recognised as an international legal right by both proponents and opponents.

The need for attention to this problem becomes evident when one considers the current imbalance in the presentation of world news to the global public. It is upon the basis of news and views thus presented that, in an age of mass television and radio presentation into nearly every home, the citizens of the global community make up their minds on matters of international affairs.

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[15] *Development Forum,* November 1991-February 1992, Vol.19 No.6; Vol.20 No.1 10.

Depending on these views, national governments construct and reorientate their international policies. It is vitally important that these presentations be as objective and balanced as possible.

Yet the structure of news distribution renders this difficult, for four news agencies gather and distribute over eighty per cent of the world's international news.[16] The most widely used newspaper agencies in the world send out tailor-made packages of news and views by jet and satellite to around 150 countries across the world.

For such reasons the 1978 Mass Media Declaration of UNESCO recognised that the flow of information should be both free and better balanced and that the media had a role to play in the quest for peace.[17] The problem assumed such importance as to stimulate a detailed study of it by the World Association for Christian Communication, from which many insights can be gathered.[18]

Current problems in information and communication thus need to be urgently addressed, including legal and conceptual questions of the right of every global citizen to a balanced presentation of news, the right of the media to transmit their news free of obstruction, ethical codes among media operators, the right of governments to protect the national interest on the one hand and the communication rights of their citizens on the other. The problems are complex, and the need for attention is urgent. But underlying it, as a basic point of departure, seems to be the right to communicate and the right to receive information, both of which have achieved the status of human rights.

9.6 Transborder data flow

The vast accumulation in governmental and corporate files of personal data relating to such matters as social security, tax, police, education, health, insurance and credit records means that a pooling of such information could result in a data file embodying a complete breakdown of the privacy to which each citizen is entitled. When such data cross national boundaries, power over individuals passes into the hands of foreign entities, thus adding another undesirable dimension to this new form of power. Race, religion, drug addiction, sexual behaviour, travel data, club and trade union affiliations, and

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[16] S.R. WILSON, 'The New World Information and Communication Order and International and Human Rights Law', 9 *Boston College International and Comparative Law Review* (1986) 107 at 110.

[17] See *New Communication Order: Historical Background of the Mass Media Declaration* (UNESCO, 1982).

[18] See *Communication for All: New World Information and Communication Order*, ed. PHILIP LEE (Maryknoll, NY, 1985).

household data revealed to insurance companies are other details that can be stored, with grave danger to the individual in the event of penetration of this mass of data.

While governments, corporations and individuals have a right to a free flow of information, the right can conflict with another right, equally fundamental – the right to information privacy which is itself a basic human right. Article 17 of the International Covenant on Civil and Political Rights provides that no one shall be subjected to arbitrary or unlawful interference with his privacy (see also Article 12 of the Universal Declaration). The right to privacy is also guaranteed by many national constitutions, and we are here in the area of a clash between two human rights. Clearly the right to privacy will often prevail against the right to a free flow of information, though of course it is conceivable that there will be cases where the right of the public to information concerning an individual overrides his or her privacy protection.

The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Data contains some basic principles of data protection which the member parties must implement in national legislation. Article 12 which deals with transborder data flow endeavours to afford a maximum of data protection while at the same time creating a minimum of barriers against the free flow of information.

In all of these concerns regarding transborder data flow one has to keep in mind also that technologically advanced countries are data-rich and have in this respect an extra source of influence and power over the data-poor countries which lack comparable resources to assemble and store information.[19]

The United Nations Center on Transnational Corporations, which deals with transborder data flow problems relating to multinationals, has issued a technical paper on this problem[20] and, more recently, *Guidelines Concerning Computerised Personal Data Files,* 1989, have been prepared.

Some of the guidelines for transborder data flow issued by the Council of Europe Convention and the OECD highlight the basic considerations that need to be borne in mind in dealing with this area which is of such growing importance – for example the *individual access principle* (requiring the data subject to be informed that information is kept on him, which he has a right to have communicated to him); the *collection limitation principle* requiring the gathering of data to be fair and legal; the *purpose specification principle*

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[19] See J.A. KEUSTERMANS and I.M. ARAKENS, *International Computer Law* (Matthew Bender, NY, 1990) S.17.03 A.

[20] 'Transnational Corporations and Transborder Data Flow: A Technical Paper', UN Doc.ST/CT.23 (1982).

requiring the data keeper to inform the data subject of the aim of the data base; the *data quality principle* requiring the data to be accurate and up-to-date and the *use limitation principle* requiring the use of the data to be in accordance with the aim of the data base.

10. THE NATIONAL LEVEL

10.1 Administrative information

Most governments preserve what the Royal Commission on Australian Government Administration describes as "a formidable reticence towards the disclosure of certain types of information - even to bodies such as the Royal Commission [. . .]. This resistance is associated with considerable tactical acumen in avoiding disclosure".[21] The Canadian situation too has attracted comment, for the 1969 Canadian task force reported: "Totalitarian capitals apart, only official Canberra comes close to matching that special air of furtive reticence which marks the Ottawa mandarins off from other men".[22]

Great strides have been made since those criticisms were written but bureaucratic attitudes may in many instances still be governed by the old principle that "the guiding presumption is one of secrecy; the duty of each public servant is not to disclose information unless authorised to do so".

If the right to information is a human right, legislation may in many instances be required to break through such bureaucratic attitudes, subject of course to necessary limitations in the public interest. Areas of special interest include the disclosure of information to interest groups and to the media; the problem of unequal access to departments depending on the strength of organisation and rapport of the inquirer with ministers and departments; consultation in the making of delegated legislation; greater use of 'Green Papers' inviting public discussion on policy options before the government has decided on a given course of action; and the practice of spreading information by publicising draft bills to stimulate wide public discussion before the bills are presented to the legislature.

10.2 Scientific information

There are many areas of information of a scientific nature of which the public has a right to be kept informed. An example that readily comes to mind

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[21] Royal Commission on Australian Government Administration, 1976, App., Vol.2, para 6.
[22] *To Know and Be Known,* Vol.2 (1969) 25.

is information regarding the testing of drugs which are released for public consumption.

The thalidomide case[23] provided a vivid illustration of the fact that the depth of testing of a drug prior to public release is a matter of vital public interest. Through the injunction procedures which ran all the way through the British courts and eventually to the European Court of Human Rights, the opportunity also arose of weighing this right against the proprietary and other private interests which desired a curb to be placed on that information. The public interest in knowledge eventually outweighed the private interest in withholding it from the public.

The thalidomide illustration is one of many in the medical field. The medical field is only one of many areas in the scientific field where public knowledge of scientific information is essential – agricultural, environmental, meteorological, biomedical, mechanical (as with automobile and factory safety) and chemical (hazardous chemicals). The right is vital and the field is vast.

10.3 Commercial information

Here again the field is vast and one illustrative example only is cited. In *Markt Intern and Burmann v. Germany*,[24] the applicants published in their information bulletin the dissatisfaction of a consumer who had been unable to obtain the promised reimbursement for a product obtained from a mail order firm. The European Court held that in a market economy a business undertaking inevitably exposed itself to the close scrutiny of its practices by its competitors. Its commercial strategy and the manner in which it honoured its commitments might give rise to criticism on the part of consumers and the specialised press. In order to carry out this task the specialised press must be able to disclose facts which could be of interest to its readers and thereby contribute to the openness of business activities.

10.4 Information bearing on public security

The European Court of Human Rights had occasion in *Castello v. Spain*[25] to consider the limits of permissible criticism of governments where it was alleged that such criticism needed to be curbed for the preservation of public order. The Court held that freedom of expression was applicable to all ideas and information, whether offensive or inoffensive, shocking or disturbing, and especially when ideas are voiced by an elected representative. In the case in

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[23] *The Sunday Times v. United Kingdom* (Series No.30), (1979-80) 2 EHRR 245.
[24] (1990) 12 EHRR 161.
[25] (1992) 14 EHRR.

question it was held that the denial to the applicant of an opportunity to adduce evidence of the truth of his statements was an unnecessary interference with his right to freedom of expression.

10.5 Freedom of artistic expression

The freedom to receive and impart information and ideas includes freedom of artistic expression. This is a means of taking part in the public exchange of cultural, political and social information. However, artists and those who promote their work are not free from the possibility of limitations, for whoever examines his freedom of expression undertakes duties and responsibilities.

Where, for example, the works in question were found to have an emphasis on sexuality in its most offensive forms a national court ordering confiscation of paintings was held by the European Court of Human Rights not to have infringed Article 10 of the European Convention.[26]

10.6 Access and equity

The concept of Access and Equity (A&E) arose in Australia as a policy response to providing services for people of non-English speaking background (NESB) in 1985 and is worthy of mention in an overall survey of the right to know. In 1989 the Access and Equity strategy was formally extended to include all groups who may face barriers of race, religion, language or culture.[27]

Under this programme access to information about government agencies, programmes, services and entitlements is viewed as a right as well as a prerequisite to the effective use of opportunities and resources provided by government. In turn, governments are seen to have an obligation to inform citizens about their entitlements to services and to market these programmes and services.[28] At many conferences participants from such groups reported difficulty in finding out information about the range of programmes available through government, and regarding their entitlements and eligibility to receive services.[29]

Governments all over the world spend vast sums of money providing welfare services to citizens especially in the disadvantaged groups but perhaps devote insufficient attention to distributing information to those most in need of those services, with the result that those who need the services most may

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[26] *Muller and others v. Switzerland,* (1991) 13 EHRR 212.

[27] See *Access and Equity, Evaluation Report* (Department of the Prime Minister and Cabinet, Australian Government Publishing Service, Canberra, 1992) 11.

[28] *Ibid.*, 41.

[29] *Ibid.*, 74.

not have practical access to them. Information in this context means access to those services and lack of information means lack of access and *de facto* discrimination.

10.7 The subordinate law-making process

The principle of legal professional privilege excludes third parties from information given on a confidential basis by a client to the lawyer. The purpose of this protection is to ensure that legal experts can be fully informed of all the facts by their clients to enable them to give full and complete advice on the matter in hand.

An interesting exception to this rule emerged in the Australian case of *Attorney General (NT) v. Kearny*[30] where, in claims to land in the Northern Territory by the Northern Territory Land Council, the claimant alleged that certain town planning regulations were invalid, on the ground that they were made otherwise than for a purpose authorised by the Town Planning Ordinance. The allegation was that the regulations were made for the purpose of defeating the aboriginals' land claim. The claim of privilege was raised, protecting confidential communications between the government and its professional legal advisers.

The High Court looked at the underlying policy behind the common law rule and observed:

> "It would be contrary to the public interest which the privilege is designed to secure – the better administration of justice – to allow it to be used to protect communications made to further a deliberate abuse of statutory power and by that abuse to prevent others from exercising their rights under the law. It would shake public confidence in the law if there was reasonable ground for believing that a regulation had been enacted for an unauthorised purpose and with the intention of frustrating legitimate claims, and yet the law protected from disclosure the communications made to seek and give advice in carrying out that purpose."[31]

11. AT INDIVIDUAL LEVEL

11.1 Administrative decision making

It is not proposed to venture in detail into this area save to note the increasing recognition in several jurisdictions of the need for administrative

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[30] (1985) 61 ALR 55(HC).

[31] See also *Cross on Evidence* (4th Australian edition, Butterworths, 1991) 712.

decision-making involving the rights of subjects to be based on communicated reasons rather than an unformulated exercise of bureaucratic discretion.

In common law jurisdictions there was early recognition of the duty of a statutory tribunal, if requested to do so by a person connected with the decision, to furnish a written or oral statement of the reasons for the decision.[32] The statement may be refused on grounds of national security. The reasons given must be full and sufficient, intelligible and must deal with the substantial points which are at issue.[33] It should be noted also that the principle of procedural fairness requires that no evidence should be placed by one party to a dispute without the knowledge of the other, who must have the opportunity to oppose it.[34] This principle has been applied in relation to such proceedings as those relating to dismissals and retirements from employment, promotions appeals within the public service, disciplinary proceedings against members of an organisation, decisions of parole boards and deportation orders.[35]

11.2 Immigrants

An important informational problem of our time arises from the position of new immigrants in many countries. They lack the language of their country of adoption and at the time when they most need knowledge regarding the services available to them they are probably least able to reach it. They need basic survival information and this is indeed a human right.

At their point of arrival basic information such as what medical facilities are available to them, what interpreter services, how they set about finding accommodation, basic consumer information, what allowances they are entitled to, what facilities are available for their children's education, the bus routes in the city and even how to make a telephone call. There is goodwill on the part of the host government in welcoming them but this may not often be translated into appropriate and understanding information made available to them at their point of arrival in the language they understand and in a manner shorn of the officiousness of bureaucracy which is very often seen as a wall of arrogance shutting off the migrant from the survival knowledge to which he or she is entitled.

Likewise in the country of origin, diplomatic posts need to gear themselves to giving such information in advance. Not all migrants are literate and what

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[32] See the Tribunals and Inquiries Act 1971 (UK).

[33] See HALSBURY's *Laws of England,* Vol.1, 156. For Australia see the Administrative Appeals Tribunal Act 1975 s.28(1) and the Administrative Decisions (Judicial Review) Act 1977, s.13(1); ARONSON AND FRANKLIN, *Review of Administrative Acts* (Law Book Company, 1987) 406.

[34] HALSBURY's *Laws of Australia,* 10-1890.

[35] *Ibid.*

they need to know requires to be explained to them in a manner they understand.

The Access and Equity programme of the Australian Government is a step in this direction and perhaps various countries can pool their experience so as to give reality to the right to know in this vital field.

11.3 Legal professional confidences

We have already referred to this privilege in the context of the subordinate law-making process. The rationale of the rule, as stated by Lord LANGDALE MR in *Reece v. Trye*[36], reads as follows:

> "The unrestricted communication between parties and their professional advisers has been considered to be of such importance as to make it advisable to protect it even by concealment of matter without the discovery of which the truth of the case cannot be ascertained."

Yet there are several exceptions, where the privilege disappears and the right to information revives:

1. No privilege is accorded to a communication made to commit a crime or fraud.[37]
2. The privilege does not apply to facts discovered by either party in the course of their professional relationships.[38]
3. Legal professional privilege is unavailable if it operates to exclude documents which may establish the innocence of an accused in a criminal trial.[39]
4. No legal professional privilege protects a solicitor from the duty to reveal the address of a child who is a ward of the court.[40]
5. Legal professional privilege will not protect communications made by a public authority in order to obtain advice or assistance to exceed its statutory power.[41]

11.4 Consumer protection

The EEC probably leads in this area, and a brief reference follows to some steps taken in that jurisdiction.

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[36] (1846) 9 Beav. 316 at 319; 50 ER 365 at 366.
[37] *R. v. Cox and Railton* (1884) 14 QBD 153.
[38] *Brown v. Foster* (1857) 156 ER 1397.
[39] *R. v. Barton* (1972) 2 All ER 1192.
[40] *Re Bell*; Ex parte Lees (1979-1980) 30 ALR 489 (High Court).
[41] *Australian Government for Northern Territory v. Kearney* (1985) 61 ALR 55.

In 1975 the EC Council adopted a resolution on a preliminary four-year programme for consumer protection and information policy.[42] The consumer was seen not only as a purchaser and user of goods but also as a person concerned with the various facets of society which may affect him either directly or indirectly as a consumer. Among the five basic rights of the consumer set out in the programme are the right to information and education.[43]

The objective of enabling consumers to be correctly informed about prepackaged goods is stressed in detailed directives adopted about the packaging of goods. Labelling must not be misleading and must include various items of basic information. Directives concerning colouring matters, preservatives and anti-oxidants require packagings and containers to bear certain information regarding these.[44]

Steps have also been taken with a view to requiring competent authorities in the member states to ensure the gradual introduction of consumer education into curricula so that it is systematically provided throughout the period of compulsory education.

In varying degrees Commonwealth jurisdictions are embodying consumer information principles in their domestic legislation and regulations.

11.5 Credit references

Credit reference agencies who carry on the business of furnishing information regarding the financial standing of individuals open up another area concerning the right to individual information. Special provisions have been enacted in several jurisdictions to enable an individual to find out whether an agency has been consulted about him in any credit transactions in which he is involved, to discover what information an agency has compiled concerning him, and in the event of an error to enable him to correct that error.[45]

An individual is entitled to see any information kept on him by a credit reference agency, which must provide such information within a specified number of days of receiving a written request for such information. Credit agencies contravening this provision commit an offence.

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[42] EC Council Resolution of 14 April 1975.

[43] EC Council Directive 70/527 Art.3 (amended by Directives 73/103 and 75/296).

[44] See HALSBURY'S *Laws of England,* Vol.51, p. 821.

[45] For the UK see HALSBURY, Vol.22, p. 182. For Australia see the Privacy Act, 1988, ss.18H and 18J.

11.6 Confidential personal records

Credit references apart, the individual is entitled to information from record keepers regarding the existence of data collected regarding himself. When dealing with the guidelines of transborder data flow we have referred to the recognition of the individual access principle as basic to the management of such data.

Specific instances wherein such rights have been recognised in human rights case law are not difficult to find. For example in *Gaskin v. UK*[46] the local authority had kept confidential records regarding the applicant and his care from 1959 when he was taken into council care until he attained majority in 1977. Since his majority he had tried to obtain details of these records, alleging he had been ill-treated in care.

The case involved a fine balance between confidentiality of reports, which was necessary for receiving objective and reliable information, and the principle of respect for family life recognised in Article 8 of the Convention. Where a contributor failed to answer or refused consent the principle of proportionality required an independent authority to decide whether access should be granted, and in the absence of such a procedure there had been a breach of Article 8.

Privacy legislation in various jurisdictions requires record keepers who have possession or control of records containing personal information to enable any person to ascertain whether the records contain personal information.[47] The individual concerned is entitled to have access to such a record, except to the extent that the record keeper is entitled in law to refuse to provide such access.[48]

11.7 Medical information

Medical examinations have become a means of selection for employers, a means of risk-assessment for insurers and a species of evidence in criminal and civil proceedings, apart from their traditional role of being a diagnostic prerequisite to decisions about further medical treatment including invasive procedures such as heart and other major surgery.

Major right-to-know issues arise. Does the subject have a right to know all this information, do third parties have a right to know and does the state have a right to know? Confidentiality at once surrounds the physician-patient relationship. Unauthorised disclosure is a breach of the right to privacy. In

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[46] (1990) 12 EHRR 36.

[47] See for example s.14 Principle 5 of the Australian Privacy Act, 1988.

[48] See Principle 6 of the Australian Privacy Act.

recognition of this principle Article 6 of the Council of Europe Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data, provides that health information may not be processed automatically "unless domestic law provides appropriate safeguards". 'Informed consent' to medical examination as well as to invasive procedures raises in another form the question of the patient's right to know. The patient needs sufficient understanding of the purpose and implications of the examination so that he can give a considered decision. Without informed consent there cannot be a valid medical procedure.

The extent of the patient's right to know the consequences of a proposed line of treatment has also aroused lively debate, for in theory a book could be written on the possible consequences of nearly every avenue of proposed medical treatment.

Likewise, in regard to test results, the patient is entitled to know them unless the patient determines he or she does not want to know them – in which case there is the converse right which some researchers describe as 'the right not to know'.[49]

The question of confidentiality also becomes subject to limitations in the interests of public health, as for example in the control of epidemics and contagious diseases.

Questions of the right to know could also arise in the context of a proposed marriage where one or other of the parties carries or is a potential carrier of a disease transmissible to the offspring of the union, such as thalassaemia, or where one of the parties suffers from a highly contagious or infectious disease. These questions have not as yet been fully explored.

Only a few illustrative examples have been selected for this exploratory study, but they are sufficient to show the vastness and variety of the field, as well as the extent of the work that lies ahead in giving firmer contours to this very important right. We all have a stake in it, for upon it depends the completeness of nearly every human right that we recognise.

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[49] A. HENDRIKS and M. NOWAK, 'The Impact of Advanced Methods of Medical Treatment on Human Rights' in C.G. WEERAMANTRY, ed., *The Impact of Technology on Human Rights: Global Case Studies* (United Nations University Press, Tokyo, 1993).

SYMPOSIUM ON THE EFFECTUATION OF INTERNATIONAL LAW IN THE MUNICIPAL LEGAL ORDER

Editorial note

When planning Volume 4 of the *Yearbook* the General Editors took up the idea of composing a symposium on the effectuation of international law in the municipal legal order, consisting of a number of articles, each analysing the topic from the perspective of one specific state. Together these papers would offer a picture of the law and practice of the whole region. Unfortunately these plans have only partly materialized due to the limited time available to the persons invited to participate. The four contributions, two from East Asia, one from Southeast Asia and one from South Asia, which the Editors have been fortunate to obtain are presented in the following pages. The General Editors express the hope that they will as yet be able to commit scholars from other Asian countries to contribute papers on the subject in future Volumes of the *Yearbook*.

INTERNATIONAL LAW AND PAKISTAN'S DOMESTIC LEGAL ORDER

Jamshed A. Hamid*

1. INTRODUCTION

The problem of relationship between international law and municipal law has been the subject-matter of much controversy between jurists and scholars of the Law of Nations. As we shall see later, every case in a municipal court in which a rule of international law is asserted to govern the decision raises the problem. In fact the greatest disparity in approach to this subject has been between those who support the 'dualist' doctrine and those who follow the 'monist' theory. In present times discernable disparity in state practice has further accentuated the disparate approach of these two schools of thought.

According to the states which follow the 'dualist' doctrine the starting point is the proposition that law is an act of sovereign will which is supreme within the state. Consequently, international law and domestic law are differentiated and are treated as two totally separate and distinct legal systems. International legal norms, therefore, irrespective of its source, would not automatically form part of the law of the State. In order to apply a rule of international law within the state it is necessary to incorporate it in the domestic law in accordance with the relevant legislative or administrative procedures established in its municipal legal system.

On the other extreme the 'monists' believe in the unitary conception of law. According to this concept international and domestic law are two facets of the same single legal structure and as such the monists see no difficulty in applying international legal norms within the municipal legal order without the need for their incorporation. In fact some jurists, and even states, have in their practice accorded higher status to international law so that in case of any

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inconsistency or conflict between municipal and international law primacy is given to the latter. According to the followers of this doctrine, if a state exceeds the limits prescribed by international law its acts shall be void.

In order to have a clear understanding of the two doctrines and their relationship *inter se* it may be appropriate, at the outset, to examine the disparate practices of states and to determine how states, following different doctrines, apply the rules of international law within the framework of their domestic legal order and how the conflict, if any, between rules of international law and the legal system applicable within the state have been resolved. This can be viewed from various angles and reduced to three contrasting approaches, viz. (1) the primacy of international law, (2) the primacy of domestic law, and (3) harmonization between the two concepts mentioned above. A survey of the practice of some states in which rules of international law operate as part of municipal law without express municipal adoption or incorporation would reveal that there is considerable diversity in the domestic procedures whereby the states give effect within their municipal legal orders to rules of international law, depending on whether the rules are based on customary law or treaties.

For example, in the United Kingdom rules of customary international law which are universally recognized are given effect by English courts without the need for any specific act incorporating those rules into English law, subject to the overriding effect of statute law. In Austria customary international law is applied by Austrian courts by virtue of Article 9 of the Constitution of 1955 which provides that generally recognized rules of international law are component parts of Austrian law. Article 25 of the Basic Law of the Federal Republic of Germany provides that the general rules of international law form part of the federal law and take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory. Under Article 29 of its Constitution Ireland "accepts the generally recognized principles of international law as its rules of conduct in its relations with other states". Similarly Article 10 of the Italian Constitution declares that the Italian juridical system conforms to the generally recognized principles of international law.

The above examination of the practice of states would clearly indicate that the states in question follow the 'monist' doctrine as far as customary international law is concerned and that there is, more or less, an automatic incorporation of customary international law into the domestic law whose legality can be traced to either common law, as in the UK, or to their constitutions as in the case of the Federal Republic of Germany, Belgium, Ireland and Italy. In cases where automatic incorporation of international customary law in the domestic system is based on the constitution, international norms so established shall normally prevail over the statute law.

As regards treaties it seems that most of the countries follow the 'dualist' doctrine in that there is no automatic incorporation. As in the case of customary international law, practice varies. In Ireland, Italy, Luxembourg, Switzerland, France, the United States and the United Kingdom treaties do not automatically apply within the municipal order. Some act, either executive or legislative, is necessary in order to make the provisions suitable for domestic application. In some cases legislative cover is required. In other cases the treaty may be submitted for legislative approval as in the United States and Switzerland. In yet other cases an act of the executive is required for their applicability, such as the official publication of the treaty, as in France. These examples of states adopting different methods for domestic applicability of treaties are by no means exhaustive.

2. THE PRACTICE IN PAKISTAN

Pakistan follows the 'dualist' doctrine both in case of customary international law and treaties. In both cases the applicability in the municipal legal order of Pakistan would depend on the subject matter which determines the act of state required for their domestic application: either a legislative cover or an executive act, having the effect of making the international provisions suitable for application by the courts of Pakistan. Broadly speaking a distinction may be made between the following three categories:

(i) Rules of international law not covered by a statutory instrument;
(ii) Rules of international law which are already covered by a legislative instrument;
(iii) Rules of international law which conflict with a statutory instrument or which may require legal cover for their application.

Before a detailed examination is undertaken of the legal aspects regarding the applicability of international law in Pakistan it is imperative to identify the organ of the Government which in Pakistan is responsible to take such actions as are deemed necessary for the implementation of international obligations. For this purpose the constitutional provisions need to be examined to pinpoint the governmental agency responsible for the conduct of Pakistan's international relations.

Article 97 of the Constitution of the Islamic Republic of Pakistan defines the extent of the executive authority as follows:

> "Subject to the Constitution, the executive authority of the Federation shall extend to the matters with respect to which Majlis-e-Shoora [Parliament] has

power to make laws, including exercise of rights, authority and jurisdiction in and *in relation to areas outside Pakistan.*" (Emphasis added).

While it is clear that Article 97 assigns the functions of external relations to the Federal Government, the extent of the functions is not clearly specified. While it may not be possible to define, with any degree of precision, the executive functions 'in relation to areas outside Pakistan', it can be stated that they are roughly a residue of functions of the government, after separation of the legislative and judicial functions. These may include the functions which relate to the direction of foreign policy and all those acts which are ancillary thereto, including the provision of legislative cover, if so needed, for the implementation of international legal obligations within Pakistan. In fact, the extent of the executive authority in foreign relations is, to some extent, elaborated, though not exhaustively, in the Fourth Schedule under the Federal Legislative List which assigns 'External Affairs' to the Federal Government, illustrating this by including within its ambit such subjects as defence of the Federation or any part thereof, the security of Pakistan, *implementation of treaties, pacts, agreements,* extradition, etc. If any legal cover is needed for the implementation of bilateral treaties or multilateral treaties to which Pakistan has become a party, it is the federal legislature that is competent, whenever necessary, to enact the law to give municipal legal effect to the treaty. Consequently there should be a close coordination between the executive and the legislative organs, which in turn may depend on the prevailing form of government. For the purpose of a clear understanding of the enforcement mechanism the governmental set-up under the constitution of Pakistan will be briefly discussed hereunder.

Pakistan is a federal state with a parliamentary form of government based on the Westminster pattern. In the case of a presidential form of government the separation of powers or, more appropriately, the division of governmental functions, sometimes complicates coordination between the executive and the Parliament. In a parliamentary form of government, however, as established under the constitution of Pakistan, the two functions, legislative and executive, coalesce in the same group of persons. In this system the people who legislate and those who govern are the same. Consequently, the municipal effectuation of international obligations requiring legal cover is ensured by the close cooperation between the two organs of the State concerned. As long as the government has the majority in Parliament, which is necessary for its existence, legal cover would not be difficult to provide.

As regards formulation of policy, generally the federal government has discretion. The Constitution merely provides political guidelines. These guidelines are contained in Article 40 which lays down that:

> "The state shall endeavour to preserve and strengthen fraternal relations among Muslims countries based on Islamic unity, support the common interests of the peoples of Asia, Africa and Latin America, promote international peace and security, foster goodwill and friendly relations among all nations, and encourage the settlement of international disputes by peaceful means."

Article 40 merely provides general guidelines of foreign policy and does not deal with the municipal applicability of international law rules. It is up to the Government of Pakistan to determine, in the exercise of its sovereign discretion, the extent to which it should give municipal effect to its international obligations keeping in view its laws and practice. This approach is followed with regard to both treaties and customary international law. Keeping the above in view I shall now discuss the modalities of according municipal validity to international obligations and the determination of the choice of approach in order to achieve that aim.

3. APPLICABILITY OF INTERNATIONAL LAW RULES IN THE ABSENCE OF MUNICIPAL LAW ON THE SUBJECT

There may be international customary law rules or bilateral or multilateral treaty provisions for which there is no legal cover for their applicability. The question arises whether the provisions can be applied in the municipal legal order of Pakistan without further measures being taken to provide legal cover. This type of situation may arise not too frequently and is practically limited to the following two cases: (1) where the treaty or customary rule does not create direct rights or obligations for the legal subjects of the municipal legal order and, (2) where the rights granted or obligations imposed do not come into conflict with the existing laws in force within the state concerned.

For an answer to the question we have to examine the status of customary international law and treaties, particularly in relation to their application by the courts of Pakistan. In this regard it is worth pointing out that Pakistan has been a part of the British Empire and that the legal system that we inherited and which is applied by our courts is based on the Anglo-Saxon law. This point has been clearly established by the Lahore High Court in *Saeed Ahmad* v. *Mahmood Ahmad*.[1]

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[1] *Saeed Ahmad v. Mahmood Ahmad*, PLD [1968] Lahore 520 at 524. In this case reliance was placed on G.C. CHESIRE'S *Private International Law*.

According to Justice ANWAR-UL-HAQ, Judge of the Lahore High Court who pronounced the judgement,

> "it is submitted [. . .] that as we in this country have inherited the English judicial system and the English concepts of law, both municipal and international, the practice obtaining in England and other Anglo-Saxon countries should be held to prevail in Pakistan as well."

The practice of our courts of applying customary international law is best illustrated in the more recent case of *M.A. Qureshi* v. *The Union of Soviet Socialist Republics*.[2] This case involved the question of whether or not the then USSR enjoyed absolute sovereign immunity from being sued in the Courts of Pakistan. The Karachi High Court[3] accepted the plea and dismissed the suit on the ground that USSR enjoyed absolute immunity. Justice QADEERUDDIN stated that "I would only add that the Private International Law of this country is bound to be a part of the law of this country for otherwise the courts of this country would be unable to administer it".

At the time this case was instituted in the Sind (Karachi) High Court there was no law to govern sovereign immunity. The plaintiff appealed to the Supreme Court for quashing of the judgement. The Supreme Court, in order to come to a definite conclusion, examined the customary international law principles and state practice regarding sovereign immunity.

While examining customary international law principles the Court opined that "to prove the existence of a rule of international customary law or General Law, it is necessary to establish that states act in this way because they recognize a legal obligation to this effect". After examining the practice of states the Supreme Court came to the conclusion that

> "to give our answer straight away, our study has led us to the conclusion that the grant or acceptance of absolute jurisdictional immunity to a foreign state has neither been a uniform practice nor a rigid obligatory rule, and there has never been a uniformity of courts of various countries in this respect, and if at any interval of time in the world it was so considered then it has undergone a tremendous change and has rather entrenched to the contrary."[4]

In addition to the state practice the Supreme Court also surveyed the case-law beginning with the observations of Lord DENNINGS in the famous case

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[2] PLD [1981] Supreme Court 377.

[3] *M.A. Quraishi* v. *The USSR,* PLD [1968] Karachi 443.

[4] *Supra*, n.2.

Ibrahim Rahimtoola v. *Nizam of Hyderabad*.[5] The Court also took into consideration the views and opinions of jurists and expert writers and came to the conclusion that "it will appear that they also constitute, if not conclusive, at least prima facie evidence of the development of restrictive immunity." The Supreme Court decided the case on the basis of the restrictive immunity principle, *viz.* no immunity for transactions of a commercial nature.

This was an instance of the prevailing international law principle being applied by the court where municipal law on the matter was non-existent at that point in time.[6]

The question of relationship between international law and domestic law was also discussed in the most recent case of *Messrs. Najib Zarab Ltd.* v. *The Government of Pakistan*.[7] The issues to be examined by the Karachi High Court were stated to be whether "there is any mandate of international law or if the rules of international law afford us any guidance and if such mandate or guidance is perceptive under Pakistan law". Two questions arise for our consideration. First, whether international law is, of its own force, drawn into the law of the land without the aid of municipal law and secondly, whether, once so drawn, it overrides municipal law in case of conflict. It has been said in England that there are two schools of thought, one school of thought propounding the doctrine of 'incorporation' and the other the doctrine of 'transformation'. After examining the British practice the Court came to the conclusion that

> "we are of the view that nations must march with the international community and the municipal law must respect rules of international law, even as nations respect international opinion; the comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament."

The legal status of treaties would also be the same and the same principles shall apply as demonstrated in the above mentioned case.

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[5] (1957) 3 All E.R. 441 and [1958] AC 79.

[6] It was only in 1981 that Pakistan enacted the State Immunity Ordinance which confined the restrictive immunity principle.

[7] PLD [1993] Karachi 93. Summarized in 3 AsYIL (1993) 206.

4. APPLICABILITY OF INTERNATIONAL LAW IN FACE OF OTHER APPLICABLE LAW GOVERNING THE SAME MATTER

In Pakistan, the application of international law rules by the courts is subject to two limitations. The first is their conflict with a statute or an Act of Parliament. The second limitation is the one imposed by the Islamic Laws or the Shariat and is imposed by the Constitution of the Islamic Republic of Pakistan.

4.1. Law repugnant to the injunctions of Islam

The Constitution of the Islamic Republic of Pakistan makes the 'Objectives Resolution'[8] as its substantive part. Under one of the 'Objectives' of this 'Resolution' the State of Pakistan resolved to make Pakistan a sovereign independent state

> "wherein the Muslims shall be enabled to order their lives in their individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah."

Article 227 of the Constitution further provides that

> "All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah [. . .] and no law shall be enacted which is repugnant to such injunctions."

To ensure this the Constitution by its Article 203 establishes a Federal Shariat Court which

> "may, [either of its own motion or] on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet [. . .]."

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[8] In 1985 (P.O.No.14 of 1985) an "Objectives Resolution" was made substantive part of the Constitution by insertion of an Art.2A. See A.P. BLAUSTEIN & G.H. FLANZ, *Constitutions of the Countries of the World*, Vol. 14, Islamic Republic of Pakistan (release 93-4) at 233.

If the Shariat Court decides that a law or legal provision is indeed repugnant to the injunctions of Islam it shall give a reasoned decision and determine the extent to which such law or provision is so repugnant and specify the day on which its decision shall take effect[9]. In such a situation either the Government takes steps to amend the law so as to bring it in conformity with the injunctions of Islam, or, if no action is taken by the Government, then such a law or, as the case may be, any specific provision therein, shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect.

In view of the provisions of the Constitution referred to above it is impossible that a rule of customary international law or a treaty provision which is in conflict with the principles of Islamic Law as laid down in the Quran and the Sunnah of the Prophet would ever be applied in Pakistan. There is a dicta to this effect in the Supreme Court judgement in the case of *M.A. Qureshi* v. *The USSR*.[10] In it Justice MUHAMMAD AFZAL ZULLAH, while discussing the relation between customary international law and the law in Pakistan with respect to the question of state immunity as well as to the rule of law in Pakistan in case of absence of statutory regulation, stated:

> "[It] is no more good law to interpret [the] expressions 'justice, equity and good conscience' to mean the rules of English Law, as in any way applicable in Pakistan. Instead, accepted and fundamental principles and juridical norms of Islam, its philosophy, jurisprudence and its common law shall govern the application of the rules of justice and equity as also would control the discretion of the judges when the question of good conscience and fairplay are involved."[11]

Justice Dr. NASIM HASAN SHAH while supporting Justice ZULLAH stated that:

> "Whenever the expression 'justice, equity and good conscience' occurs in law it shall be interpreted in accordance with Islamic law and principles. When law gives discretion to the court and it can be exercised in more than one way, it would be so exercised so as to advance justice and fairplay as understood in Islam. Rules of prudence, propriety and abundant caution and similar other considerations would be applied only in consonance with Islamic standards. Present law when required to be applied to new situation would be followed

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[9] This is a special feature. Only the Shariat Court has been specifically so authorized by the Constitution.

[10] *Supra*, n.2.

[11] This opinion is based on an earlier judgement of Justice ZULLAH in *Haji Nizam Khan v. Additional District Judge, Lyalipur*. PLD [1976] Lahore 930.

> and applied so as to advance Islamic principles. All doubts in interpretation of laws and appreciation of evidence would be resolved in a manner consistent with Islamic principles and jurisprudence in preference to any other contrary norm."[12]

Applying the principle to the question of restricted sovereign immunity Justice Dr. NASIM HASAN SHAH stated:

> "I am of the view that on account of the increasing involvement of states in international trade and economic relations it is only fair and equitable that they should be amenable to the jurisdiction of the courts as private traders in respect of their private/commercial activities. This view is consistent with the principles of justice and equity, the principles of Islam as well as the trend of state practice of most states. In fact, in our country, the law is that the courts can fill in the gaps which may be found in it by resort to the principles of Islamic law, justice and equity. Wherever, while interpreting the statute law, more than one interpretation are possible, the one consistent with Islamic principles and jurisprudence may be adopted. Out of two otherwise equally possible interpretations one of which advances the principle of policy and Islamic provisions of the constitution and the other does not, the former, unless prohibited by 'written' constitution and the written law, may be adopted."

While dealing with the question of immunity of the sovereign in English law and its conflict with the Islamic principles Justice SHAH held:

> "The Muslim Shariat does not embrace the concept of the British Common Law that a sovereign can do no wrong and cannot be sued in the municipal court in his own domain. On the contrary, in Shariat a sovereign can be sued in the Court of Qazi and like any other citizen is subject to his jurisdiction and bound to carry out any decree or order passed against him by the Qazi."

As in the case of customary international law it would be difficult for the court to apply treaty law in case it conflicts with the principles of Shariat. This limitation imposed on the law by the Shariat in Pakistan can best be illustrated with reference to concrete examples.

Pakistan is committed to safeguard the welfare of the child as enjoined by Islam. Consequently, Pakistan's delegation actively participated in the adoption of the Convention on the Rights of the Child, adopted on 20 November 1989. However, the provisions relating to 'Adoption' were found to be repugnant to

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[12] Ibid.

the Islamic legal system which does not recognize adoption as a mode of filiation. Consequenty Pakistan could become a party to the Convention only subject to the Pakistani legal position vis-à-vis the Shariat. Therefore, ratification of the Convention took place with the following reservation:

> "Provisions of the convention shall be interpreted in the light of the principles of Islamic laws and values."

Pakistan faced a similar problem while negotiating the UN Declaration on Social and Legal Principles with Reference to Foster Placement and Adoption Nationally and Internationally. Most of the Muslim states, including Pakistan, expressed their inability to agree to the provisions on adoption as these were repugnant to the principles of Islam. As a result the UN General Assembly recognized the principle of 'Kafala' of Islamic law as an equivalent humanitarian principle that could be applied by states practising Shariat.

4.2. Applicability of rules of international law in face of coinciding municipal legislation

In the preceding discourse, I discussed the applicability of customary international law or treaties relating to matters not covered by domestic law, and the limits imposed by Islamic law on their applicability in countries like Pakistan, where Shariat is the dominant law from which there can be no derogation. I shall now discuss the case where customary international law rules or treaty provisions can be applied without the need for a specific legal cover as the existing municipal legislation already provides such cover. In certain cases international principles or international obligations can be implemented by a mere executive order or administrative directive. Here municipal legislation and international legal norms coincide. In such a situation it could be argued that the international law rules form part of a broader complex of norms for the regulation of activities within the municipal legal order.

For example, in order to give municipal legal effect to the Convention on the Privileges and Immunities of the United Nations Pakistan enacted the United Nations (Privileges and Immunities) Act, 1948. However, to enable the Government of Pakistan to extend similar facilities to other international organizations and their representatives and officials, if it so decides, the Act of 1948 provides in its section 2 that where in pursuance of any international agreement, convention or other instrument it is necessary to accord to any international organization or its officials and representatives privileges and

immunities similar to those extended to the United Nations and its officials and representatives, the only thing that needs to be done is for the Federal Government to issue a notification in the Official Gazette (a purely executive act) in order that the 1948 Act takes effect with regard to the international organization mentioned in the notification.

There are also legislative enactments which enable the Federal Government to implement international obligations incurred by Pakistan under any specific international instrument. If the Government, under an international instrument, has to relax the conditions under which a foreign national is to stay in Pakistan, the Government can do so under Section 10 of the Foreigner's Act 1946 which provides that the

> "Federal Government may by order declare that any or all of the provisions of this act or the orders made thereunder shall not apply, or shall apply with such modifications or subject to such conditions as may be specified, to or in relation to any individual foreigner, or any class or description of foreigners."

Similarly, if exemption from registration is to be granted to officials or representatives of international organizations who are posted in Pakistan under a treaty, then, under section 6 of the Registration of Foreigners Act, 1939,

> "the Federal Government may, by order, declare that any or all the provisions of the rules made under this Act shall not apply, or shall apply with such modifications or subject to such conditions as may be specified in the said order, to or in relation to any individual foreigner or any class or description of foreigners."

Pursuant to the 1939 Act, the Registration of Foreigners (Exemption) Order 1966 was issued in compliance with Pakistan's international obligations of extending the facility of non-registration to diplomatic and consular agents, UN personnel, etc. Exemption from duties, customs and other taxes can also be granted by the Central Board of Revenue in accordance with the authority vested in it under the Finance Act. These are some examples where rules of customary international law or treaty law are already covered by or form part of the municipal legal order of Pakistan.

Legal cover will not be necessary either where a treaty is concluded upon specific authorization of an instrument of domestic law. The Pakistan Extradition Act of 1972 provides that extradition is possible only to a state with which there is either an extradition treaty or in respect of which a notification is issued in the Official Gazette. If Pakistan intends to enter into extradition arrangements with another country it will have to enter into a treaty with that state. The obligations incurred under that treaty will then be

implemented in Pakistan on the strength of the Extradition Act of 1972. Incorporation of the treaty through enactment of legislation for the purpose of implementation would not be necessary. Only its notification would be required for the courts to take cognizance of the treaty, but this is purely an administrative act.

4.3. Applicability of rules of international law in face of conflicting municipal law

While discussing the limitations on incorporation of rules of international customary law or treaty law in the municipal legal system I mentioned Shariat from which there can be no derogation. The other limitation is the municipal law in force. Consequently, in most countries the law of the land prevails over international legal norms unless the constitution of the state provides otherwise. In Pakistan international law has no superior status and municipal law shall prevail in case of inconsistency between it and international law rules.

Right from the beginning the courts in Pakistan have given superior status to the domestic law in case of conflict between the latter and international law rules. Originally, the courts in Pakistan took the view that a customary international law rule could not be applied unless it had the cover of municipal law. This point was made adequately clear in the case of *Federation of Pakistan* v. *Messrs Dalmia Cement Co. Ltd.*[13] In this case the Supreme Court of Pakistan observed that

> "if the proposition that a new state is bound by the obligations of its predecessor is accepted, even then it will not be possible to grant any relief to the respondent company, *because in the absence of a statutory recognition the municipal courts have no authority to enforce such an obligation.*"

However, as discussed earlier, this concept has undergone some changes and international legal norms were enforced by the Courts of Pakistan even in the absence of 'statutory recognition'. The courts adopted a uniform and consistent policy in cases where there was a conflict between international law and domestic law provisions. But while deciding cases brought before them the courts were confronted with two types of situations, namely (1) where the treaty itself prescribed legislation for its implementation and (2) where the

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[13] PLD [1962] Supreme Court 260.

customary international law or treaty rules were at variance with the statutory instruments in force in Pakistan.

In cases where a treaty prescribes the adoption of legislation for its implementation it is not always necessary to enact laws. If a legal instrument already exists it shall automatically cover the treaty. If there is no existing implementing legislative instrument and if the treaty cannot be implemented through an executive order, then covering legislation would be needed. This brings us to the second point of discussion namely where the customary or treaty rule of international law comes into conflict with domestic law or other rules or customs having the force of law in Pakistan.

As already stated earlier Pakistan follows the 'dualist' doctrine both with regard to customary international law and treaties, but as also adverted earlier, in certain circumstances the courts of Pakistan do take judicial notice of, and apply international customary law or treaty law as a matter of policy to meet the ends of justice. This is evident from the reasons enunciated in the cases of *M.A. Qureshi* v. *The USSR*[14] and *Messrs Gammon-Layton* v. *Secretary of State of the USA*[15] on the question of sovereign immunity. However, in the latter case, while pronouncing on the question of applicability of international law rules where municipal law applied, the court expressed the view that it could not "engraft upon" the provisions of domestic law "general principle[s] of international law which our legislature did not think it proper to do so".

The matter was also dealt with, at considerable length, in *Messrs Najib Zarab Ltd* v. *The Government of Pakistan*.[16] In this case the court examined two issues namely, (1) whether international law is, of its own force, drawn into the law of the land without the aid of municipal law and (2) whether so drawn, it overrides municipal law in cases of conflict.

While examining the two British doctrines of 'incorporation' and 'transformation' the Court was favourably inclined towards the practice that nations must march together and for that reason it supported the principle that municipal law must respect international law rules, and international law norms may be accommodated in municipal law whenever possible even without express legislative sanction,

> "provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making laws may

[14] *Supra*, n.2.
[15] PLD [1965] (W.P.) Karachi 425.
[16] *Supra*, n.7.

> not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves."

It is, therefore, clear that in Pakistan in case of a conflict of international law rules with domestic law, the later shall prevail. It is difficult to go against the domestic law which reflects the will of a sovereign state. The national courts, being one of the principal organs of a sovereign state, and not of international law, must apply national laws if international law conflicts with it. However, Pakistan being a member of the comity of nations, its courts must, as far as possible, in the absence of a *prima facie* conflict, interpret the municipal law so "as to avoid confrontation with the comity of nations or the well established principles of international law". It is only where the provisions of domestic law are incapable of being interpreted in any other manner and conflict is inevitable, that the domestic law shall prevail. In *Messrs. Najib Zarab* v. *The Government of Pakistan*[17] the Court accepted the interpretation given in the authoritative book on 'Interpretation of Statutes'[18] which states:

> "Every statute is to be interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of Nations or with the established rules of international law."

This principle was also accepted in an earlier case in which Justice NASIM HASAN SHAH, placing reliance on the same book, held:

> "The Law of Pakistan is that every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of Nations or with the established rules of international law."

The language used is almost a verbatim reproduction of the principle contained in the book on interpretation.

5. CONCLUSIONS

On close examination of the various decisions of Pakistani courts it becomes clearly discernable that any rule of customary international law which have the following two constitutive elements, *viz.* (a) a general practice of states and (b) acceptance by states of this general practice as law, would be

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[17] See *supra*.

[18] Sir Lenon Maxwell, at page 107.

applied by the courts in Pakistan provided the same do not conflict with any provision of statutes or the principles of Islamic Law. In this regard it is recommended that the courts in Pakistan may take judicial notice of the rules of international law just as they do of foreign law.

International law is, and as a result of its continuing development in catering for newly emerging situations would remain, a highly specialized branch of the legal system with which domestic courts do not deal with frequently in their ordinary course. Like the status of foreign law in our domestic courts, international legal principles also constitute a question of fact with which the courts in Pakistan may not be conversant and, therefore, views and opinions of experts on international law may be permitted. Both prudence and justice demands that the courts of Pakistan should treat international law on the same footing as foreign law and, in support of it, admit the opinion of experts on international law. The courts may invite international law experts to appear as *amicus curiae* to assist the courts provided that the rule of international law in question is not *prima facie* in conflict with a statutory instrument or the Shariat. Books on international law have been admitted and relied on by the courts.[19] However, the books of which courts should take judicial notice and admit in evidence in support of a legal proposition, must be authoritative, standard international law text books, universally accepted as such.

[19] See, e.g., *M.A. Quraishi v. The USSR*, *supra* n.2 at 432-3.

EFFECTUATION OF INTERNATIONAL LAW IN THE MUNICIPAL LEGAL ORDER OF JAPAN

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1. INTRODUCTION

In the past five years Japanese courts have handed down a series of interesting decisions on the relationship between international law and national law. In 1989 and 1990 the Japanese Supreme Court denied the direct applicability of two very important treaties: the International Covenant on

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Economic, Social and Cultural Rights (ICESCR)[1] and the General Agreement on Tariffs and Trade (GATT).[2] In 1989 in the *Siberian Internment* case, the Tokyo District Court used the term 'self-executing' to discuss the domestic applicability of customary international law.[3] In 1993 in the same case the Tokyo High Court offered a more sophisticated analysis of the 'domestic applicability' of international law.[4] In this contribution, the author will summarize the Japanese situation as regards 'Effectuation of International Law in the Municipal Legal Order' and highlight the above developments.[5]

2. TREATY-MAKING PROCESS

2.1. Approval of Treaties by the Diet

Article 73(3) of the Japanese Constitution, which was enacted in 1946, provides that the Cabinet has the authority to '[c]onclude treaties' on the condition that 'it shall obtain prior or, depending on circumstances, subsequent approval of the Diet.' Article 61 provides that the streamlined procedure for approval of budgets is also to be used for approval of treaties. Thus, procedurally it is easier to conclude a treaty than to enact a statute, let alone to amend the Constitution. It is the normal practice of the Japanese Government to obtain the approval of the Diet (Japanese parliament) before Japan

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[1] Judgment of 2 March 1989, Supreme Court, 35 *Shomu Geppo* 1754.

[2] Judgment of 6 February 1990, Supreme Court, 36 *Shomu Geppo* 2242.

[3] Judgment of 18 April 1989, Tokyo District Court, 1329 *Hanrei Jiho* 36, 32 JAIL (1989) 125, 29 ILM (1990) 391.

[4] Judgment of 5 March 1993, Tokyo High Court, 811 *Hanrei Taimuzu* 76.

[5] . This contribution is based upon the author's previous works, especially YUJI IWASAWA, 'The Relationship between International Law and National Law: Japanese Experiences', 63 BYIL (1993) 333. For more detailed discussion and further references on the issues addressed in this contribution, see the above article. Other literature available in English includes: L. JEROLD ADAMS, *Theory, Law and Policy of Contemporary Japanese Treaties* (1974); KAY HOLLOWAY, *Modern Trends in Treaty Law* (1967) 313-15; KAZUYA HIROBE, 'The Japanese Practice Concerning International Treaties', 25 *Archiv des Völkerrechts* (1987) 39; SAKUTARO KYOZUKA, 'Internal Enforcement and Application of Treaties in Japan', 12 JAIL (1968) 45; SHINYA MURASE, 'Reception of International Law into Domestic Law of Japan', *Proceedings of the 1990 Conference of the Canadian Council on International Law* (1990) 263; NAOYA OKUWAKI, 'Interim Report of the National Committee on International Law in Municipal Courts', 36 JAIL (1993) 100; MASAKI ORITA, 'Practices in Japan Concerning the Conclusion of Treaties', 27 JAIL (1984) 52; ISAO SATO, 'Treaties and the Constitution', 43 *Washington Law Review* (1968) 1057; YUICHI TAKANO, 'Conclusion and Validity of Treaties in Japan: Constitutional Requirements', 8 JAIL (1964) 9.

becomes bound by a treaty. To date there have been eleven cases in which the government has, exceptionally, sought the subsequent approval of the Diet.[6]

Japanese constitutional scholars have been divided on the question whether the validity of a treaty is affected if the Diet refuses to give subsequent approval. Most scholars agree that in such circumstances the treaty becomes invalid so far as Japanese law is concerned. What is more controversial is whether the international validity of the treaty is also affected. Japanese constitutional scholars tend to neglect the Vienna Convention on the Law of Treaties which was ratified by Japan in 1981. Article 46 of the Convention provides:

> "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance."

The government takes the view that the international validity of the treaty is unaffected even if the Diet refuses subsequent approval.[7] In any event, in the eleven cases where subsequent approval has been sought, approval has in fact been given. Thus, the question remains theoretical so far.

2.2. 'Treaties' and 'Executive Agreements'

Not all international agreements need to be approved by the Diet. The government can conclude international agreements without Diet approval under the power to '[m]anage foreign affairs' provided for in Article 73(2). These agreements are called 'executive agreements'. The distinction between 'treaties' and 'executive agreements' is maintained for constitutional purposes. Both are treaties under international law. In recent years more than ninety per cent of the international agreements concluded by Japan have been 'executive agreements'.

The government decides whether an international agreement is a 'treaty' which requires Diet approval or an 'executive agreement' which can be concluded by the government alone. The government's view has often been

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[6] ORITA, loc.cit. n. 5, at 61 n. 19.

[7] See e.g., House of Representatives, Budget Committee, 23 June 1953, 16th Diet, 8 *Yosaniinkaigiroku* 3-4 (statement of Mr. SATO, Director General of the Cabinet Legislation Bureau).

challenged in the Diet. It was under these circumstances that, in 1974, the government enunciated in the Diet a 'unified view' with respect to the distinction between 'treaties' and 'executive agreements'. According to the government, three categories of international agreements require the approval of the Diet as 'treaties'[8] The first category consists of international agreements which contain 'statutory matters'. This category includes the following three sub-sets of agreements: (1) international agreements which require the enactment of new statutes; (2) international agreements which require the maintenance of existing statutes; and (3) international agreements which affect the sovereignty of the state and thus modify the power of the legislature as well. The second category consists of international agreements which deal with 'financial matters'. International agreements which are deemed politically important in the sense that they provide a fundamental legal framework for a relationship between Japan and another state or amongst states in general constitute the third category; as such they require ratification. On the other hand, the following agreements need not be approved by the Diet, but can be concluded by the government alone as 'executive agreements': (1) agreements concluded within the scope of a treaty already approved by the Diet; (2) agreements concluded within the scope of existing domestic laws and regulations; and (3) agreements concluded within the scope of budgetary appropriations.

In the *Sunagawa* case the Supreme Court upheld the government's interpretation that it could conclude the Administrative Agreement under Article III of the Security Treaty with the United States[9] without Diet approval, because the Diet had rejected a draft resolution declaring that the Agreement required Diet approval.[10]

2.3. Implementation of Treaties

2.3.1. Publication of Treaties

Article 7 of the Constitution provides that "[t]he Emperor, with the advice and approval of the Cabinet, shall [p]romulgat[e] treaties." Thus, when the

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[8] House of Representatives, Foreign Affairs Committee, 20 February 1974, 72d Diet, 5 *Gaimuiinkaigiroku* 2, 27 JAIL (1984) 102 (statement by Foreign Minister OHIRA).

[9] Administrative Agreement under Article III of the Security Treaty, 28 February 1952, 208 UNTS 255; Japan-US Security Treaty, 8 September 1951, 136 UNTS 211.

[10] Judgment of 16 December 1959, Supreme Court Grand Bench, 13 *Keishu* 3225, 3236, 4 JAIL (1960) 103, 32 ILR 43.

Diet approves a treaty and the Cabinet ratifies it, the treaty is promulgated in the official gazette in the name of the Emperor and the Cabinet. The promulgation is a formal act needed for the treaty to have the force of law in Japan. By virtue of this act, a treaty is 'incorporated' (or 'adopted') into Japanese law. Nevertheless, the treaty retains its character as international law; it is not 'transformed' into national law.[11]

Executive agreements, on the other hand, are published in the official gazette by way of notification by the Ministry of Foreign Affairs or other Ministry primarily responsible for the agreement. The notification is an act of a public organ to give notice of matters to the nation under authority given by statute and is to be distinguished from promulgation. Agreements which only concern the administration and do not affect the rights or obligations of Japanese nationals are often not published.[12] 'Executive agreements' which have not been published have no force of law in Japan. Their effects upon government agencies would be similar to those of governmental 'instructions'.[13] Resolutions adopted in international organizations are usually not published. However, if a resolution is legally binding and affects the rights and obligations of Japanese nationals, it is often published.

2.3.2. Implementation of Treaties

Treaties have the force of law and prevail over statutes in Japan. Nevertheless, if there is any conflict between a treaty and domestic law, the government strives to amend the domestic law before it enters into the treaty. If there is no domestic law giving effect to the treaty, the government usually attempts to have laws and regulations enacted to give effect to the treaty. Sometimes the government takes no special measures to implement the treaty, on the theory that it has the force of law and is capable of regulating the matter directly in Japan. This was the technique used for such treaties as the 1910 Brussels Convention respecting Assistance and Salvage at Sea, the 1910 Brussels Convention respecting Collisions between Vessels, the 1929 Warsaw Convention relating to International Transportation by Air and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Even if a treaty is capable of regulating the matter directly, a special statute is sometimes enacted, rephrasing the text of the treaty in Japanese legal

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[11] KYOZUKA, loc.cit. n. 5 at 49.

[12] SHUZO HAYASHI, 'Jōyaku no Kokunaihōjō no Kōryoku ni tsuite' [Domestic Effects of Treaties], 7 *Hogaku Kyoshitsu* (First Series) (1963) 34, 37.

[13] HAYASHI, ibid. at 39.

terms and adding some new provisions. This technique was used for such treaties as the 1924 Brussels Convention relating to Bills of Lading and the 1957 Brussels Convention relating to the Limitation of the Liability of Ship-owners. Thus, corresponding domestic law usually exists for any treaty and it normally suffices to apply the domestic law. Nevertheless, the question of direct applicability of treaties remains, because if there is a conflict between a treaty and a statute, the treaty is to be given priority.

3. THE POSITION OF INTERNATIONAL LAW IN JAPAN

3.1. Domestic Validity

Article 98(2) of the Constitution provides: "Treaties concluded by Japan and established laws of nations shall be faithfully observed." It is generally believed that international law is incorporated into Japan's legal order through this article. It is self-evident that international law must be observed on the international level. If that is what Article 98(2) means, it is of little use. Therefore, it is argued that the purpose of this provision must be to order the residents and officials in Japan to observe international law. In other words, the effect of the provision is to give the force of law to international law in Japan.

An overwhelming majority of scholars supports the view that treaties have the force of law in Japan by virtue of Article 98(2). In addition to Article 98(2), they base their arguments on the following facts: (1) international law was given the force of law under the Meiji Constitution of 1889; (2) Article 73(3) of the Constitution requires approval of treaties by the Diet; and (3) Article 7(1) requires promulgation of treaties by the Emperor.[14] The government has consistently taken the position that treaties have the force of law in

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[14] E.g., TOSHIYOSHI MIYAZAWA, *Zentei Nihonkoku Kenpō* [The Constitution of Japan (Completely Revised Edition)] (1978) 808; KYOZUKA, loc.cit. n. 5, at 50-53; KISABURO YOKOTA, 'Shin Kenpō ni okeru Jōyaku to Kokunai Hō no Kankei' [The Relationship between Treaties and National Laws under the New Constitution], 24 *Nihon Kanri Horei Kenkyu* (1948) 1, 2. Some scholars deny that treaties have the force of law in Japan, arguing that Article 98(2) only dictates the faithful observance of treaties under international law. This view, however, is held by only a few now. For details on the academic discussion, see YUJI IWASAWA, *Jōyaku no Kokunai Tekiyō Kanōsei: Iwayuru "self-executing" na Jōyaku ni kansuru Ichi Kōsatsu* [Domestic Applicability of Treaties: What Are "Self-Executing" Treaties?] (1985) 345.

Japan through Article 98(2) of the Constitution.[15] The Japanese courts have endorsed that view as well.[16]

'Executive agreements' which are published in the official gazette also acquire domestic legal force in Japan by virtue of Article 98(2).[17] 'Treaties concluded by Japan' in Article 98(2) are interpreted to encompass not only 'treaties' approved by the Diet but also 'executive agreements' concluded by the government alone. Thus, 'executive agreements' must also be 'faithfully observed' and have the force of law in Japan.[18] The government seems also to take the view that published 'executive agreements' have the force of law in Japan.[19]

When Japanese is not among the authentic languages of a treaty, which is the case with most multilateral treaties, a Japanese translation is published in the official gazette together with an authentic text (usually English). Theoretically, it is the authentic text, not the Japanese translation, which has the force of law in Japan. Nonetheless, unless there is ambiguity in the Japanese text, the courts seldom refer to the authentic text, but look only at the Japanese translation.[20] Some statutes contain explicit provisions giving priority to treaties. For example, Article 3 of the 1954 Tariff Law stipulates that tariffs shall be imposed in accordance with the laws regulating tariffs, but 'if a treaty contains a special provision on tariffs, that provision shall be applied.'[21] A statutory provision giving priority to treaties merely has a declaratory effect.[22]

It is established that customary international law is part of the law of Japan. '[E]stablished laws of nations' in Article 98(2) is generally interpreted to mean customary international law. Literally, the concept of 'laws of nations'

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[15] See IWASAWA, ibid. at 29-30.

[16] E.g. Judgment of 28 June 1977, Supreme Court, 31 *Minshu* 511, 23 JAIL (1979-80) 174, which interprets and applies the Warsaw Convention on International Transportation by Air.

[17] IWASAWA, op. cit. n. 14 at 65-66, n. 193. Some commentators deny that "executive agreements" have the force of law in Japan. MICHIO SEKI, 'Waga Kuni no Kokunai Hō to shiteno Jōyaku' [Treaties as National Law of Japan], 44 *Jichi Kenkyu* no. 7 (1968) 37, 46.

[18] E.g. MIYAZAWA, op. cit. n. 14 at 808.

[19] HAYASHI, loc.cit. n. 12 at 39.

[20] Compare the Judgment of 19 March 1976, Supreme Court, 30 *Minshu* 128, 21 JAIL (1977) 150 and the Judgment of 29 September 1989, Fukuoka District Court, 1330 *Hanrei Jiho* 15, 33 JAIL (1990) 176, with the Judgment of 14 June 1984, Yokohama District Court, 1125 *Hanrei Jiho* 96, 29 JAIL (1986) 228 (referring to the English text in brackets for the concept of "degrading treatment").

[21] See also Patent Law (Art. 26), Utility Model Law (Art. 55(4)), Copyright Law (Art. 5), Wireless Telegraphy Law (Art. 3), Post Law (Art. 13(1)), Unfair Competition Prevention Law (Art. 3). See generally IWASAWA, op. cit. n. 14 at 33 n. 106.

[22] IWASAWA, ibid. at 30-31.

could embrace not only customary international law but also treaties.[23] Nonetheless, since Article 98(2) speaks of "treaties concluded by Japan" separately from "established laws of nations," the latter concept is generally interpreted to refer to customary international law.[24] The concept of 'established' laws of nations is considered to be similar to the concept of 'general' international law in Article 25 of the German Constitution, which provides that "general rules of international law shall form part of federal law." In order for the law of nations to be regarded as 'established,' it must be recognized by most states in the world, but does not need to be specifically recognized by Japan.[25]

The Japanese courts recognize the domestic legal force of customary international law. For example, in the *Yoon Soo Kil* case, the Tokyo District Court found that the non-extradition of political offenders was an established rule of customary international law and, on this basis, annulled a deportation order.[26] In accordance with the view dominant in international law, Japanese courts maintain that both general practice of states and *opinio juris* are necessary before they find a rule of customary international law, but do not require that the rule is recognized by Japan.[27] On the whole, Japanese courts are strict in finding a rule to be established as customary international law.[28] For example, in the *Texada* case, the Wakayama District Court concluded that the twenty-four mile bay closing line rule stipulated in Article 7(4) of the 1958

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[23] See e.g., MIYAZAWA, op. cit. n. 14 at 808.

[24] E.g. YOICHI HIGUCHI (et al.), *Chūshaku Nihonkoku Kenpō* [A Commentary on the Japanese Constitution] (1988) 1494; ISAO SATO, *Poketto Chūshaku Zensho Kenpō* [Pocket Commentary Book: The Constitution] Vol. 2 (1984) 1287; YOKOTA, loc.cit. n. 14 at 10-12.

[25] E.g. 2 *Chūkai Nihonkoku Kenpō* [Commentaries on the Japanese Constitution] (Hogaku Kyokai ed. 1954) 1480-81.

[26] Judgment of 25 January 1969, Tokyo District Court, 20 *Gyoshu* 28, 14 JAIL (1970) 146; *reviewed*, Judgment of 19 April 1972, Tokyo High Court, 18 *Shomu Geppo* 930, 18 JAIL (1974) 171; Judgment of 26 January 1976, Supreme Court, 117 *Minshu* 15, 20 JAIL (1976) 127. The courts have recognized the customary international law principle of state immunity in many cases. E.g., Judgment of 18 July 1957, Tokyo High Court, 8 *Kaminshu* 1282, *affirming* Judgment of 23 December 1955, Tokyo District Court, 6 *Kaminshu* 2679, 1 JAIL (1958) 138, 23 ILR 210; Judgment of 15 March 1956, Fukuoka High Court, 7 *Kaminshu* 629.

[27] E.g. Judgment of 5 March 1993, Tokyo High Court, 811 *Hanrei Taimuzu* 76; Judgment of 14 March 1984, Tokyo High Court, 35 *Gyoshu* 231, 28 JAIL (1985) 202.

[28] SHINYA MURASE, 'Kokunai Saibansho ni okeru Kanshū Kokusai Hō no Tekiyō' [Application of Customary International Law in Domestic Courts], *in Yamamoto Soji Sensei Kanreki Kinen: Kokusai Hō to Kokunai Hō* [Commemorating the Sixtieth Birthday of Professor Soji Yamamoto: International Law and National Law (hereinafter cited as *Festschrift Yamamoto*)] (1991) 133, 156.

Convention on the Territorial Sea was a rule of customary international law, but the Osaka High Court reversed the decision.[29]

The question whether 'established laws of nations' embrace international law other than treaties and customary international law has not been fully explored by Japanese scholars. Some scholars have indicated that 'general principles of law' cannot be included in the concept of 'established laws of nations' under Article 98(2).[30] The domestic legal force of resolutions of international organizations and judgments of international courts is not entirely clear. If they bind Japan internationally, arguably they are binding also under Japanese law by virtue of Article 98(2).[31] The resolution of an international organization which has most often been invoked before Japanese courts is the Universal Declaration of Human Rights. Japanese courts have invariably rejected arguments based directly on the Declaration, stating that it is not legally binding.[32] However, the United Nations Security Council has power to issue binding resolutions, and so far as these resolutions have been published in the official gazette they arguably have legal force under Japanese law.[33] Judgments of international courts are rarely referred to in Japanese court judgments.[34]

Reports of the International Labour Organization (ILO) have frequently been invoked before the courts. The courts, however, have dismissed arguments based on views and reports of ILO organs, stating that they are not legally binding.[35] Paradoxically, the courts have tended to rely on the ILO

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[29] Judgment of 19 November 1976, Osaka High Court, 8 *Keisai Geppo* 465, 22 JAIL (1978) 131, dismissing appeal from Judgment of 15 July 1974, Wakayama District Court, 22 JAIL (1978) 138, summarized in TAKEO SOGAWA & SHIGERU ODA, *Nihon no Saibansho ni yoru Kokusai Hō Hanrei* [International Law Cases in Japanese Courts] (1991) 155.

[30] E.g. MURASE, op. cit. n. 28 at 149.

[31] See, generally, IWASAWA, loc.cit. n. 5 at 378-88.

[32] E.g., Judgment of 2 March 1989, Supreme Court, 35 *Shomu Geppo* 1754, 1761; Judgment of 25 November 1983, Supreme Court, 30 *Shomu Geppo* 826, 828.

[33] See also KAZUYA HIROBE, 'Article 98 Paragraph 2 of the Constitution of Japan and the Domestic Effects of Resolutions of the United Nations Security Council', 36 JAIL (1993) 17, 32.

[34] Only a few courts have referred to judgments of international courts in their decision. E.g. Judgment of 27 May 1953, Tokyo District Court, 4 *Kaminshu* 755, 1 JAIL (1957) 55, 20 ILR 305 (referring to the judgment in the *Anglo-Iranian Oil Company* case); Judgment of 22 April 1982, Tokyo District Court, 28 *Shomu Geppo* 2200, 27 JAIL 148 (1984) (referring to the judgment in the *North Sea Continental Shelf* cases).

[35] See e.g. Judgment of 24 November 1992, Fukuoka High Court, 620 *Rodo Hanrei* 45; Judgment of 26 December 1991, Fukuoka High Court, 639 *Rodo Hanrei* 73; Judgment of 15 November 1988, Tokyo High Court, 532 *Rodo Hanrei* 77; Judgment of 26 May 1988, Tokyo High Court, 519 *Rodo Hanrei* 73.

reports in justifying restrictions on trade union rights.[36] General comments and views of human rights organs, such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have been invoked before the courts. Although, strictly speaking, they have no binding force, they have influenced some courts. Article 900 of the Japanese Civil Code provides that an illegitimate child's share of inheritance is half that of a legitimate child. An illegitimate child challenged this article, invoking General Comment 17 of the Human Rights Committee.[37] In 1993, the Tokyo High Court held the provision to be unconstitutional. Even though the court did not refer to the General Comment in its judgment, its impact was undeniable.[38] The Human Rights Committee's opinion has been invoked in cases of war compensation. Most Japanese laws providing relief to those who were wounded or killed in the Second World War exclude aliens.[39] Koreans who were conscripted and wounded in the War and now reside in Japan sued the Japanese government for compensation, invoking the opinion of the Human Rights Committee on the matter.[40] In a judgment delivered in 1994, the Tokyo District Court disregarded the opinion.[41]

3.2. Direct Applicability

Whether international law can be directly applied in domestic law – the question of direct applicability – should be distinguished from whether inter-

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[36] E.g. Judgment of 25 April 1973, Supreme Court Grand Bench, 27 *Keishu* 547, translated and reprinted in part in HIDEO TANAKA, *The Japanese Legal System: Introductory Cases and Materials* (1976) 806.

[37] In General Comment 17, the Human Rights Committee requested states parties to indicate in their reports "how legislation and practice ensure that measures of protection are aimed at removing all discrimination in every field, including inheritance, particularly as between [. . .] legitimate children and children born out of wedlock," suggesting that discrimination against illegitimate children is prohibited also with respect to inheritance. General Comment 17 (35), *Report of the Human Rights Committee* (UN GAOR, 44th Sess., Supp. No. 40) at 173, 174, UN Doc. A/44/40 (1989).

[38] Judgment of 23 June 1993, Tokyo High Court, 46 *Kominshu* 43. See also text accompanying *infra* n. 81.

[39] For background information on the issue of war compensation, see generally YUJI IWASAWA, 'Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law', 8 HRQ (1986) 131, 173-74.

[40] *Gueye et al.* v. *France*, *Report of the Human Rights Committee* (UN GAOR, 44th Sess., Supp. No. 40) at 189, U.N. Doc. A/44/40 (1989) (finding that a French law which granted retired soldiers of Senegalese nationality who had served in the French Army pensions inferior to those given to retired French soldiers was a violation of Article 26 of the ICCPR).

[41] Judgment of 15 July 1994, Tokyo District Court, 1505 *Hanrei Jiho* 46.

national law has the force of law in domestic law – the question of validity. In order for international law to be directly applied, it must have the force of law in the domestic legal order. Thus 'domestic validity' of international law is a prerequisite for its 'domestic applicability.' On the other hand, even if international law has domestic legal force, not all international law rules are directly applicable.[42]

Japanese courts have tended to apply a treaty without examining its direct applicability once they have confirmed that the treaty has the force of law in Japan by virtue of Article 98(2).[43] The courts have, however, also refused to apply a treaty in some instances, although they have rarely used the term 'non-self-executing.' In those cases the courts have not engaged in a detailed explanation as to why the treaty was not directly applicable.[44] In 1989 the Tokyo District Court used the term 'self-executing,' examining in detail the direct applicability of customary international law.[45] In a book published in 1985,[46] the present author pointed out that the concept of 'self-executing' treaties had created enormous confusion. The author advocated that the concept of 'direct applicability' in domestic law, or 'domestic applicability,' should be used instead of 'self-executing,' and that 'domestic applicability' of international law should be distinguished from its 'domestic validity.' In 1993 the Tokyo High Court adopted the terms and the distinction advocated by the author, referring to the 'domestic validity' and 'domestic applicability' of customary international law.[47]

Direct applicability of a treaty must be examined in two stages.[48] First, it must be ascertained whether the parties have not excluded the direct applicability of the treaty as a whole. The parties may express a negative intent to exclude the direct applicability of a treaty, either in the text or in the *travaux préparatoires* of the treaty. If they have done so, the treaty's direct applicability should be denied. It is often asserted by scholars as well as by

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[42] For further discussion on the distinction between "domestic validity" and "domestic applicability" of a treaty, see IWASAWA, op. cit. n. 14 at 281-89; YUJI IWASAWA, 'The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis', 26 VaJIL (1986) 627, 643-49.

[43] IWASAWA, op. cit. n. 14 at 33-40.

[44] Ibid. at 40-41.

[45] Judgment of 18 April 1989, Tokyo District Court, 1329 *Hanrei Jiho* 36, 32 JAIL (1989) 125, 29 ILM 391 (1990) (stating: "In order for customary international law to have self-executing quality, its existence and contents must be particularly clear").

[46] IWASAWA, op. cit. n. 14. See also IWASAWA, loc.cit. n. 42.

[47] Judgment of 5 March 1993, Tokyo High Court, 811 *Hanrei Taimuzu* 76.

[48] For details on how to determine direct applicability of treaties, see IWASAWA, op. cit. n. 14 at 296-337; IWASAWA, loc.cit. n. 42 at 653-92.

courts in various countries that whether a treaty is directly applicable depends on the intent of the parties.[49] It is, however, inappropriate to require a positive intent to make a treaty directly applicable in order to recognize its direct applicability. Such a positive intent can hardly ever be found either in the text or in the *travaux préparatoires*.

If the direct applicability of the treaty is not excluded, then secondly, each provision of the treaty must be examined. With respect to customary international law, only this second stage comes into play. In this second stage, the principal criterion to determine the direct applicability of an international law rule should be its precision. An international law rule must be precise and complete in itself to be applied by the courts. The judiciary would usurp the power of the legislature if it applied imprecise international law rules. Direct applicability of international law depends on the context in which it is invoked. Direct applicability is more easily admitted in a situation where a government action is claimed to be illegal than in a situation where a positive action by the government is sought in reliance on an international rule. Thus, the same rule may be directly applicable in one situation but not in another.

Direct applicability of international law is a question of domestic law. The same rule can be directly applicable in one state but not in another. The determination with respect to the precision of an international rule may vary from one state to another, depending on various factors. An international rule that is considered directly applicable in a state where the judiciary is afforded broad interpretative powers may not be directly applicable in a state where the power of the judiciary is more circumscribed. The extent to which the subject matter of the rule is regulated by domestic law will also affect the determination of its direct applicability. When domestic law in a particular area is firmly established, and the international rule would bring about a substantial change in the domestic legal system, the international rule tends to be considered imprecise. A rule's precision depends on the *structures d'accueil* (institutional framework) of the state, as well. An international rule which does not specify the organs or procedures necessary for its execution is not complete and cannot be directly applied. If the complementary measures have already been adopted, the rule can be deemed complete and thus directly applicable.

In 1993, apparently adopting the present author's framework of analysis, the Tokyo High Court set out the criteria to determine when international law is directly applicable in the following manner:

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[49] The leading Japanese scholar who adopted this view is Professor YUICHI TAKANO. YUICHI TAKANO, *Kenpō to Jōyaku* [Constitutions and Treaties] (1960) 103-04.

> The specific intent of the parties to a treaty is, of course, an important element, but moreover, the provisions must be precise. In particular, when an international rule imposes on states an obligation to act, when it involves appropriation of national expenditure, or when a similar system already exists in domestic law, then harmony with the system must be taken into full consideration, and therefore, the content needs to be all the more precise and clearer.[50]

One Japanese author has contended that executive agreements cannot be self-executing.[51] However, the direct applicability of executive agreements should not be denied categorically. Executive agreements which have been published acquire the force of law in Japan. As long as a provision of a published executive agreement is sufficiently precise, there is no reason to deny its direct applicability. If executive agreements could not be directly applicable, it would become difficult to manage foreign affairs speedily and effectively.[52]

In recent years Japanese courts apparently have denied the direct applicability of the ICESCR and the GATT in their entirety. In the *Siberian Internment* case, Japanese courts have examined the direct applicability of customary international law. In the following sections these cases will be examined in some detail.

3.2.1. The ICESCR

In the *Shiomi* case, Japanese courts have denied the direct applicability of the ICESCR. It concerned the exclusion of aliens from the national pension scheme, which was the case until 1982. Mrs. SHIOMI initiated a lawsuit challenging the nationality restriction of the National Pension Law before the law was amended. The plaintiff argued that the rejection of her application for a handicapped welfare pension because of her nationality was contrary to the ICESCR, in particular Article 9 which provides: "The States Parties [. . .]

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[50] Judgment of 5 March 1993, Tokyo High Court, 811 *Hanrei Taimuzu* 76, 87.

[51] YUZURU MURAKAMI, 'Waga Kuni ni okeru Jōyaku oyobi Kanshū Kokusai Hō no Kokunaiteki Kōryoku' [Domestic Effects of Treaties and Customary International Law in Japan], 688 *Toki no Horei* (1969) 18, 24, 26, n. 20, 28.

[52] For further discussion, see IWASAWA, op. cit. n. 14 at 65-66 n. 193. YACHI, a Foreign Ministry official, also takes the view that there is no reason to deny the direct domestic effect of executive agreements. SHOTARO YACHI, 'Kokusai Hōki no Kokunaiteki Jisshi" [Domestic Implementation of International Rules], in *Festschrift Yamamoto*, loc.cit. n. 28 at 109, 113.

recognize the right of everyone to social security." Article 2(1) of the ICESCR provides:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

The Osaka High Court suggested that the ICESCR, as a whole, was not directly applicable because of the terms of Article 2(1). The court stated:

> "This Covenant [. . .] is not a type of treaty whose contents become operative like domestic law by themselves, but a type of treaty which requires legislative procedures for its contents to be implemented [. . .]. It is apparent [from Article 2(1)] that the Covenant is premised on the assumption that the states parties will use all appropriate means [. . .] for the full realization of the rights recognized in the Covenant (including of course the right stipulated in Article 9)."[53]

The Supreme Court rejected appeal in this case, stating: "[Article 9] [. . .] does not provide for a concrete right to be granted to individuals immediately. That is clear also from Article 2(1)."[54] When this decision is read in conjunction with the lower court judgment, one cannot escape the impression that the Supreme Court might have denied the direct applicability not only of Article 9 but also of the ICESCR as a whole.

The ICESCR, admittedly, has been regarded by many as not directly applicable because of Article 2(1).[55] It is inappropriate, however, to deny the direct applicability of the ICESCR in its entirety because of Article 2(1). The prohibition against discrimination provided for in Article 2(2) of the ICESCR is precise enough to be directly applied.[56] A clause calling for domestic implementation only reinforces the customary international law rule that a party is bound to take every measure necessary to give full effect to the treaty,

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[53] Judgment of 19 December 1984, Osaka High Court, 35 *Gyoshu* 2220, 2282-83.

[54] Judgment of 2 March 1989, Supreme Court, 35 *Shomu Geppo* 1754, 1760-61.

[55] E.g. Belgian Conseil d'Etat, Documents parlementaires, Chambre, 1977-78, No. 188/1, at 27, 29; A. LUINI DEL RUSSO, *International Protection of Human Rights* (1971) 43; 'The United Nations Covenants on Human Rights and the Domestic Law of the United States', 48 *Boston University Law Review* (1968) 106, 112-13.

[56] E.g. IWASAWA, op. cit. n. 14 at 131.

and thus does not prevent the treaty from being directly applicable.[57] Nothing in the *travaux préparatoires* suggests that the parties intended to prevent the ICESCR from becoming directly applicable by means of this clause.[58] In 1990 the Committee on Economic, Social and Cultural Rights adopted General Comment No. 3, in which the Committee stated: "[T]here are a number of [. . .] provisions in the [ICESCR], including articles [2(2)], 3, 7(a)(i), 8, 10(3), 13(2),(a), (3) and (4) and 15(3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain."[59]

3.2.2. The GATT

Japanese courts have denied the direct applicability of the GATT in the *Kyoto Necktie* case. The Raw Silk Price Stabilization Law ('the Law') had given a government agency (the Japan Silk Business Corporation) the exclusive right to import raw silk from abroad; no other person or entity was permitted to import silk. Necktie fabric producers in Kyoto, who had to use expensive silk sold in Japan, brought a lawsuit against the Japanese Government, demanding compensation for the losses they had incurred. The plaintiffs argued, *inter alia*, that the Law was contrary to Articles 17(1)(a) and 2(4) of the GATT. The Kyoto District Court dismissed the claim in 1984, denying, in effect, the direct applicability of the GATT as a whole. The court stated:

> "[V]iolations of the GATT provisions cited by the plaintiffs will result in the violating country being forced to rectify them, suffering such disadvantages as the following: the [violating] country will be confronted with a request for

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[57] IWASAWA, ibid. at 130-33; Iwasawa, loc.cit. n. 42 at 658-60. See also HANS FLORETTA & THEO ÖHLINGER, *Die Menschenrechte der Vereinten Nationen* (1978) 56; BENEDETTO CONFORTI, *International Law and the Role of Domestic Legal Systems* (1993) 30-33.

[58] See IWASAWA, op. cit. n. 14 at 132 n. 408.

[59] General Comment No. 3 (1990), *Report of the Committee on Economic, Social and Cultural Rights* (U.N. ESCOR, Supp. No. 3) at 83, 83-84, U.N. Doc. E/1991/23 (1991). See also 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights', 9 HRQ (1987) 122, 127; IWASAWA, op. cit. n. 14 at 131.

> consultation from other contracting parties, or will have retaliatory measures taken. The violations cannot be interpreted to have any more effects."[60]

The Supreme Court dismissed appeal in this case in 1990.[61] Although the Supreme Court did not discuss the GATT issue in detail, one probably can conclude that the Supreme Court approved the decision of the Kyoto District Court in principle. The Kyoto District Court denied the direct applicability of the GATT simply because the GATT had its own dispute settlement mechanism. This reasoning of the court is difficult to accept. Even if a treaty provides for an international procedure to ensure its fulfilment, one should not readily conclude that the treaty is not directly applicable in domestic law.[62] When the international procedure is accessible only to states and not to individuals – as is the case with the GATT – one must be especially careful in concluding that it is not directly applicable. If it is not directly applicable, no remedy is available to individuals either on the international plane or on the national plane.

If the international procedure provided in a treaty is very flexible and leaves states room to settle disputes on grounds of political expediency, overriding the strict terms of the treaty, the treaty's direct applicability may be denied. If domestic courts apply a treaty setting forth a political procedure, they will interfere with the foreign affairs prerogative of the government. Such practices, in turn, may defeat the purpose of establishing a political procedure.[63] The direct applicability of the GATT is sometimes denied because of the 'flexibility' of its dispute settlement mechanism.[64] The procedure, however, is quasi-judicial and resembles arbitration more than negotiation. The GATT dispute settlement procedure has proved to be quite effective.[65] This procedure is not as political as it is alleged to be, and, therefore, should not

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[60] Judgment of 29 June 1984, Kyoto District Court, 31 *Shomu Geppo* 207. Neither the court nor the parties made reference to earlier decisions in other jurisdictions concerning the direct applicability of the GATT, including the decision of the European Court of Justice in *Int'l Fruit Co.* v. *Produktschap voor Groenten en Fruit*, 1972 *European Court Reports* 1219.

[61] Judgment of 6 February 1990, Supreme Court, 36 *Shomu Geppo* 2242.

[62] IWASAWA, op. cit. n.14 at 316-17; Iwasawa, loc.cit. n. 42 at 681-84.

[63] IWASAWA, op. cit. n. 14 at 316; Iwasawa, loc.cit. n. 42, at 683-84.

[64] *Int'l Fruit Co.* v. *Produktschap voor Groenten en Fruit*, 1972 *European Court Reports* 1219, 1228.

[65] See generally YUJI IWASAWA, *Sekai Bōeki Kikan (WTO) ni okeru Funsō Shori: Kokusai Bōeki Funsō no Hōteki Kaiketsu* [The Dispute Settlement in the World Trade Organization (WTO): Legal Resolution of International Trade Disputes] (1995).

be considered as an obstacle to recognizing the direct applicability of the GATT.[66]

3.2.3. Customary International Law

Some American scholars have maintained that the distinction between self-executing and non-self-executing rules does not arise with respect to customary international law. Professor PAUST has argued, for instance, that 'customary international law does not present the 'self-executing' versus 'non-self-executing' problem,' and that 'customary law, of course, is inherently 'self-executing.'"[67] This argument confuses the issue of 'domestic validity' and 'domestic applicability' of international law. The statement that customary international law is inherently self-executing can only mean that customary international law has the force of law in the United States without the need for legislation. Some customary international law rules are too vague and imprecise to be directly applied domestically. German scholars have long recognized that while some rules of customary international law are directly applicable, others are not.[68] KIRGIS, an American scholar, admitted in 1987 that "it is apparent that certain rules of custom are, in effect, self-executing and others are not."[69]

In the *Siberian Internment* case, Japanese courts have confirmed that the question of direct applicability indeed arises with respect to customary international law. In this case, former Japanese soldiers who had been detained by the Soviet Union after the Second World War in camps located in Siberia and forced to labour under the most severe conditions for a number of years, claimed against the Japanese government for settlement of credit balances earned through their forced labour, and compensation for damage incurred

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[66] See ERNST-ULRICH PETERSMANN, 'Application of GATT by the Court of Justice of the European Communities', 20 *Common Market Law Review* (1983) 397, 429-34.

[67] JORDAN J. PAUST, 'Book Review', 56 *New York University Law Review* (1981) 227, 240; JORDAN J. PAUST, 'Incorporation of Human Rights into Domestic Law', in ANDRE-JEAN ARNAUD et al. (eds.), *Juristische Logik, Rationalität und Irrationalität im Recht* (1985) 367, 370; 'Jurisdiction in Human Rights Cases: Is the Tel-Oren Case a Step Backward?', 79 Proceedings American Society of International Law (1985) 361, 364 (remarks by JORDAN J. PAUST).

[68] E.g. RUDOLF GEIGER, *Grundgesetz und Völkerrecht* (1985) 183-84, 189-90; 2 *Grundgesetz-Kommentar* Vol. 2 (Ingo von Münch ed., 2d ed. 1983) 141-62 (contribution of ONDOLF ROJAHN); ALFRED VERDROß & BRUNO SIMMA, *Universelles Völkerrecht* (3d ed. 1984) 550-54; GUSTAV WALZ, *Völkerrecht und staatliches Recht* (1933) 274-75.

[69] . FREDERICK L. KIRGIS JR., 'Federal Statutes, Executive Orders and "Self-Executing Custom"', 81 AJIL (1987) 371, 372.

during their detention. The plaintiffs principally relied on Articles 66 and 68 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War, which provide that the Power on which the prisoner of war depends shall be responsible for settling any credit balance due to him from the Detaining Power and paying compensation for damage. As most of the plaintiffs had been repatriated by 1953 when the Convention entered into force for Japan, the plaintiffs had to argue that the rule contained in Articles 66 and 68 of the Convention had been established as customary international law. In 1993, the Tokyo High Court denied the customary law status of Articles 66 and 68 of the Geneva Convention. The court examined the 'domestic applicability' of customary international law in detail, stressing that rules of customary international law must be precise in order to be directly applied domestically:

> "If a customary international rule is not minutely detailed as to the substantive conditions on the creation, existence, and termination of a right, the procedural conditions on the exercise of the right, and moreover, the harmony of the rule with the existing various systems within the domestic sphere, and so forth, its domestic applicability cannot but be denied."[70]

The court concluded that Articles 66 and 68 of the Geneva Convention, as well as the customary rule allegedly represented by them, did not meet these requirements, and therefore were not domestically applicable.[71]

3.3. Indirect Application

Because international law overrides statutes in Japan, Japanese courts are generally wary of recognizing the direct applicability of international law. As seen in the previous section, Japanese courts have denied the direct applicability of the ICESCR, the GATT and the alleged customary rule of compensation to its own nationals who were prisoners of war. The doctrine of direct applicability was apparently used by the court in these cases as a device to avoid application of international law. Japanese courts seem to prefer dealing with the Constitution to dealing with international law.

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[70] Judgment of 5 March 1993, Tokyo High Court, 811 *Hanrei Taimuzu* 76, 87, *affirming* Judgment of 18 April 1989, Tokyo District Court, 1329 *Hanrei Jiho* 36, 32 JAIL (1989) 125, 29 ILM (1990) 391.

[71] Ibid.

Japanese courts are not very receptive to arguments relying directly on international law.[72] In the past decade the International Covenants on Human Rights have been invoked before the courts on numerous occasions. Even though the courts assume that the International Covenant on Civil and Political Rights (ICCPR) is generally directly applicable, in no case has a court found Japanese law to be inconsistent with the ICCPR.[73] It should be noted, however, that such passivity of the courts is not peculiar to international law. Japanese courts are highly restrained in judicial review and generally reluctant to invalidate legislation even on constitutional grounds.[74]

Reliance on international law has proved effective more as a political means to give legitimacy to a political movement to change laws, rather than as a legal weapon to win cases before the courts. In some instances, the challenged laws were eventually amended, although direct invocation of international law was without success before the courts. For example, the fingerprinting of Koreans was challenged as contrary to the ICCPR in numerous cases in the 1980s. The courts consistently held that it was not a violation of the ICCPR.[75] In 1991, however, the Japanese Government decided to abolish the practice of fingerprinting permanent residents.

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[72] For further discussion on the reluctance of Japanese courts to deal with international law, see YUJI IWASAWA, 'The Enforcement of International Human Rights by Domestic Courts: The Japanese Experience', in BENEDETTO CONFORTI and FRANCESCO FRANCIONI (eds.), *The Role of Domestic Courts in the Enforcement of International Human Rights* (forthcoming).

[73] Japanese courts have interpreted many articles of the ICCPR, such as Articles 2(1), 7, 9, 12, 13, 14(3), 17, 18, 19, 23, 25 and 26 and have concluded that they have not been violated, arguably assuming their direct applicability. E.g. Judgment of 8 March 1989, Supreme Court Grand Bench, 43 *Minshu* 89, 22 *L. Japan* (1989) 39 (on Art. 19(3)); Judgment of 22 October 1981, Supreme Court, 35 *Keishu* 696 (on Arts. 18, 19, and 25); Judgment of 13 May 1994, Fukuoka High Court, 855 *Hanrei Taimuzu* 150 (on Art. 12(4)); Judgment of 1 October 1992, Tokyo High Court, 791 *Hanrei Taimuzu* 267 (on Art. 14(3)(a) and (f)); Judgment of 27 November 1990, Osaka High Court, 1368 *Hanrei Jiho* 46, 35 JAIL (1992) 145 (on Art. 12); Judgment of 19 June 1990, Osaka High Court, 1385 *Hanrei Jiho* 134, 35 JAIL (1992) 136 (on Arts. 7 and 26); Judgment of 17 May 1989, Osaka High Court, 1333 *Hanrei Jiho* 158, 33 JAIL (1990) 158 (on Art. 9(3)).

[74] See generally HIROSHI ITOH, *The Japanese Supreme Court: Constitutional Policies* (1989); HERBERT F. BOLZ, 'Judicial Review in Japan: The Strategy of Restraint', 4 ICLR (1980) 88; Y. OKUDAIRA, 'The Japanese Supreme Court and Judicial Review', 3 Lawasia (1972) 67.

[75] E.g. Judgment of 19 June 1990, Osaka High Court, 1385 *Hanrei Jiho* 134, 35 JAIL (1992) 136; Judgment of 28 April 1989, Tokyo District Court, 1316 *Hanrei Jiho* 62, 33 JAIL (1990) 166; Judgment of 29 January 1988, Tokyo District Court, 1287 *Hanrei Jiho* 158, 32 JAIL (1989) 118; Judgment of 29 August 1984, Tokyo District Court, 1125 *Hanrei Jiho* 101, 29 JAIL (1986) 238; Judgment of 14 June 1984, Yokohama District Court, 1125 *Hanrei Jiho* 97, 29 JAIL (1986) 228.

Direct application is only one effect international law can have in domestic law. Another important effect of international law is to aid in the interpretation of domestic law. Such indirect application of international law can be very effective; in fact, while reluctant to endorse the direct application of international law, courts may be more willing to use international law in this manner.[76] The term 'indirect effect' has sometimes been used in European Community law to refer to this effect, to contrast it with 'direct effect' (a concept equivalent to 'direct applicability' in this article).[77]

The legal character of the international instrument is not so important in indirect application. Not only ratified treaties and customary international law, but also unratified treaties, treaties which cannot be acceded to (e.g. regional conventions in other regions) and non-binding instruments can all be used as aids in the interpretation of domestic law. Japanese courts have rejected arguments based directly on the Universal Declaration of Human Rights, stating that the Declaration was not legally binding. In one case, however, the Japanese Supreme Court used the Declaration as an aid in the interpretation of the Constitution, significantly broadening the human rights protection under the Constitution. Article 14 of the Constitution, the basic non-discrimination clause, provides that "[a]ll *kokumin* [nationals] are equal under the law." The phrase 'all natural persons' had been proposed by the Supreme Commander for the Allied Powers in an earlier draft of the Constitution, but the Japanese Government changed it to 'all nationals.'[78] With this restrictive wording, the view was put forward in the past that the human rights provisions in the Constitution were applicable only to Japanese nationals and not to aliens.[79] In 1964 the Supreme Court concluded:

> [A]lthough Article 14 [. . .] is targeted directly to Japanese nationals, its tenor must also be applied, by analogy, to aliens as well, in view of the fact that Article 7 of the Universal Declaration of Human Rights provides that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law [. . .]"[80]

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[76] On the distinction between direct and indirect application of international law, see generally IWASAWA, op. cit. n. 14 at 325-37; IWASAWA, loc.cit. n. 42 at 689-91.

[77] E.g. JOSEPHINE SHAW, *European Community Law* (1993) 166-69; JOSEPHINE STEINER, *Textbook on EC Law* (4th ed. 1994) 37-40; STEPHEN WEATHERILL, *Cases and Materials on EEC Law* (2d ed. 1994) 83-99.

[78] See e.g. SHOICHI KOSEKI, 'Japanizing the Constitution', 35 *Japan Quarterly* (1988) 234, 235-36.

[79] See IWASAWA, loc.cit. n. 39 at 138-39, n. 38.

[80] Judgment of 18 November 1964, Supreme Court, 18 *Keishu* 579, 582.

In 1993, the Tokyo High Court rendered a epoch-making decision with respect to children born out of wedlock. A child born out of wedlock challenged Article 900 of the Civil Code, which provides that an illegitimate child's share of inheritance is half that of a legitimate child. The plaintiff argued that the provision violated not only Article 14 of the Japanese Constitution but also various human rights treaties, including Article 24(1) of the ICCPR, General Comment 17 of the Human Rights Committee, Article 16 of the Convention on the Elimination of Discrimination against Women, Articles 2 and 3 of the Convention on the Rights of the Child, Article 25(2) of the Universal Declaration of Human Rights, Article 1 of the 1959 Declaration on the Rights of the Child and the 1972 ECOSOC Resolution on the Status of the Unmarried Mother. While the Tokyo High Court invalidated Article 900 of the Civil Code solely on the constitutional ground, it stated:

> "[I]n view of the spirit of Article 24(1) of the [ICCPR] and the spirit of Article 2(2) of the Convention on the Rights of the Child [. . .] this court believes that the problem must be solved in a manner in which the objective of the protection of family relations based on legal marriage and the objective of the respect of human rights of illegitimate children are reconciled."[81]

It is obvious that the court used international human rights law as an aid in the interpretation of the Constitution.

International law can be a useful guide to the interpretation of general concepts found in domestic law, such as 'public policy' stipulated in Article 90 of the Civil Code. According to this article, any private contract which is contrary to 'public policy' is null and void. The Convention on the Elimination of All Forms of Discrimination against Women has raised the question of applicability of a human rights treaty to relations between private individuals.[82] In Japan, applicability of human rights provisions to relations between individuals is discussed under the strong influence of the German doctrine of *Drittwirkung* (third-party effect) and, in much the same way as the theory of 'indirect' third-party effect predominates in Germany.[83] According to the 'indirect' effect theory, the human rights provisions of the Constitution can only be implemented between private individuals 'indirectly' through the

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[81] Judgment of 23 June 1993, Tokyo High Court, 46 *Kominshu* 43, 48.

[82] See generally JOST DELBRÜCK, 'Third-Party Effects of Fundamental Rights through Obligations under International Law', 12 *Law & State* (1975) 61.

[83] See e.g. 1 *Kenpō II: Jinken* [Constitutional Law II: Human Rights] (Nobuyoshi Ashibe ed.), (1978) 39-106. This theory also appears to have found favor with the courts. Judgment of 24 March 1981, Supreme Court, 998 *Hanrei Jiho* 3.

'public policy' concept found in Article 90 of the Civil Code. It is likely that this theory will be extended to the Convention on Discrimination against Women as well. Attempts have already been made by Japanese women to invoke the Convention indirectly to enrich the concept of 'public policy' and to nullify, for instance, an office regulation which set a lower retirement age for women. The courts, however, have not been very receptive to such arguments.[84]

3.4. Rank

3.4.1. Relationship with statutes

Article 98(2) of the Japanese Constitution provides only that treaties and established laws of nations "shall be faithfully observed." It does not specify the rank which international law holds in the Japanese legal order. As for the relationship between treaties and statutes, treaties are generally regarded as ranked higher. A treaty prevails even when an inconsistent statute is enacted later. Scholars have reached this conclusion for the following reasons: (1) the Constitution makes internationalism one of its basic tenets; (2) Article 73(3) requires approval of treaties by the Diet; and (3) the phrase that treaties "shall be faithfully observed" implies that they are higher than ordinary statutes.[85] The government adopted this view during the drafting stage of the Constitution and has maintained it ever since. The view has been accepted by the courts as well. In numerous instances in which human rights treaties were invoked to challenge the legality of statutes, the courts, including the Supreme Court, assumed the superior force of treaties.[86] In one case the Tokyo District Court held that an article in the Public Corporation and National Enterprises Labour Relations Law was null and void because it conflicted with the 1949 International Labour Organization Convention on the Right to Organize and Collective Bargaining (No. 98).[87]

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[84] E.g. Judgment of 4 July 1990, Tokyo District Court, 1358 *Hanrei Jiho* 28, 32; Judgment of 4 December 1986, Tokyo District Court, 1215 *Hanrei Jiho* 3, 13. For details, see YUJI IWASAWA, 'The Impact of International Human Rights Law on Japanese Law: The Third Reformation for Japanese Women', 34 JAIL (1992) 21, 33-35.

[85] E.g., SHIRO KIYOMIYA, *Kenpō I* [Constitutional Law I] (3d ed. 1979) 449; MIYAZAWA, op. cit. n. 14 at 814; TAKANO, op. cit. n. 49 at 209-13.

[86] E.g. Judgment of 8 March 1989, Supreme Court Grand Bench, 43 *Minshu* 89, 22 L. Japan (1989). 39.

[87] Judgment of 10 September 1966, Tokyo District Court, 17 *Rominshu* 1042.

The rank of executive agreements is rarely discussed. Some commentators seem to presume that they have the same rank as treaties.[88] However, one of the grounds for giving superiority to treaties over statutes – that treaties are approved by the Diet – is lacking as far as executive agreements are concerned. An executive agreement which is concluded by the government alone on the basis of existing domestic laws and regulations, or within the scope of budgetary appropriations, probably should not be given a rank higher than statutes enacted by the Diet; their rank should be equal to orders and regulations issued by the government. Only executive agreements concluded on the basis of a treaty may be given the same rank as a treaty.[89]

While treaties may be entered into by two states alone, general customary international law must be accepted by most states in the world. Since treaties prevail over statutes, Japanese scholars and courts take it for granted that customary international law also prevails over statutes. For example, in the *Yoon Soo Kil* case, the Tokyo District Court assumed that customary international law had stronger force than statutes, when, based upon the customary international rule of non-extradition of political offenders, it annulled a deportation order made in accordance with municipal law.[90]

3.4.2. Relationship with the Constitution

As for the relationship between treaties and the Constitution, scholarly opinions are sharply divided into those who regard treaties as higher than the Constitution (hereinafter referred to as the 'treaty supremacy theory') and those who regard the Constitution as higher than treaties (the 'constitutional supremacy theory').

The advocates of the treaty supremacy theory give the following reasons for taking such a view. First, Article 98 paragraph 1 stipulates the superiority of the Constitution over any "law, ordinance, imperial prescript or other acts of government." 'Treaties' are not listed; instead paragraph 2 of the same article orders their faithful observance. Secondly, Article 81 empowers the Supreme Court to review the constitutionality of any "law, order, regulation

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[88] E.g. NOBUYOSHI ASHIBE, *Kenpō Kōgi Notes I* [Lecture Notes on Constitutional Law, I] (1986) 37; HIGUCHI et al., op. cit. n. 24 at 1493, 1500; MIYAZAWA, op. cit. n. 14 at 808, 814.

[89] See TERUYA ABE, *Kenpō* [Constitutional Law] (1983) 279; HAYASHI, loc.cit. n. 12 at 39. YACHI seems to believe that all executive agreements should be ranked lower than statutes. YACHI, loc.cit. n. 52 at 113.

[90] Judgment of 25 January 1969, Tokyo District Court, 20 *Gyoshu* 28, 14 JAIL (1970) 146.

or official act." Again, 'treaties' are not listed. Thirdly, internationalism is one of the basic tenets of the Constitution.[91]

The proponents of the constitutional supremacy theory refute these arguments as follows. First, since Article 98(1) relates to the superiority of the Constitution in the domestic order, it is natural that treaties are not listed. Secondly, treaties are not listed in Article 81 because some treaties are not suitable for judicial review. Thirdly, internationalism is such a vague principle that it cannot be a ground for justifying supremacy of treaties over the Constitution. Moreover, the proponents of this view point to the simplified treaty-making procedure under the Constitution. A rigid procedure is prescribed for revision of the Constitution, whereas the treaty-making procedure is quite simple. It is easier to conclude a treaty than to enact an ordinary statute, not to speak of revising the Constitution. Therefore, the view giving superiority to treaties would, in effect, make a revision of the Constitution easy and infringe the principle of the sovereignty of the people, another important principle of the Constitution.[92]

The treaty supremacy theory was advocated by some of the most influential scholars immediately after the Second World War. Starting from the late 1950s, however, when the constitutionality of the Japan-US Security Treaty became an intense political issue, the validity of this theory came into serious doubt, and support for it dwindled. Today, most scholars support the constitutional supremacy theory. The government also supports the constitutional supremacy theory, at least with respect to 'bilateral political or economic treaties.'[93]

In 1959 the Supreme Court, too, endorsed the constitutional supremacy theory in the *Sunagawa* case. In this case, a group of demonstrators who had trespassed on *Tachikawa* Air Base while protesting against the extension of a

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[91] E.g. MIYAZAWA, op. cit. n. 14 at 814-18; JIRO TANAKA, 'Shin Kenpō ni okeru Jōyaku to Kenpō no Kankei' [The Relationship between Treaties and the Constitution under the New Constitution], in JIRO TANAKA, *Hōritsu ni yoru Gyōsei no Genri* [The Principle of Administration by Law] (1954) 99, 115-21; YOKOTA, loc.cit. n. 14 at 32-33.

[92] E.g. KIMINOBU HASHIMOTO, *Nihonkoku Kenpō* [The Constitution of Japan] (Rev. ed. 1988) 680-01; HIGUCHI (et al.), op. cit. n. 24 at 1500-01; KIYOMIYA, op. cit. n. 85 at 450-52; SATO, op. cit. n. 24 at 1290-93; TAKANO, op. cit. n. 49 at 207-09.

[93] The government seems to distinguish between three kinds of treaties and takes the position that some treaties prevail over the Constitution while others do not: treaties which represent "established laws of nations" prevail over the Constitution; treaties which concern "matters of vital importance to the destiny of a nation such as a surrender document or a peace treaty" prevail over the Constitution; while the Constitution prevails over "bilateral political or economic treaties." See KAZUO YAMANOUCHI, *Seifu no Kenpō Kaishaku* [Interpretations of the Constitution by the Government] (1965) 247-48.

runway were indicted on the basis of a law implementing the Administrative Agreement concluded between Japan and the United States under Article III of the Security Treaty. The accused in this case argued that the Security Treaty, which allowed US forces to be stationed in Japan, was contrary to Article 9 of the Japanese Constitution, which provides that "the Japanese people forever renounce war" and that "[i]n order to accomplish [that] aim [. . .] land, sea, and air forces [. . .] will never be maintained." The Supreme Court declined to engage in a constitutional review, stating:

> The Security Treaty [. . .] must be regarded as having a highly political nature [. . .] Consequently, the legal decision concerning its constitutionality has a character unsuitable in principle for review by a judicial court [. . .] , and accordingly falls outside the power of judicial review by the court, unless its unconstitutionality or invalidity is obvious.[94]

Although the Supreme Court refused judicial review in this case, it suggested that it would exercise a review power if a treaty's substantive "unconstitutionality or invalidity is obvious." Thus, the Supreme Court acknowledges in principle that the Constitution is ranked higher than treaties and that treaties are subject to judicial review. In reality, however, one could hardly think of a situation in which the 'unconstitutionality or invalidity' of a treaty is 'obvious'.

Even though treaties are ranked lower than the Constitution, appeals to the Supreme Court based on treaties should not be dismissed summarily. In Japan, appeals to the Supreme Court in criminal matters are admissible only when they find support either in 'the Constitution' or in 'case law' (Arts. 405 and 433 of the Criminal Procedure Law). As for civil matters, appeals to the Supreme Court as the fourth instance and special appeals to the Supreme Court in cases where appeals are not normally allowed are admissible only when they find support in 'the Constitution' (Arts. 409*bis* and 419*bis* of the Civil Procedure Law). The Supreme Court tends to summarily dismiss appeals based on 'treaties' as inadmissible, regarding them as appeals based merely on ordinary 'laws.' As treaties have higher authority than 'statutes,' appeals based on treaties should not be equated with appeals based on 'statutes.' Moreover, human rights treaties, especially the International Covenants on Human Rights,

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[94] Judgment of 16 December 1959, Supreme Court Grand Bench, 13 *Keishu* 3225, 4 JAIL (1960) 103; 32 ILR 43. For commentaries on this case, see ALFRED C. OPPLER, 'The Sunakawa Case: Its Legal and Political Implications', 76 *Political Science Quarterly* (1961) 241; SENJIN TSURUOKA, 'La Décision de la cour suprême du Japon dans l'affaire de Sunakawa', 70 *Revue Général de Droit International Public* (1966) 431.

have provisions similar to the human rights provisions in the Constitution. Appeals to the Supreme Court based on such treaties should be considered as equivalent to appeals based on 'the Constitution.'[95]

As for customary international law, many scholars take the view that it is ranked even higher than the Constitution. The proponents of the treaty supremacy theory tend not to distinguish customary international law from treaties, apparently advocating supremacy of customary international law over the Constitution as well.[96] On the side of the constitutional supremacy theory camp, many scholars maintain that customary international law must be distinguished from treaties and that it should be given a rank higher than the Constitution.[97] The government also seems to take the view that 'established laws of nations' prevail over the Constitution.[98] It certainly would be possible to give peremptory norms of international law (*jus cogens*) privileged status not only under international law but also under domestic law. It is doubtful, however, whether one should give such special status to all rules of customary international law, when, on the international level states can deviate from customary international law by entering into treaties – the principle of *lex specialis derogat legi generali*.[99]

4. CONCLUSION

In Japan, treaties and customary international law have domestic legal force and have a rank higher than statutes but lower than the Constitution. Japan's defeat in the Second World War was the main driving force for the elevation of international law to such a high status in Japan. Repentance for the war is deeply imbedded in the Constitution[100] and has brought about many epoch-making provisions in the Constitution. Because treaties have the force

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[95] MASAMI ITO, 'Kokusai Jinken Hō to Saibansho' [International Human Rights Law and the Courts], 1 *Human Rights International* (1990) 7, 11.

[96] *Chūshaku Kenpō*, op. cit. n. 25 at 1482-84.

[97] E.g., HASHIMOTO, op. cit. n. 92 at 682-83.

[98] *Supra* n.93. See also HIGUCHI (et al.), op. cit. n. 24 at 1501-02; KOJI SATO, *Kenpō* [Constitutional Law] (New ed. 1990) 31.

[99] See ASHIBE, op. cit. n. 88 at 39; TAKANO, op. cit. n. 49 at 194-95 n. 95.

[100] See the following excerpt from the Preamble of the Constitution: "We, the Japanese people [. . .] resolved that never again shall we be visited with the horrors of war [. . .] do firmly establish this Constitution. We [. . .] desire peace for all time [. . .] and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace [. . .]."

of law and override statutes, however, Japan has been wary of ratifying treaties and is extraordinarily cautious in examining compatibility of domestic laws with a treaty before it proceeds with ratification.[101] Nevertheless, once Japan has decided to ratify a treaty, it has been scrupulous in bringing domestic laws into conformity with the treaty. By virtue of amendments made before ratification of treaties, and, to a lesser extent, of their judicial application, the impact of international law on Japanese law has been substantial, especially in the fields of human rights.[102]

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[101] YACHI, loc.cit. n. 52 at 115.

[102] See IWASAWA, loc.cit. n. 39; IWASAWA, loc.cit. n. 84; IWASAWA, loc.cit. n. 72. One non-Japanese scholar has observed that a "revolution" has been brought to Japan by international human rights law. KENNETH L. PORT, 'The Japanese International Law "Revolution": International Human Rights Law and Its Impact in Japan, 28 *Stanford Journal of International Law* (1991) 139.

EFFECTUATION OF INTERNATIONAL LAW IN THE MUNICIPAL LEGAL ORDER OF THAILAND

Kriangsak Kittichaisaree*

1. INTRODUCTION

In general, international law has no direct application in the municipal legal order in Thailand. Thailand adheres to the 'dualist' (or 'pluralist') doctrine, according to which the international legal system and the municipal legal system operate on different planes and regulate different subject matters.

Thai jurists are used to codes of law and positive law. There are the Penal Code to govern all aspects of criminal law, and the Civil and Commercial Code to govern all civil matters, such as contracts, torts, and family law. The Criminal Procedure Code and the Civil Procedure Code are there to guide Thai law officers and courts in criminal and civil proceedings. Acts of Parliament have been enacted to supplement these Codes. Apart from certain cases of customary international law, international law finds no direct municipal validity in these realms of positive law — except to the extent that a rule of international law is expressly adopted as part of the law in question.

2. CUSTOMARY INTERNATIONAL LAW AND GENERAL PRINCIPLES OF LAW

One distinguished Thai jurist has opined that where there is a lacuna in Thai law, Thai courts resort to three methods to apply international law. First, they construe the Thai law at issue as being in line with customary international law. Secondly, the courts heed certificates, circulars and recommendations of the Ministry of Foreign Affairs, as in cases concerning the issuance of writs to members of foreign diplomatic missions at the time long before the conclusion of the 1961 Vienna Convention on Diplomatic Relations. Thirdly, Thai courts apply general principles of law, such as *caveat emptor, volenti non*

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fit injuria, and *actio personalis moritur cum,* generally adopted by courts in various countries.[1] This third method is exemplified by Section 4, second paragraph, of the Civil and Commercial Code. It is here provided that when there is no provision of the Code applicable to the case in point, the latter shall be decided according to the local custom or, in the absence of such custom, the case shall be decided by analogy to the provision most nearly applicable, and in default of such provision, by the 'general principles of law'.

In a similar vein, Section 34 of the Civil Procedure Code provides:

> "Where any proceeding is to be carried out wholly or in part through the medium of or by request to the authorities in any foreign country, the Court shall, in the absence of any international agreement or provision of law governing the matter, comply with the general principles of international law".

It has been argued that the 'general principles of international law' are not rules of customary international law, but in fact consist of general practice adopted by the States involved and comity, such as the principle of justice in the taking of evidence, that of convenience, and that of reciprocity in mutual cooperation and assistance.[2] Since Thai courts turn to general principles of law as a last resort, they are only considered after Thai law, local custom, and analogous provisions of Thai law, in that order.

With regard to customary international law, although there are quite a few sceptics of its direct municipal validity in Thailand, precedents do exist to substantiate such municipal validity, and this is true even in the case of criminal offences where neither the Penal Code[3] nor the Criminal Procedure Code makes any reference to some other law as we have seen in civil cases. With regard to diplomatic privileges and immunities, Thailand regarded the 1961 Vienna Convention on Diplomatic Relations as a codification of rules of customary international law on the matter long before Thailand's enactment of the Diplomatic Privileges and Immunities Act in 1984 and its subsequent ratification of the 1961 Convention in 1985. When certain members of a foreign mission were implicated in a drug offence, the Ministry of Foreign Affairs declared them *persona non grata* and asked them to leave the country,

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[1] WISSANU KRUA-NGAM, *Application of International Law in the Thai Legal System* (Research Report [in Thai language], Chulalongkorn University, Bangkok, 1977) 122-8, 141-2.

[2] Ibid, 144-5.

[3] Section 2, paragraph 1, of the Penal Code stipulates: "A person shall be criminally punished only when the act committed by such person is defined as an offence and the punishment is defined by the law in force at the time of the commission of such act, and the punishment to be inflicted upon the offender shall be that provided by the law".

or else they would be stripped of diplomatic immunities and stand trial in Thai courts. The Ministry of Justice Regulation on Service of Judicial and Extra-Judicial Documents of 1979 provides, in Part I, Article 5, that if the Ministry is informed by the Ministry of Foreign Affairs that a person to whom a writ of summons is issued is in fact a person entitled to diplomatic immunities, the Ministry of Justice will inform the court accordingly, so that the court may dismiss the case against that person. Moreover, in the *Red Case No.12083* decided in 1983, the court requested the Ministry of Justice to seek an opinion from the Ministry of Foreign Affairs as to whether judgment could be executed against defendant's land on which the Embassy of Bulgaria was situated. This illustrates that Thai courts did respect the inviolability and immunity from execution of the premises of foreign missions under customary international law as enshrined in Article 22 of the 1961 Convention, which Thailand had not yet ratified at the time. Immunities of members of a foreign consular mission are similarly recognized by Thai courts although Thailand has yet to ratify the 1963 Vienna Convention on Consular Relations, and there is no written Thai law according such immunities.

In its *Judgment No. 1142* of 1951, the Supreme Court recognized that a Thai warship could exercise the right of hot pursuit on the high seas against a foreign vessel which had violated Thai fisheries law in the Thai fishery zone. No Thai law at that time provided for the right of hot pursuit. Therefore, the Supreme Court could only have resorted to customary international law to reach its decision.

It must be admitted that examples in Thai courts applying customary international law as part of the law of the land are few and far in between. This might be attributable to the difficulty in ascertaining a rule of customary international law in most of the cases before the courts. The case of immunity of members of foreign diplomatic missions and consular posts from both civil and criminal jurisdiction of Thai courts stands out as a unique exception in that customary international law on this matter is unequivocal and indisputable and that courts frequently have to touch on this branch of customary international law. As it will be seen later on, the judgment in 1951 concerning the right of hot pursuit might be an isolated example of Thai courts applying customary international law in an area unrelated to the immunity issue.

Therefore, it cannot be predicted with confidence that Thai courts will in effect grant municipal validity to customary international law as a matter of course whenever an issue before them involves such law. Indeed, it has been a moot point as to how Thai courts would react to a case of foreign sovereign States being sued in Thailand. One cannot simply assume that sovereign immunity would be accorded in line with customary international law or even general State practice.

3. TREATIES

Section 178, second paragraph, of the Constitution of 9 December 1991, stipulates:

> "A treaty which provides for a change in the Thai territories or the State jurisdiction area or requires the enactment of an Act for its implementation must be approved by the National Assembly."

Up to the present day, Thailand has had 14 constitutions, and numerous amendments, starting from the first Constitution in 1932, after a coup d'état to transform the absolute monarchy into a constitutional monarchy. The essential difference between these Constitutions lie in the different relationships between the legislative and the executive powers, reflecting the changing situations in Thailand at the time of a particular constitution.

So far as international law and international relations are concerned, the first, and interim, Constitution merely stipulated in Section 36 that the King had the prerogative to ratify treaties of friendship, on the advice of the People's Committee that had staged the coup. It was the second Constitution which followed in the same year that started the now-entrenched tradition regarding municipal validity of treaties as stipulated in Section 178 of the present Constitution. The rationale for this tradition can be gleaned from the debate in the House of Representatives at the time of drafting of the second Constitution. The Executive was recognized as the competent organ to conclude and ratify treaties. However, treaties as such did not bind individual subjects because treaties had legally binding force only on the international plane. Treaties that involved any change in the duties, rights or obligations of the individual subjects thus needed implementing legislation. In order to enact such legislation, however, the Legislature had, logically, to give prior assent to the treaty concerned.[4] This was a far cry from the days of absolute monarchy when Royal Proclamations were the law of the land and, by proclaiming which treaties were binding on Siam, as Thailand was then called, these Proclamations in effect transformed the treaties into part of the law of the land.[5]

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[4] Record of the Meetings of the House of Representatives, First Session, 1932, 39th Meeting, Sunday 27 November 1932, pp. 530-4, also quoted at length in WISSANYU KRUA-NGAM, *supra* n.1, at 131-5.

[5] Cf. SOMBOON SANGIAMBUT, "Thai Law of Treaties" [in Thai], 31 *Saranrom* (1981) 141 at 157-8.

In Thailand, there is no distinction or difference in status between self-executing and non-self-executing treaties so far as municipal validity in Thailand is concerned. No treaty has direct applicability in Thailand. Where implementing legislation does not exist, treaty obligations merely bind the state through the Executive on the international plane, but not the state organs or subjects in the Thai legal order. For treaty obligations to become law in the municipal sphere, the Executive is obligated to initiate legislation to be adopted by the National Assembly (Parliament), in order to give effect to them. Logically, if the Legislature has already given its approval in case of treaties that need implementing legislation, pursuant to the constitutional requirement mentioned earlier, the Legislature is somehow estopped from disapproving the implementing bills. Only when a new Parliament with a radical change in membership has replaced the preceding one, then the new Parliament might have an excuse not to pass the bills into Acts of Parliament. But this has not yet occurred.

Many treaties merely oblige the State to adopt particular policies, and the issue of legal validity in the municipal sphere consequently does not arise. However, in the case of treaties requiring implementing legislation the National Assembly looks askance at the Executive's attempt to by-pass the Legislature's mandate by having Acts of Parliament enacted in anticipation of Thailand's becoming party to the treaty in question, for fear that the Legislature will be pre-empted from its constitutional role of giving or withholding assent to treaties that by their nature require its approval. Moreover, according to an October 1983 opinion of the Juridical Council, which is a government organ acting as the Executive's chief legal advisers and draftsmen, enacting an Act and giving approval to a treaty are two distinct processes. When reading a bill, the Senate and the House of Representatives, which together constitute the National Assembly, hold sessions separately, whereas they sit in joint session at the time of considering whether to give assent to the treaties that require their approval. As a result, the Cabinet resolved on 20 December 1983 that a treaty which requires implementing legislation shall be submitted to the National Assembly for approval prior to the submission of its implementing bill to the National Assembly. The present Constitution of 9 December 1991 reaffirms the regulation laid down in previous constitutions. Sections 139 and 140 provide that bills have to be submitted first to the House of Representatives before their forwarding to the Senate. On the other hand, Section 156(2) stipulates that the House and the Senate shall hold a joint sitting to approve a treaty that requires assent of the National Assembly.

Recently, an opposition member of the House of Representatives voiced his concern over the Copyrights Bill submitted by the Ministry of Commerce, on the grounds that the Bill was intended to implement Thailand's obligations

under the GATT's Uruguay Round Agreements, which Thailand has not yet ratified. In his view, this was a thinly-veiled attempt to by-pass the requirement of Section 178, second paragraph, of the 1991 Constitution. The Government's response was that the Bill was not *specifically* intended to implement the GATT's Uruguay Round obligations as alleged. The GATT's Uruguay Round Agreements had multifarious obligations besides those on copyrights, and the Government was still uncertain about the extent to which Thailand needed implementing legislation in this case.

In fact, the Legislature has enacted numerous pieces of legislation that do not have the *main* objective of implementing Thailand's treaty obligations prior to the Legislature's endorsement of the treaties pursuant to the constitutional requirement, but with the main objective of keeping Thai law abreast of Thailand's national interests in the light of ever-changing circumstances. Framework or 'enabling' legislation has been passed on many occasions. The Transfer of Prisoners (Execution of Penal Sentences) Act of 1984 is one example. The Act enables Thai courts to apply provisions of the relevant treaties on transfer of prisoners as if they were part of Thai law, be it that these treaties have already been concluded or have yet to be concluded in the future. Similarly, the Measures to Suppress Illicit Drug Offenders Act of 1991 and the Mutual Assistance in Criminal Matters Act of 1992 have been enacted, while a money laundering law is being contemplated — all in line with the provisions of the 1988 UN Convention against Narcotic Drugs and Psychotropic Substances, which Thailand is not yet sure whether it will ratify eventually. In other words, Thai national interests may coincide with most provisions of a treaty without Thailand necessarily being able to accept the treaty obligations *in toto*. In this situation, an Act of Parliament may be enacted without infringing any constitutional requirement.

Another plausible theoretical explanation is that of a distinguished expert on treaty-making practice in Thailand. In his opinion, legislation implementing treaty obligations may be of either of two types. The first type aims at implementing a specific treaty, whereas the second type aims at simultaneous implementation of various treaties, some of which may have already been in existence while others are to be concluded in the future. In this latter case, of which the 1961 Act to Protect the Functioning of the United Nations and Specialized Agencies in Thailand is an oft-cited example, it is not possible to seek approval from the National Assembly for the whole class of treaties prior to the National Assembly's enactment of the legislation concerned. Such approval can be asked in the case of a specific treaty. Therefore, the Cabinet

resolution of 20 December 1983 is believed to cover only the case of a specific treaty.[6]

With due respect, practice since 1983 has been too inconsistent to support this explanation. The Diplomatic Privileges and Immunities Act was passed in 1984 to implement the 1961 Vienna Convention on Diplomatic Relations which Thailand did not ratify until 23 January 1985. With regard to a 'class' or 'group' of treaties, the ordeal of the Extradition Act of 1929 is illuminating. Section 3 of the Act stipulates:

> "This Act shall be applicable to all extradition proceedings in Siam so far as it is not inconsistent with the terms of any Treaty, Convention or Agreement with a foreign State, or any Royal Proclamation issued in connection therewith."

Logically, where extradition treaties exist, Thai courts ought to be able to apply their provisions without having regard to any contrary provisions in the 1929 Act since the Act has already authorized the courts to do so. Nonetheless, even before 1983 the Executive played safe by annexing the extradition treaty in question to the extradition bill for the implementation of each particular extradition treaty, such as in the Extradition between Thailand and Indonesia Act of 1979. It was, in fact, the bill to implement the Extradition Treaty between Thailand and the Philippines, of 16 March 1981, that prompted the Cabinet to pass the resolution of 20 December 1983.

At present, where a treaty obligation involves the rights and duties of subjects under Thai municipal law, a bill is usually prepared for its reading in the National Assembly immediately after the National Assembly has approved the treaty which the bill seeks to implement. In one unique situation, an implementing law had to come into force at the same time as the identical legislation in another country. This was the case with the Thailand-Malaysia Joint Authority Act of 1990, which had been harmonized with the Malaysia-Thailand Joint Authority Act of 1990 enacted by the Malaysian Parliament.[7] Pursuant to the Agreement on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority, signed on 30 May 1990, both countries were to enact identical legislation to implement the

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[6] SOMBOON SANGIAMBUT, 'Procedural steps in enacting legislation to implement treaties', 34 *Saranrom* (1984), 149 at 149-150. Dr. SANGIAMBUT is currently Director-General of the Department of East Asian Affairs of the Ministry of Foreign Affairs. He used to serve as Chief of the Division of Treaties, and as Deputy Director-General of the Department of Treaties and Legal Affairs.

[7] Cf. 1 AsYIL (1991) 190, 2 AsYIL (1992) 343, 3 AsYIL (1993) 416.

Agreement, with minor drafting adjustments permitted, which legislation was to enter into force simultaneously in both countries. The provisions of the identical legislation form part of the Agreement. Immediately after the Thai National Assembly had approved the Agreement in joint session, the House and the Senate, in separate sittings, passed the Act. However, the Act did not come into force until its publication in the Government Gazette on 22 January 1991, the day after the Agreement had come into force on the exchange of instruments of ratification. This is also a clear example of a case where the National Assembly is estopped from withholding assent to a bill to give effect to the treaty which it has already approved. The National Assembly could not even amend any provision of the bill in spite of the complaints by some members of the House that the legislation was tantamount to a *fait accompli.*

On the whole, an obsession with the supremacy of legislation or Thai municipal law over treaties has brought about the dilemma described above. It is interesting to note that treaties entailing financial obligations on Thailand's part need not be submitted to the National Assembly for prior approval despite the fact that the Executive must subsequently submit budget bills to the House to implement such obligations.[8] This is probably because if a budget bill fails to sail through the National Assembly, the Executive must dissolve the House and call for a general election. Such a situation is not likely to occur so long as the Executive controls the majority in the House and has some support in the Senate.[9]

It follows from the foregoing that an interested legal subject cannot invoke treaty obligations *per se* in the Thai municipal legal sphere for which there are no counterparts in the prevalent Thai municipal law. In April and May 1994, the Juridical Council had occasion to rule on the rights of an insurance company founded in 1968, 99.84 per cent of whose shares were subsequently owned by an American insurance company. One of the questions was whether, by virtue of Article IV of the Treaty of Amity and Economic Relations between Thailand and the USA, which had entered into force in 1968, the company would be entitled to receive national treatment on a par with Thai insurance companies operating in Thailand, including the right to open branches, *or* whether the company would not be so entitled since it was a

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[8] SOMBOON SANGIAMBUT, *supra,* n.5, at 146.

[9] Under Sections 141 and 142 of the Constitution of 9 December 1991, if a money bill is withheld by the Senate after it has been approved by the House, the House may forthwith proceed to reconsider it. If the House resolves to reaffirm the original money bill, or another money bill submitted by a joint committee composed of the representatives of both the House and the Senate, by the votes of more than one half of the total number of existing members of the House, such bill shall be deemed to have been approved by the National Assembly.

subsidiary of a foreign company which the Non-Life Insurance Act of 1992 prohibits from establishing more branches in Thailand in addition to those in existence prior to the enactment of the Act. The Juridical Council, meeting in plenary, ruled, *inter alia,* that under the long-established tradition of democracy in Thailand and every Thai constitution a treaty was enforceable in Thailand only to the extent that it did not conflict or contradict Thai municipal law or insofar as there existed municipal legislation implementing the treaty's provisions. Although the 1968 Treaty was binding on Thailand, the right conferred under Article IV of the Treaty found no counterpart in Thai insurance law. Therefore, the provisions of the Act of 1992 were held to prevail over the Treaty's provisions, and the insurance company in question could not avail itself of the right accorded by the Treaty. Most interestingly, the Juridical Council ruled that this has been the traditional practice in Thailand even though the 1968 Treaty came into force during the life of the interim Constitution of 1959 which did not lay down any rule on treaty-making, unlike the other constitutions since the time of the second Constitution of 1932. On 16 August 1994, the Cabinet endorsed the Juridical Council's ruling.

That there must be adaptation of the international to the municipal legal structure, notions and terminologies is manifest from the example of the Royal Proclamation dated 29 April 1969, proclaiming that the four Geneva Conventions on the Law of the Sea of 1958 are binding on Thailand.

By virtue of Article 24 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, coastal States may exercise certain jurisdiction in the contiguous zone. Yet, up to the present day the relevant Thai law enforcement authorities have been pressing for an Act of Parliament on the contiguous zone in order to bring Article 24 of the 1958 Convention to life. It might be, of course, that the provisions of the 1958 Conventions on the law of the sea are too ambiguous or vague for Thai law officers to understand. Another and more valid reason is, however, that the provisions of the Conventions need to be 're-enacted' as Thai legislation before they are enforceable.

Although Royal Proclamations at the time of the absolute monarchy caused a treaty to become the law of the land, under the constitutional monarchy Royal Proclamations merely inform the public that Thailand has become a State Party to a treaty. On the other hand, Thai legislation in whatever form and however named binds subjects under Thai law irrespective of Thailand's international obligations. For instance, Thai law officers have had no difficulty with the Diplomatic Privileges and Immunities Act of 1984 which prescribes that diplomatic privileges and immunities as provided in the 1961 Vienna

Convention on Diplomatic Relations shall be accorded to those qualified under the Convention, while Thailand had not ratified the Convention until 23 January 1985. It is also fascinating to note the 'unenforceability' in Thailand of the provisions of the 1958 Geneva Conventions, some of which, including those on the contiguous zone, have become part of customary international law.

4. RESOLUTIONS OR DECISIONS OF INTERNATIONAL ORGANIZATIONS

Resolutions or decisions of international organizations are generally treated as merely hortatory without any international legal binding force. Even if they had, they would not have direct municipal validity in Thailand. UN General Assembly or Security Council resolutions, such as resolutions on the boycott of oil export and arms embargo against South Africa and those on sanctions against Haiti, are adopted by resolutions of the Thai Cabinet. They are given the force of law through already existing provisions of an Act of Parliament that empower the Minister in charge of the application of the Act to proscribe trading between Thai nationals and a foreign State for reasons of, *inter alia,* national security and national interests. This was the case of the Cabinet Resolution of 16 August 1994 on trade embargo against Haiti. The embargo is to be carried out by virtue of the Export and Import of Goods Act of 1979, which empowers the Ministry of Commerce to control import and export of goods for certain purposes.

5. *LEX SUPERIORI DEROGAT LEX INFERIORI*

As the Thai legal system follows 'dualism' between international and municipal law, the relative status or rank of these laws in the municipal legal sphere is easy to find.

The Constitution is the supreme law of the land. Section 5 of the Constitution of 9 December 1991 provides: "The provision of any law which is contrary to or inconsistent with the Constitution shall be unenforceable". The supremacy of the Constitution is followed in hierarchy by Acts of Parliament (including codes of law and Ministerial Regulations issued by virtue

of Acts of Parliament), Emergency Decrees,[10] and Royal Decrees (or Royal Proclamations), respectively. In each group, *lex posteriori derogat priori*[11] and *lex specialis derogat generali*. If treaty provisions or resolutions/decisions of international organizations are transformed into Thai municipal law in the form of Acts of Parliament, Emergency Decrees or Royal Decrees, the same rule applies. If international law of whatever source, be it customary international law or a treaty or a resolution/decision of an international organization, is in conflict with existing municipal law, municipal law prevails. However, it is widely felt, though there is no concrete evidence to substantiate it besides the previously mentioned cases of diplomatic and consular immunities, that, wherever possible, Thai courts will avoid construing Thai municipal law in flagrant violation of Thailand's legal obligations on the international plane.

On the other hand, the Executive has been at pains to avoid infringing international law, be it a rule of customary international law, a treaty obligation, or a resolution of an international organization, insofar as it does not contradict overriding national interests. Before a law is enacted, it has to be scrutinized by the Juridical Council. The Juridical Council pays due attention to Thailand's relevant international obligations and to *de lege lata* as well as *de lege ferenda* international legal rules. For instance, as far back as 1952, the Juridical Council advised the Executive against submission of a bill to the National Assembly, on the grounds that such bill would restrict the right to resort to judicial redress contrary to Articles 8 and 10 of the Universal Declaration of Human Rights of 1948, which the Executive had declared as a matter of policy that it would respect.[12] More recently, the Juridical Council

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[10] An Emergency Decree is issued by the King for the purpose of maintaining national and public safety or national economic security or averting public calamity. The Decree has the force of an Act. In the next succeeding sitting of the National Assembly or in an extraordinary session of the National Assembly if waiting for an ordinary session would be a delay, the Cabinet must submit the Emergency Decree to the National Assembly for reaffirmation. If an Emergency Decree has the effect of amending or repealing provisions of any Act and if such Emergency Decree lapses because it is not reaffirmed by the National Assembly, the previous provisions of the Act before its amendment or repeal by the Emergency Decree shall continue to have the force of law as from the effective date of the National Assembly's disapproval of such Emergency Decree. (Section 172 of the Constitution of 9 December 1991.)

Pursuant to Section 175 of the Constitution, the King has the prerogative of issuing a Royal Decree 'which is not contrary to the law'.

[11] With regard to an Emergency Decree, it prevails over the preceding Act of Parliament unless and until the Emergency Decree lapses on its disapproval by the National Assembly.

[12] The bill in question sought to permit the Registrar of Associations to terminate an association for certain purposes without the association's right to a judicial review. See WISSANU KRUANGAM, *supra* n.1 at 112-6.

advised the Cabinet that the Thai Fisheries (Amendment) Bill needed to be modified and revised so as to be compatible with the relevant provisions of the 1982 UN Convention on the law of the Sea, which Thailand has not yet ratified but in respect to which Thailand has an obligation as a signatory not to defeat its object and purpose. The Cabinet heeds advice of the Council, and, more often than not, so does the Legislature when the latter reads opinions of the Council submitted in connection with a bill. Once a law has been enacted, however, courts must apply the Thai law even if that may violate Thailand's international obligations. This was made clear in the Supreme Court's *Judgment No. 4941* of 1967. The plaintiff in that case argued that Section 17 of the Constitution (Amendment) of 1965, which prohibited any law suits against the Prime Minister and those acting under his orders, was in violation of the Universal Declaration of Human Rights. The Supreme Court held that such argument was relevant at the time of drafting the Constitution, but not after the Constitution had been promulgated.[13]

Under customary international law, as encapsulated in Articles 27 and 46 of the 1969 Vienna Convention on the Law of Treaties, a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty, unless it is objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith that the former State's consent to be bound by a treaty has been expressed in violation of a provision of its internal law of fundamental importance regarding competence to conclude treaties. Thailand's failure to perform treaty obligations entails State responsibility. However, it has not yet been put to the test whether the Executive could cite Articles 27 and 46 in defence of its failure to have implementing legislation enacted by the National Assembly as required by the Constitution, an obviously fundamentally important legal instrument on the issue. Nor has an occasion arisen whereby the Executive cites Article 47 of the 1969 Convention[14] as a defence that the constitutional restriction was notified to the other negotiating State(s) prior to the Thai Government expressing its consent to be bound by the treaty in question. This is because the Executive has been careful to sign treaties *ad referendum,* pending fulfilment of constitutional requirements, or to ratify or accede to treaties only after constitutional requirements have been fulfilled.

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[13] Quoted in ibid. at 116-7.

[14] Art. 47 reads: "If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent".

Thai courts are the ultimate organ to decide a specific case before them. Only Acts of Parliament may be subsequently enacted to rectify any undesirable situation caused by court judgments.

It should be noted in this connection that courts may use treaties as *factual evidence* when determining a case at hand. In the past, Thai courts were involved in treaty interpretation to limit, as far as possible, the geographical areas over which the foreign Powers had extraterritorial jurisdiction over their subjects pursuant to the treaties whereby Siam ceded such extraterritorial jurisdiction to the Powers.[15] Therefore, it is inconceivable that courts of the present time would ignore relevant treaties as representing a state of affairs for them to bear in mind if necessary. For example, the courts are most unlikely to ignore maritime boundary treaties between Thailand and neighbouring states in determining the outer limits of the Thai territorial sea (which falls within the definition of 'the Kingdom of Thailand' within which all Thai law applies), and that of the continental shelf, or the exclusive economic zone whose area falls under the application of the Petroleum Act of 1971 and the Fisheries Acts, respectively. The judgment of the International Court of Justice in *The Temple of Preah Vihear Case (Cambodia-Thailand)*[16], which held that a temple on a cliff on the Thai-Cambodian border was situated in the territory under the sovereignty of Cambodia should have the same effect as factual evidence in Thai courts.[17]

6. CONCLUSIONS

The foregoing study of effectuation of international law in the Thai municipal legal order leads to the following conclusions:

(1) In general, international law has no direct application in the Thai municipal legal order.

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[15] Supreme Court *Judgments Nos. 606-607* of 1943, *Nos. 674-679* of 1943, and *No. 1315* of 1947, cited in WISSANU KRUA-NGAM, *supra* n.1 at 146-8.

[16] I.C.J. Reports 1962 p. 6.

[17] The Thai Government circulated protests against the Judgment on the grounds that the opinions of the majority of the Court which ruled against Thailand were not well-founded either in fact or in law. Phrased differently, Thailand refused to comply with the decision of the Court in this case to which it was a party, contrary to Article 94 of the Charter of the United Nations.

When irredentists' emotions subsided, the Thais gradually accepted the Court's Judgment. There is no evidence that any law has been enacted to implement the Judgment, which, in any case, concerns a remote and uninhabited area near the border. The Government of the day just ordered Thai troops to pull out of the area.

(2) General principles of (international) law are applied as last resort by Thai courts to fill in a legal lacuna.
(3) There are precedents that ascertainable rules of customary international law, especially those concerning diplomatic and consular immunity, have been adopted by Thai courts. However, the extent to which Thai courts adopt rules of customary international law is generally far from certain.
(4) Thai municipal law prevails over treaty obligations. In order to be enforceable in the Thai municipal order, treaty provisions must be transformed into Thai municipal law, unless implementing legislation already exists.
(5) Resolutions or decisions of international organizations can be binding in the Thai municipal legal order only if they are transformed into Thai law or are given the force of law through already existing provisions of an Act of Parliament.
(6) Under Thai law, *lex posteriori derogat priori* and *lex specialis derogat generali*. Thai courts are the ultimate organs to settle any conflict between international law of whatever source and existing municipal law. Long-established jurisprudence reveals that municipal law prevails over conflicting international law. However, the Executive and, to some extent, the Legislature have endeavoured to prevent conflicts between international law and municipal law.
(7) Treaties and a judgment of the International Court of Justice binding on Thailand may be used as *factual evidence* before Thai courts when determining a case at hand.

THE EFFECT OF TREATIES IN THE MUNICIPAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA: PRACTICE AND PROBLEMS*

Li Zhaojie**

1. INTRODUCTION

A great number of international treaties concluded or acceded to by the People's Republic of China during the last one to two decades address matters of civil and economic transactions between private parties, protection of human

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rights of individuals, and many other aspects of everyday activities in China.[1] While such treaties are instruments of international law, their objectives can be achieved only if they are effectuated within the Chinese municipal legal order. These recent developments in China's treaty practice have lent increasing prominence to the question concerning the effect of treaties in the Chinese municipal legal order.

Let us assume that a dispute arises from a transaction governed by a provisions of a treaty to which China is a party. In order for the treaty to apply to the settlement of this dispute before a Chinese court, at least the following questions must be answered: Is the treaty valid within the Chinese municipal legal order? If so, is the treaty provision in question applicable in legal proceedings without requiring any further qualifications? Under what conditions is the application of the treaty justified in the Chinese municipal legal order? What is the status of the treaty if confronted with a conflicting municipal norm governing the same transaction? Last but not least, how is the treaty interpreted by the appropriate Chinese judicial authorities?

Except for the general principle according to which a state must fulfill in good faith its obligations under a treaty to which it is a party, international law is not concerned with the way in which the treaty is implemented in the municipal legal order of that state. As long as a state does not invoke its municipal law "as justification for its failure to perform a treaty",[2] the issue of how effect is given to the treaty in the municipal legal order belongs essentially to the province of municipal law, and is determined mainly by its perception of the desirability of seeking protection from the rules of international law or, reversely, of the desirability of relying on its municipal law.[3] While the issue in question remains topical in many other countries,[4] little, if

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[1] For multilateral treaties to which China is a party, see the table covering the period between 1977 and 1986, in HUNGDAH CHIU, 'Chinese Attitude toward International Law in the Post-Mao Era, 1978-1987', 21 *International Lawyer* (1987), at 1154-1158. *Zhonggou Waijiao Gailan* [Annual Review of China's Foreign Affairs] 1987-, ed. by the PRC Ministry of Foreign Affairs (World Knowledge Press, Beijing) provides a chronological table of both bilateral and multilateral treaties to which China is a party.

[2] Article 27 of the Vienna Convention on the Law of Treaties.

[3] KO SWAN SIK, 'International Law in the Municipal Legal Order of Asian States: Virgin Land', in R.ST.J. MACDONALD (ed.), *Essays in Honor of Wang Tieya* (Dordrecht: Martinus Nijhoff Publishers, 1994) at 738.

[4] A recent example is the symposium organized by the United Kingdom National Committee of Comparative Law. See FRANCIS G. JACOBS and SHELLEY ROBERTS (eds.), *The Effect of Treaties in Domestic Law* (London: Sweet & Maxwell, 1987). See also BENEDETTO CONFORTI, *International Law and the Role of Domestic Legal Systems* (Dordrecht: Martinus Nijhoff Publishers, 1993).

any, has been written about the Chinese practice.[5] The present study attempts to make an inquiry into the effect of treaties in the Chinese municipal legal order. Since the effect of treaties in the Chinese municipal legal order is determined by China's general attitude towards the relationship between international law and municipal law, the present inquiry may, hopefully, also shed some light on this broader question.

2. THE SCOPE OF THE TERM TREATY AND THE TREATY-MAKING PROCEDURE

2.1. 'Treaties'

In international law, the term 'treaty' is generally used to cover all binding agreements between subjects of international law that are governed by international law.[6] Within the context of the Chinese municipal law, however, the term 'treaty' carries a special meaning. Article 67 of the Constitution of the People's Republic of China ('the Constitution') provides, *inter alia,* that the Standing Committee of the National People's Congress ('the NPC') "decide[s] on the ratification or abrogation of *treaties and important agreements* con-

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[5] HUNGDAH CHIU, *supra* n.1, at 1147. As Professor CHIU observes, the question of the effect of treaties in China's domestic system was usually ignored. Discussions on this subject are always conducted within the context of the general topic of the relationship between international law and municipal law. For the Chinese literature, see ZHOU GENGSHENG, *Guoji Fa* [International Law], (Beijing: Shangwu Chuban She, 1976) at 16-21; WANG TIEYA and WEI MIN (eds.), *Guoji Fa* [International Law], (Beijing: Falü Chuban She, 1981), at 42-47. The contemporary literature dealing with the PRC practice in this regard mainly focuses on the pre-1970 period. It includes HUNGDAH CHIU, *The People's Republic of China and the Law of Treaties* (1972); JEROME A. COHEN and HUNGDAH CHIU, *People's China and International Law: A Documentary Study* (1974); LUKE T. LEE, *China and International Agreements* (1969); JAMES CHIEH HSIUNG, *Law and Policy in China's Foreign Relations: A Study of Attitudes and Practice* (1972). The issue has been addressed more recently by two of China's most prominent scholars: LI HAOPEI, *Tiaoyue Fa Gailun* [The Law of Treaties] (Beijing: Falü Chuban She, 1987) at 379-404; WANG TIEYA, 'International Law in China: Historical and Contemporary Perspectives', 221 *Collection of Courses* (of the Hague Academy of International Law) (1990-II) at 326-333. The 1993 issue of the *Chinese Yearbook of International Law* opens a special forum to discuss the question. A number of scholars including the present author have participated in the discussion.

[6] A.D. MCNAIR, *The Law of Treaties* (1938) at 3. The 1969 Vienna Convention on the Law of Treaties also uses the term 'treaty' in its general sense. It is defined by Article 1 of the Convention as "an international agreement concluded between States in written form and governed by international law [. . .]".

cluded with foreign states". (emphasis added)[7] Similar wording is employed in Article 89 of the Constitution, which prescribes that the State Council "conclude[s] *treaties and agreements* with foreign States". (emphasis added) Chinese doctrine generally accepts that the two distinct terms '*treaties*' and '*agreements*' are used purposely, each covering a different category of treaties.

This opinion finds support in the preparatory process which led to the enacting of the Procedure Law for the Conclusion of Treaties ('the PLCT').[8] Its draft-Article 2 reads:

> "This statute applies to bilateral and multilateral treaties, conventions, agreements, protocols, and other documents which, by their nature, can be characterized as treaties".[9]

When this draft-article was submitted to the Standing Committee of the NPC for consideration, some legal experts advised this legislative body that the Constitution distinguishes between '*treaties*' and '*agreements*' and that the proposed statute should remain consistent with the Constitution in this regard.[10] The text was therefore revised and Article 2 of the law finally reads as follows:

> "This statute applies to bilateral and multilateral *treaties and agreements* which the People's Republic of China has concluded with foreign states and all other documents which, by their nature, can be characterized as *treaties and agreements*" (emphasis added).[11]

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[7] The present Constitution of the People's Republic of China is China's fourth constitution, and was adopted and came into force in 1982. For English text, see *The Constitution of the People's Republic of China* (Beijing: Foreign Languages Press, 1983), also in: *The Laws of the People's Republic of China 1979-1982* (Foreign Languages Press, 1987). The PRC National People's Congress (NPC) is China's supreme national legislative organ, with a Standing Committee exercising its power when the Congress is not in session. The PRC State Council is the highest organ of state administration.

[8] The statute was adopted at the 17th session of the Standing Committee of the 7th National People's Congress on December 28, 1990 and came into effect on the same day. For a Chinese text, see Guowuyuan Fazhi Ju [Bureau of Legislative Affairs of the State Council], *Zhonghua Remin Gonghe Guo Xin Fagui Huibian* [Collection of the New Laws and Regulations of the People's Republic of China], Vol. 4 (Beijing: Xin Hua Chuban She, 1990) at 30-36.

[9] *Renmin Ribao* [People's Daily], 21 December, 1990.

[10] Ibid.

[11] English translation by the present author.

Neither the Constitution nor the PLCT, however, specifies the category of treaties which each term is supposed to cover. In this regard, Chinese doctrine is of the opinion that the term '*treaties*' is used in the Constitution in its narrow meaning, referring only to international agreements designated as '*treaty*.' Agreements made under appellations other than '*treaty*' are accordingly classified as '*agreements*'.[12] The distinction would thus mainly serve to assign a sense of solemnity and importance to '*treaty*,' as an instrument so designated is habitually used for more formal and important purposes.[13] Be that as it may, the particular appellation of an international instrument does not in itself affect the binding character of that instrument under international law. A '*treaty*' is thus no more binding than an '*agreement*' simply because the former is regarded more formal and important than the latter. On the other hand, however, the distinction bears significance in that a '*treaty*' is accorded with a higher rank than an '*agreement*' in the hierarchy of norms in the Chinese municipal legal order.[14] In the present inquiry, unless otherwise indicated, the term 'treaty' will be used in its general meaning, covering all international agreements whatever their form or descriptive name used, to which China is a party.

Under Article 2 of the PLCT, any international instrument that by its very nature can be characterized as creating, altering, or terminating rights and obligations governed by international law falls into the scope of treaties, regardless of its appellation or modality.[15] Article 16 of the PLCT requires

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[12] WANG TIEYA, *Guoji Fa De Jige Wenti* [On Certain Issues of International Law], in DENG ZHENGLAI (ed.), *Wang Tieya Wen Xuan* [Selected Essays of Wang Tieya] (Beijing: Zhongguo Zhengfa Daxue Chuban She, 1993) at 237, 494. In practice, however, the distinction is not strictly followed. Art. 142 of the General Principles of Civil Law adopted by the National People's Congress in 1986, for example, provides: "If any international *treaty* (emphasis added) concluded or acceded to by the People's Republic of China contains provisions different from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones to which the People's Republic of China has announced reservations". Here, noticeably, the term 'treaty' must be understood in its broad sense which covers all international legal instruments to which China is a party regardless of their designation. A similar inconsistency can be found in the 1991 PRC Income Tax Law on Foreign Investment Enterprises and Foreign Enterprises, the 1991 PRC Civil Procedure Law, etc.

[13] See MCNAIR, op.cit. *supra* n. 6.

[14] This is true except for 'important agreements' defined by the PLCT. As will be discussed later, an 'important agreement' enjoys the same ranking as a 'treaty' in the hierarchy of norms of the Chinese municipal legal order.

[15] Whether such scope of coverage includes oral agreements is subject to subsequent clarification. The statute seems to rule out oral agreements by describing treaties as 'documents'. However, international transactions are not short of treaties which were concluded in oral form. A glaring example is the 'Ihlen Declaration', which was found binding on Norway by the Permanent Court

that all treaties to which China is a party should be compiled by the Ministry of Foreign Affairs into the PRC Treaty Series. To the extent that the PRC Treaty Series serves as the official collection of treaties in China, any instrument included in the Series can therefore be regarded as a treaty from the perspective of China.[16]

2.2. Treaty-Making Power and Procedure

China adheres to a unitary state system, in which the power to conclude treaties with foreign states rests exclusively with the central organs of the state, namely the NPC (as occasion requires) and its Standing Committee, the State Council, and the President. The treaty-making power is part of their respective competences in the field of legislation, administration, and representation as set out by the Constitution.[17] Accordingly, local governments in China

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of International Justice in the Legal Status of Eastern Greenland case (1933 PCIJ, Ser. A/B, No. 53, at 22). LI HAOPEI, *supra* n. 5, at 14-18.

[16] A glance at the PRC Treaty Series reveals that China's treaties include conventions, agreements, protocols, exchanges of notes, exchanges of correspondence, agreed minutes, minutes of talks, memorandum of understanding, measures for implementation, joint declarations, joint communiques, joint announcements, regulations, and even contracts and general conditions. In addition, charters, covenants, acts, arrangements, parallel unilateral statements and *modus vivendi* are also used as forms of treaties. As of 1990, 19 volumes of the PRC Treaty Series have been published, which cover a period from 1949 to 1983 and include a total of 2,337 international treaties to which China is a party. Of these 2,337 treaties, 2,295 are bilateral, which have involved 127 States and 42 multilateral treaties. WANG TIEYA, *supra* n. 5, at 317-318. For more recent information, see *supra* n. 1.

[17] The NPC is the highest organ of state power in China. Its permanent body is the NPC Standing Committee. Both the NPC and its Standing Committee exercise the legislative power of the state. The NPC is empowered to amend the Constitution and to enact basic statutes concerning criminal, civil, administrative and other matters. Its Standing Committee has the power to enact and amend statutes except those falling under the competence of the NPC, or to enact, when the NPC is not in session, partial supplements and amendments to statutes enacted by the NPC, provided that they do not contravene the basic principles of these statutes.

Although the Constitution does not expressly authorize the NPC to decide on the ratification of treaties, such power can be inferred from Art. 62 of the Constitution, under which the NPC is empowered to "exercise such other functions and powers as the highest organ of state power should exercise". A recent example is the NPC's decision on the ratification of the 1984 Sino-British Joint Declaration on the Question of Hong Kong.

The State Council is the executive body of the highest organ of state power; it is the highest organ of state administration. It has the power to adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the constitution and statutes.

The PRC President is responsible for having statutes and statutelike decisions of the NPC and its Standing Committee promulgated.

generally do not possess treaty-making capacity.[18] As provided for by the Constitution and the PLCT, the treaty-making power in China is exercised by the above-mentioned state organs through acts including ratification, approval, and signature.[19]

In state practice, a treaty on matters of importance often requires ratification by the states concerned as the formal means of expressing their consent to be bound on the international plane.[20] Ratification usually involves two distinct but related acts.

First, within the domestic context ratification signifies the procedure whereby the state puts itself in a position, as provided by its constitution, to decide whether it will accept the treaty.[21] In China, as required by Articles 62 and 67 of the Constitution and Article 7 of the PLCT, '*treaties and important agreements*', after being signed, must be submitted by the State Council to the Standing Committee of the NPC or the NPC itself (as occasion requires)[22] for its decision on ratification. According to Article 7 of the PLCT, '*treaties and important agreements*' include:

1. Political treaties, such as treaties of amity and cooperation, treaties of peace, etc.;
2. Treaties and agreements concerning territories and delimitation of boundaries;
3. Treaties and agreements concerning extradition and judicial assistance;
4. Treaties and agreements of which the provisions contravene the laws of the People' s Republic of China;

Under Arts. 62, 67, 89, and 81 of the Constitution, the treaty-making power fits into the various scopes of the legislative competence of these central state authorities.

[18] On 1 July, 1997, China will resume its sovereignty over Hong Kong, and from that date Hong Kong will become a special administrative region of China (HKSAR). Under the Basic Law of the Hong Kong Special Administrative Region adopted by the NPC, the HKSAR will be accorded the power to conclude certain types of treaties with foreign states and international organizations. However, this power is by no means an independent one under international law. It is rather the power delegated to the HKSAR by the NPC and guaranteed by the Sino-British Joint Declaration on the Question of Hong Kong. Moreover, the power will be exercised only within limited areas. For the Sino-British Joint Declaration, see 23 ILM (1984) 1366-1387.

[19] Under Article 4 of the PLCT, the procedures for the conclusion of treaties depending on whether the treaty is concluded in the name of the PRC, the PRC government (the State Council), or a PRC government department.

[20] Although the signature as such is not without legal effect under general international law. See Art. 18 of the 1969 Vienna Convention on the Law of Treaties.

[21] Professor BROWNLIE describes this as ratification in the constitutional sense. IAN BROWNLIE, *Principles of Public International Law*, 4th ed., (Oxford: Clarendon Press, 1990) at 607.

[22] The 1984 Sino-British Joint Declaration on the Question of Hong Kong was ratified by the NPC.

5. Treaties and agreements which must be ratified under the agreement of the contracting parties;
6. Other treaties and agreements which require ratification.[23]

It is submitted that the decision taken by the Standing Committee of the NPC on the ratification of '*treaties and important agreements*' does not in itself constitute ratification on the international plane *stricto sensu* but, instead, the mere approval of their eventual ratification.[24]

Such ratification in the constitutional sense must be distinguished from the ratification as "the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty."[25] It is the ratification in this latter sense which binds the state to the treaty in question in terms of international law. Ratification as such is an act usually executed by the head of state. In this regard, Art. 81 of the Constitution prescribes that the President, pursuant to the decision of the Standing Committee of the NPC, ratifies '*treaties and important agreements*.' The article thus provides the President with the constitutional authority to ratify treaties on behalf of China, and upon such ratification a treaty will become binding on China as a matter of international law.[26] Usually, ratification executed by the President is promulgated in the official Chinese newspaper and communicated to the other party(ies) through exchange of the Instrument of Ratification, which is, on the Chinese side, signed by the President and co-signed by the Foreign Minister.[27]

The need of ratification in order to bring '*treaties and important agreements*' into effect rests on the assumption, so far as China is concerned, that since the vital national interests of China are involved in these treaties, the requirement of ratification gives the Chinese government an opportunity to reexamine and review the instrument signed by its delegates before committing itself to the obligations specified therein. The period between signature and ratification enables China to further reflect on the merits involved in the

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[23] Translation by the author.

[24] BROWNLIE, op.cit. *supra* n. 21.

[25] Art. 2(1)(b) of the Vienna Convention of the Law of Treaties. See also WANG TIEYA, *supra* n. 10, at 236, 494. The decision made by the municipal legislature on the ratification of a treaty is not required by international law. Some countries, such as the United Kingdom and Canada, do not even require parliamentary ratification for most treaties. Thus, under international law, a treaty, even if 'ratified' by the municipal legislature, has no legal validity pending the ratification by the head of the state. LI HAOPEI, *supra* n. 5, at 74.

[26] WANG, *supra* n. 5, at 328.

[27] In the case of multilateral treaties, the Instrument of Ratification will be delivered to the depository state or international organization.

proposed instrument so that it can make its final decision with the highest measure of circumspection. The more careful the preparation of the treaty and the more deliberate the decision to accept it, the more likely is the treaty to be founded upon the interests of the parties and to be observed by them.[28]

In fact '*treaties and important agreements*' amount only to a small part of the treaties concluded by China. The majority deal with matters concerning everyday business of various government departments. These treaties are usually of a technical nature and, consequently, do not necessitate a decision of the Standing Committee of the NPC on their ratification. In order to facilitate the conclusion of this type of treaties, the required approval is devised as a simple procedure. Article 89 of the Constitution prescribes that the State Council is empowered to enter into '*treaties and agreements*' with foreign states. According to Article 8 of the PLCT, this power has been designed partly for giving approval to treaties falling short of '*treaties and important agreements*'[29], either pursuant to a decision of the State Council or as required by the agreement itself. The approval given by the State Council is communicated to the other contracting party(ies) through the exchange of the Letters of Approval. This letter is signed on the Chinese side by the Premier of the State Council or the Foreign Minister.[30]

China may participate in a multilateral treaty which it has not signed as an original party, through accession. Where the treaty belongs to the category of '*treaties and important agreements*', a procedure similar to ratification is required. By the same token, if the treaty in question is characterized as an '*agreement*', the approval of the State Council on the accession constitutes the final confirmation of China's consent to be bound.[31] In case of a multilateral treaty which contains a clause of acceptance, the State Council decides on its acceptance.[32]

Article 9 of the PLCT refers to another category of treaties, which come into effect by the mere signature *per se* by duly authorized delegates. Such a 'fast-track' treaty-making procedure is necessary due to the demand for an

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[28] LI HAOPEI, *supra* n. 5, at 76-77.

[29] According to Art. 3 PLCT, the treaty-making power of the State Council manifests itself in conducting negotiations toward a treaty, signing a treaty, and administering all other matters related to its conclusion.

[30] The Ministry of Foreign Affairs is responsible for the exchange of letters of approval or sending the letter of approval to the depository state or international organization as the case may be. Unlike the exchange of a Letter of Ratification, approval of a treaty can also be notified to the other party by a diplomatic note or through mutual notifications.

[31] Article 11 of the PLCT.

[32] Article 12 of the PLCT.

efficient and effective handling in view of the rapid increase of such treaties which are made to deal with matters of detail concerning, e.g., international trade, payments, and exchange rates; rail, air, and maritime transportation; technology assistance and cooperation; cooperation on medical and health matters; arrangements concerning telecommunication, postal, and broadcasting services; agricultural cooperation; and exchange of students and technical trainees.[33] Apparently neither ratification nor approval can satisfy this purpose. Under Article 9 PLCT, this type of treaties only need to be registered with the Ministry of Foreign Affairs if concluded in the name of a government department and, else, to be filed with the State Council.

Unlike Western-modeled democracies, the treaty-making procedure in China is characterized by so-called democratic centralism. This means that the NPC or its Standing Committee decides on ratification or, in the case of the State Council, on approval of a treaty on the basis of broad consultation with, and solicitation of opinions from, all sides concerned. Only after such consultation will the central authorities make their decision. This procedure implies that, between the negotiation of the treaty and its submission for ratification or approval, consensus must be reached among the government departments and institutions concerned, in order to ensure that the proposed instrument is compatible with the requirements of the Chinese municipal law. Hence, the embarrassing situation in which the central authorities refuse to ratify or approve a treaty, has never occurred in China. So far as the presidential powers are concerned, these must be exercised only pursuant to the decisions of the NPC or its Standing Committee. Therefore, once the NPC or its Standing Committee decides to ratify a treaty, the President is obliged under the Constitution to execute that decision. To act otherwise would certainly violate the Constitution, which can not conceivably happen in the present political system of China.

3. EFFECT OF TREATIES IN THE CHINESE MUNICIPAL LEGAL ORDER

The implementation of a treaty in the Chinese municipal legal system presupposes that the said treaty is internationally valid in the view of the Chinese

[33] LI HAOPEI, *supra* n. 5, at 86.

municipal law.[34] Next, the said treaty must be accepted into the Chinese municipal legal order, that is to say, it must be accorded the same legal validity as Chinese municipal law. In the preceding inquiry we have discussed the question of how a treaty attains its validity under international law as prescribed by the Constitution and the PLCT. The following discussion will be focused on the second question, namely on what conditions a treaty is accorded municipal validity in order to qualify for application in the Chinese municipal legal order.

3.1. Municipal Validity of Treaties

In state practice, treaties which have come into force on the international plane, acquire municipal validity mainly through the following two approaches.[35] The first approach may be characterized as 'transformation', under which an internationally valid treaty has, of itself, no municipal validity, and, in order to bring about that effect, must be transformed into municipal law through legislative acts. The second approach may be described as 'adoption', whereby a treaty, after acquiring international validity as prescribed by the municipal law, will be made part of the municipal legal order without the necessity of 'transformation'. Whatever approach a state takes for granting municipal validity to a treaty, it is usually the constitutional law of the state concerned which governs the matter in question.

In China the constitution is conspicuously silent on this question. Nor have there been other legislative acts to address this matter. Nevertheless, Chinese scholars generally maintain that the Chinese system takes 'adoption' as the method for bringing about municipal validity of treaties which have come into effect upon China. A standard Chinese textbook on basic legal theory typically reflects such opinion. It states:

> "International treaties are various kinds of agreements which two or more states form to regulate their rights and obligations concerning political,

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[34] Non-fulfillment of the constitutional requirements as to the international validity of a treaty, it should be noted, does not necessarily lead to the international invalidity of the treaty. Art. 46 (1) of the Vienna Convention states: "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance".

[35] JACOBS and ROBERTS, *supra* n. 4, at xxiv-xxvi.

> economic, legal, scientific and technological, cultural, and military affairs. International treaties which China concludes or accedes to acquire their legal effect upon ratification by the highest organs of state power of China, and thus become a form of law binding upon China's state organs, social organizations, enterprises and institutions, and individual citizens as well."[36]

Accordingly, it is the prevailing Chinese view that a treaty, after entering into force in accordance with the Constitution and the PLCT, will become part of the Chinese municipal legal order without the need of transforming it into a municipal statute.[37] This is confirmed by many statutes enacted by the Chinese legislature. A typical example is Article 238 of the Civil Procedure Law, which provides:

> "If an international treaty that the People's Republic of China has concluded or acceded to contains provisions that are inconsistent with this law, the provisions of the international treaty shall prevail, except for those provisions to which the People's Republic of China has declared its reservations".[38]

Accordingly, no transformation of a treaty is required as a condition for its applicability in legal proceedings in China. Although Article 238 itself can not be said to grant municipal validity to a treaty, the authorization for direct application of treaty law presupposes such validity. Given the silence of the Constitution, Article 238 of the Civil Procedure Law and similar provisions of other statutes must have been based on a generally established assumption or state policy that a treaty, after entering into force for China, automatically becomes part of the Chinese municipal legal order.

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[36] WANG TIANMU (ed.), *Faxue Jichu Lilun Jiaocheng* [A Textbook on the Basic Theories of Law] (Beijing: Falü Chuban She, 1986) at 221. Translation by the present author.

[37] According to WANG TIEYA, when the present Constitution was being drafted in the early 1980s, the question of the effect of treaties in China's municipal law seemed to have been deliberated. Considering that the then Chinese practice had not yet sufficiently matured to be embodied in an express provision, the authorities decided that the Constitution should be silent on this question. WANG, *supra* n. 12, at 230. This may partly explain the silence of the Constitution on the matter. But it was taken for granted that all treaties to which China is a party have the effect of law in China's municipal legal system. For instance, PERRY KELLER noticed in his interview with officials of the PRC Ministry of Foreign Affairs that it is China's policy that treaties have legal effect in China's municipal law upon their ratification. PERRY KELLER, 'Freedom of the Press in Hong Kong', 27 *Texas International Law Journal* (1992) at 392.

[38] English translation of Article 238 cited from 5 *China Law and Practice*, 17 June, 1991, at 56. The PRC Civil Procedure Law entered into force on 9 April 1991, and replaced the 1982 Civil Procedure Law (for Trial Implementation). For the official text of the present law, see *Zhonghua Renmin Gongheguo Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongbao* [Gazette of the Standing Committee of the PRC National People's Congress] 1991 No. 3, at 41.

China's diplomatic practice in recent years also attests to the correctness of this observation. On 14 November 1991, the Chinese delegate to the Third Committee of the General Assembly of the United Nations presented an official statement about China's attitude towards the prohibition of torture and other inhuman and cruel treatment of prisoners. The Chinese delegate put on record that China, as a party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, would fulfill in good faith its legal obligations under the Convention, and, within the scope of its obligations, exercise jurisdiction over any offence specified by the Convention, whether or not committed in China. In regard to the question concerning the validity of the Convention in the Chinese municipal legal order, the statement made it clear that, according to Chinese law, as soon as a treaty is ratified or acceded to by the Chinese government, and comes into force for China, the Chinese government will fulfill its obligations arising therefrom without the necessity of transforming that treaty into municipal law. In other words, the Convention had acquired validity in the Chinese municipal legal order upon its ratification by China.[39]

This official statement is most significant, it is submitted, not only because it reaffirmed the determination of the Chinese government to fulfill its international legal obligations under the Convention, but also because, in doing so, it made known to the international community China's position as to how treaties acquire municipal validity in China. As such the statement may be seen as the most authentic and reliable evidence of the Chinese position.

As will be discussed later, under the present Chinese system a treaty rule enjoys an exclusive trumping effect over conflicting municipal law rules. The adherence to the adoption doctrine may introduce an element of danger of altering conflicting municipal law rules by way of a treaty without the consent of the Chinese legislative authorities. This concern is particularly warranted as the majority of treaties are concluded by means of the simplified treaty-making procedure, which do not involve the participation of the Standing Committee of the NPC. In order to prevent the municipal law from being unduly interfered by international treaties, many states where the adoption method is employed in conferring municipal validity to treaty law have devised a certain measure of legislative control over the treaty-making power. So has China. Article 7(5) of the PLCT provides that a treaty which contravenes the laws of

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[39] UN doc. A/C.3/46/SR.41 para.12. Thus, any act which can be characterized as torture, and cruel, inhuman, or degrading treatment or punishment against prisoners as specified by this convention has been and will be strictly prohibited. *Renmin Ribao* [People's Daily, overseas edition], 16 November 1991, at 4.

China shall be submitted to the Standing Committee of the NPC for its decision on ratification. Therefore, it is on the basis of a decision of the Standing Committee of the NPC that the provisions of a treaty can prevail over conflicting municipal rules.

3.2. Direct Application of Treaties

For the purpose of this inquiry, the term 'direct application' of treaties means that rules of internationally valid treaties are directly applied within the scope of the competence of the Chinese courts and other appropriate authorities, or to use the Chinese legal parlance, "the specialized law-applying authorities", in the same manner as municipal law rules. In this sense, a directly applicable treaty rule is one which can be invoked in Chinese legal proceedings as the source of rights and obligations asserted by parties concerned.[40]

The question of direct application of treaties in the Chinese municipal legal order should be distinguished from that of municipal validity which internationally valid treaties acquire. While the direct application of a treaty presupposes the municipal validity of that treaty, it does not follow that all treaties which have acquired municipal validity are directly applicable. This is because, first, treaties vary in their subject matters, and it is hardly conceivable that all treaties to which China is a party address subject matters which fall within the scope of the competence of the appropriate Chinese authorities as set out by the Constitution; second, not all treaties have the mandatory quality required for their direct application in the Chinese municipal order. Accordingly, where internationally valid treaties forms part of the municipal legal system without transformation, it is necessary to distinguish between directly applicable and indirectly applicable treaties.[41]

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[40] JACOBS and ROBERTS, *supra* n. 4, at xxvii. Also JACKSON is of the opinion that the term 'direct application' expresses the notion that an international treaty has a direct statute-like role in the domestic legal system. Thus, the term should not limited only to the situations where private parties can file a law suit on the basis of the treaty provisions, but will also cover the situations where government can use the treaty provisions as part of domestic law. J.H. JACKSON, 'Status of treaties in domestic legal systems', 86 AJIL (1992), at 310 and 321. Often 'direct application' is mixed up with the term 'self-executing', and in many cases they address similar issues. However, this author is of the opinion that 'direct application' is more appropriate in addressing the issue of applying treaties in the municipal order.

[41] LI HAOPEI, *supra* n. 5, at 392.

The concept of the direct application of treaties was first developed in the United States in *Foster and Elam* v. *Neilson* in 1829.[42] The California Supreme Court's decision in *Fujii* v. *California* (1952)[43] that the provisions of the Charter of the United Nations on human rights are not 'self-executing' in the legal system of the United States has further exerted impact on the development of this concept elsewhere. Today states have generally accepted the distinction between the two categories of treaties in the municipal legal system.[44] There is, however, no uniform criterion as to where the line should be drawn between directly applicable treaties and non-directly applicable ones. Opinions among scholars on this matter vary. An inconclusive survey suggests that the following four types of treaties may be viewed as non-directly applicable in the practice of various states: political treaties which may not give 'cause of action' within the municipal legal sphere; treaties which expressly require further legislative acts of the contracting parties for their implementation; treaties which address matters lying within the exclusive law-making power of the legislative authorities of the state; treaties which merely impose obligations in principled terms on the contracting parties without mandatory quality for the purpose of application in concrete cases.[45] These four criteria may serve as useful measures in evaluating the practice of states.

The present discussion attempts to focus on some distinctive features which Chinese practice has so far revealed in regard to the direct application of international treaties in the Chinese municipal legal system. Again, the Constitution is silent on the matter, there are no legislative acts addressing the issue, nor are there instructive Chinese court decisions on the subject.[46] On

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[42] 27 US(2 Pet)253, 7 L.Ed. 415. The American jargon for directly applicable treaties is 'self-executing treaties'. See *Restatement of the Foreign Relations Law of the United States (Third)* (American Law Institute, 1987) § 111; LOUIS HENKIN et al., *International Law Cases and Materials*, 3rd Ed. (St. Paul: West Publishing Co., 1993) at 212-221.

[43] 38 Cal.2d at 724, 242 P.2d at 621-22.

[44] While American practice has exerted great impact on other countries, it has also caused a great deal of confusion. On the one hand, the American Constitution recognizes that treaties are part of the "supreme law of the Land." On the other hand, however, the American system puts on constitutional restraints under which a treaty, even if it has the quality that the municipal law carries for the purpose of application by courts, can not take effect as domestic law without implementation by Congress if the treaty deals with matters which are within the exclusive law-making power of Congress under the American Constitution.

[45] Max Planck Institute for Comparative Public Law and International Law, *Encyclopedia of Public International Law* (New York: North-Holland, 1984) installment. 7, at 414-416.

[46] While cases involving direct application of treaties by Chinese courts are increasing in recent years, they hardly throw light on the matters in question. This is mainly because the Chinese courts usually do not give legal reasonings for their decisions.

the other hand, there are a number of statutes which contain provisions permitting the direct application of treaties in the Chinese municipal system. A typical example is Article 238 of the Civil Procedure Law, which has been discussed earlier in a different context. Other statutes containing similar provisions are:[47]

- Law on Economic Contracts Involving Foreign Interests (1985), Article 6;
- General Principles of Civil Law (1986), Article 142;
- Regulations for Diplomatic Privileges and Immunities (1986), Article 27;
- Law on National Border Health and Quarantine (1986), Article 24;
- Law on Postal Service (1986), Article 42;
- Law on the Control of Water Pollution (1988), Article 51;
- Law on the Protection of Wild Animals (1988), Article 40;
- Administrative Procedure Law (1989), Article 72;
- Law on Environmental Protection (1989), Article 46;
- Regulations for Consular Privileges and Immunities (1990), Article 27;
- Income Tax Law for Foreign Investment Enterprises and Foreign Enterprises (1991), Article 28;
- Law on the Quarantine for the Entry and Exit of Animals and Plants (1991), Article 47;
- Law on the Control of Taxation (1992), Article 59;
- Maritime Law (1992), Article 268;
- Regulations for the Implementation of International Copyright Treaties (1992), Article 19.

According to these laws, whenever their provisions are in conflict with those of a treaty to which China is a party, the Chinese authorities shall apply the provisions of the said treaty.[48]

Among the statutory provisions, Article 142 of the PRC General Principles of Civil Law is worth special attention. It reads:

> "If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall

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[47] All these statutes are contained in the annually published *Zhonghua Remin Gongheguo Falü Huibian* [Collection of the Laws of People's Republic of China] (Beijing, Falü Chuban She).

[48] The earliest statutes containing such provisions are the 1980 Sino-Foreign Equity Joint Venture Income Tax Law and the 1981 Foreign Enterprise Income Tax Law, which have been replaced by the 1991 Income Tax Law for Foreign Investment Enterprises and Foreign Enterprises.

> apply, unless the provisions are ones on which the People's Republic of China has announced reservations."[49]

As appears from its title, this statute was enacted to establish the basic framework of the Chinese civil law system. Consequently, the principles and rules prescribed in it are formulated in quite general terms and are to be followed by subsequent, more specific legislation.[50] Accordingly, to the extent that Article 142 provides that the provisions of a treaty shall prevail over conflicting rules of the *'civil laws'*, this article is to be interpreted as applying not only to the provisions of this particular statute but also to all subsequently enacted laws which, by their nature, fall into the *'civil laws'* branch of the Chinese municipal legal system.[51] The PRC Law on Adoption, for instance, does not contain a provision on the direct application of treaty law to adoption of children in China. But as the Law constitutes part of the *'civil laws'* of the Chinese municipal legal system, a treaty can be directly applied on the basis of Article 142 of the General Principles of Civil Law, if it is established that the Adaption Law contains provisions inconsistent with those of the treaty in question. It is thus with this omnipotent article that treaties to which China is a party can be directly applied throughout all property and personal relations between subjects of equal status" as provided by the PRC General Principles of Civil Law.[52]

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[49] English translation is cited from *The Laws of the People's Republic of China 1983-1986*, compiled by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China (Beijing: Foreign Languages Press, 1987) at 247.

[50] In China's law-making process for civil law matters, instead of developing a comprehensive civil code right away, the Chinese legislature first drew up a body of general principles and applied these general principles as guidance and basis for the subsequent development of more detailed branches of civil law.

[51] The official translation of the statute uses the term "civil laws" for *minshi falü* [law for civil affairs]. The plural form of the term strongly suggests the comprehensive coverage of this statute.

[52] Art. 2 of the PRC General Principles of Civil Law. A hypothetical case could be the adoption of children. Assuming that China concluded a treaty allowing private citizens of each contracting party to adopt children living in the territory of the other contracting party, and assuming that the provisions of this hypothetical treaty contain a regulation on the subject matter differing from the Chinese municipal law. Even if the municipal law on adoption would not specifically allow international treaties to prevail over the former's conflicting rules, a national of the other contracting party who would like to adopt a child in China would still be able to avail himself of the treaty regulation by arguing before the Chinese court that the treaty rules have priority on the basis of Article 142 of the General Principles.

According to the above statutory provisions on direct application of treaty law, this direct application is conditioned on a conflict or discrepancy between treaty provisions and those of municipal law. Thus, the underlying idea is the solution of that conflict. In other words, even if a treaty possesses the mandatory quality of direct application, the Chinese authorities do not have to apply it unless they find the municipal law regulating the same transaction inconsistent with the provisions of the treaty in question. Under such a conflict-solution-oriented system, the mechanism of the direct application of treaties in the Chinese municipal legal system leaves a fair amount of latitude to the municipal authorities for interpretation whether there is in fact a discrepancy between the treaty and the related municipal law. Only if they find such discrepancy as a result of their interpretation, will the question about the direct application of the said treaty arise. To this extent, it is submitted that, whether or not a treaty is directly applicable will depend on the interpretation of the treaty and the related municipal law.[53]

On the other hand, the evidence of discrepancy between the treaty provision and the municipal rule alone does not suffice to establish a basis for the direct application of the treaty. Besides, the treaty provision must have the mandatory quality for direct application, prescribing rights and obligations which can be directly applied within the scope of the competence of the municipal law-applying authorities. This raises the question of criteria for the determination of the direct applicability of a treaty. It is an essential question faced by every state in which treaties are given municipal law effect through adoption. Answers to this question are usually found in the practice of the law-applying authorities in general and in court decisions in particular.

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[53] For instance, Art. 21 para.(a) of the UN Convention on the Rights of the Child, to which China acceded in 1992, provides that a state shall "ensure that the adoption of a child is authorized only by competent authorities" of that state. Under the PRC Law for Adoption, however, the authorization by the competent authorities does not constitute the *sine qua non* for the establishment of the relationship of adoption in China. Under the present Chinese system of residence registration, the relationship of adoption can not be effectively established pending the registration of the adopted child into the adoptive family for residence by the competent authorities. The registration as such is regarded as the exercise of the authorization as required by the Convention. The *prima facie* conflict between the Law on Adoption and the relevant provisions of the Convention is thus solved through the interpretation of the former, and the Chinese authorities do not have to directly apply the provisions the Convention. See WANG LIYU, "Guoji Tiaoyue Zai Zhongguo Guonei Fa De Shiyong" [Application of international treaties in China's municipal law], *Zhongguo Guoji Fa Niankan* [Chinese Yearbook of International Law] 1993.

The present Chinese practice in this respect is, however, not quite revealing. In giving decisions involving the direct application of treaties, the Chinese courts rarely provide a legally reasoned explanation of why the treaty is applied as the governing law. No other manifestations of state practice either are available to throw light on the question. Be that as it may, scholars generally acknowledge the importance and necessity to identify such criteria.[54] In this author's view, to the extent that the direct application of a treaty in the Chinese municipal legal system is conditioned upon a conflict between the treaty rule and a relevant rule of municipal law, the logical test of the direct applicability of the treaty rule should be its mandatory quality as measured against that of the conflicting municipal law. In other words, direct applicable treaty rules within the Chinese municipal legal order should be those which are as precise and specific as those of the conflicting municipal law.

Under the present Chinese municipal legal system, certain aspects of a subject matter may be specifically placed directly under the authority of treaty law. Such referral to treaty law is contained in statutory law dealing with subject matters of a civil, administrative, or commercial nature. In case of a transaction relating to a matter which has been so yielded to the authority of a treaty, the latter is to be directly applied. Although the direct application of the treaty under these circumstances is not conditioned on a conflict between a treaty and relevant municipal law, the treaty still needs to have the mandatory quality for direct application. It is submitted that the criterion to be applied should be the same as in the cases mentioned earlier, that is the measuring of the mandatory quality against that of the rules of the municipal law that has referred the subject matter to treaty law.

A typical statutory rule authorizing the direct application of a treaty as the proper law governing a transaction is Article 9 of the PRC Trademark Law. This article provides:

> "Where a foreigner or foreign enterprise applies for trademark registration in China, the matter shall be handled in accordance with any agreement between the country to which the applicant belongs and the People's Republic of China or any international treaty to which both countries are parties, [. . .]"[55]

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[54] LI HAOPEI, *supra* n. 5, at 392.

[55] English translation is cited from *The Laws of the People's Republic of China 1979-1982*, compiled by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China (Beijing: Foreign Languages Press, 1987) at 306.

Thus, when such 'matter' as defined by this article arises, parties concerned can directly invoke relevant treaties to which China is a party as the source of the rules governing their trademark registration.

In 1985, China acceded to the Paris Convention for the Protection of Industrial Property. Under the Convention, persons (natural and legal) in each contracting party are entitled to the application of the relevant provisions of the Convention to the registration of their trademarks in other contracting parties. The State Council on 15 March 1985 issued the Interim Rules for Applying for Prior Registration of Trademarks in China.[56] The Rules prescribe that applications made by nationals of the member states of the Convention for the prior registration of trademarks in China should be dealt with according to Article 9 of the Trademark Law and Article 4 of the Paris Convention.[57]

Other areas where the same approach is followed for the direct application of treaties include inheritance involving foreign interests, immigration (the administration of foreign nationals entering and leaving China), international shipping, etc. For example, Article 35 of the Law on Succession prescribes that the inheritance of property involving foreign interests is governed by the law of the country of residence of the deceased in case of movable property and by the law of the country where the property is located in case of immovable assets. But if there is a treaty governing the matter, to which China is a party, the treaty is to be applied in any case.[58] According to the Law on the Administration of Foreign Nationals Entering and Leaving China, matters concerning the entry into and exit from China by the nationals of neighboring countries who live in the border areas are dealt with in conformity with the agreements concluded between China and the foreign countries concerned. Similarly, Article 12 of the Rules for the Control of International Maritime Container Transport issued by the State Council requires that the use of containers for international maritime transport conforms with the relevant international treaties governing the subject matter.

Today, judicial assistance is becoming another prominent area within the Chinese municipal legal order for the direct application of treaties. In this regard, Articles 262, 268, and 269 of the Civil Procedure Law provide, respectively:

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[56] For the text of the Interim Rules, see THOMAS C. W. CHIU, *P.R.C. Laws for China Traders and Investors* (2nd ed) at 644.

[57] There also exist a number of bilateral agreements between China and other countries concerning trademark registration. Ibid, at 663-91.

[58] The direct application of a treaty is not occasioned by the possible or consequent discrepancy between the municipal provisions and the treaty. Even if there is no such discrepancy, the treaty is still the governing law.

[Art.262] "Pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity, People's Courts and foreign courts may request mutual assistance in the service of legal documents, investigation, taking of evidence, and other acts in connection with litigation, on other's behalf."

[Art.268] "Having received an application or a request for recognition and execution of a legally effective judgment or ruling of a foreign court, a People's Court shall review such judgment or ruling pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity [. . .]."

[Art.269] "If an award made by a foreign arbitration organ must be recognized and executed by a People's Court of the People's Republic of China, the party concerned shall directly apply to the Intermediate People's Court of the place where the party subject to execution is domiciled or where his property is located. The People's Court shall handle the matter pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity."[59]

According to these articles, parties concerned can refer to the relevant treaty provisions as a direct basis for their requests for and provision of judicial assistance.[60]

China has acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters,[61] and has also concluded a number of bilateral treaties

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[59] English translation is cited from 5 *China Law and Practice*, 17 June 1991, at 59-60.

[60] Some of these treaties which are regarded as not conferring rights on individual parties may nevertheless be applied by the courts, and individual parties may claim the application of the treaty provisions in specific cases.

[61] China acceded on 2 December 1986 to the former Convention which came into effect for China on 22 April 1987; China acceded to the latter Convention on 22 March 1991, which came into force for China on 1 January 1992.

on judicial assistance.[62] Some of these treaties confer a right upon private subjects to request judicial assistance in the courts of the contracting parties. Under Article 4 of the New York Convention, for instance, a person (natural and legal) from a state party to the Convention is entitled to request a court of another state party to recognize and enforce an award rendered by an arbitral tribunal of the former state. Similarly, under the 1987 Sino-French Agreement on Judicial Assistance in Civil and Commercial Matters, persons (natural and legal) of the contracting parties are entitled to proceed directly to seek the recognition and enforcement of a final judgment or arbitration award rendered by a court or arbitral tribunal of one party in the court of the other party.

In order to ensure the direct application of the above treaties by the Chinese courts, the Supreme People's Court has issued a number of judicial notices. The Notice on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards issued on 10 April 1987 and the Notice on the Implementation of Chinese-Foreign Agreements on Judicial Assistance issued on 1 February 1988, for instance, require the competent Chinese courts to conscientiously study the international treaties concerned and, when receiving applications or requests for judicial assistance, to handle the matter in question strictly in conformity with the provisions of these treaties concluded or acceded to by China.[63] On 13 May 1989, the People's Supreme Court issued another Notice, to clarify the scope of cases that the Chinese admiralty courts are competent to file for trial. According to this Notice, these cases include, *inter alia*, applications filed under the 1958 New York Convention and those for judicial assistance under the other agreements on judicial assistance concluded by China.[64]

In accordance with China's policy of opening to the outside world, the number of cases involving the direct application of treaties in the Chinese

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[62] The Treaties on judicial assistance have been concluded with Poland (1988), France (1988), Mongolia (1990), Romania (1993), Russia (1993), Byelorussia (1993), Ukraine (1994), Cuba (1994), and Spain (1994). Among these treaties, those with Poland, Mongolia, Romania, Russia, Byelorussia, Ukraine, and Cuba deal with both civil and criminal matters, whereas the other treaties deal with civil and commercial matters only. Moreover, a number of bilateral treaties on judicial assistance between China and other states have been signed or initialed.

[63] For the former notice, see, *Zhongguo Falü Nianjian* [Chinese Yearbook of Law] 1989 (Beijing, Falü Chuban She), at 548; the latter one was documented as Doc.(1988)Fa(ban) Fa No. 3. The People's Supreme Court is the highest judicial organ in China. One of its main tasks is to supervise the work of the subordinate courts by providing them with judicial guidance and interpretations through the form of notices.

[64] *Zhonghua Remin Gongheguo Falü Guifanxing Jieshi Jicheng* [Collection of Regulated Interpretations of the Laws of the PRC] (Changchun: Jilin Remin Chuban She, 1990) at 1041.

municipal legal order is steadily increasing. The Supreme People's Court has repeatedly stated in its annual reports to the NPC in recent years that cases involving foreign interests must be handled by the Chinese courts strictly in conformity with the treaties concluded or acceded to by China. The following case is an example of the direct application of the 1929 Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air by a Chinese court in dealing with damage arising out of theft during international air carriage.[65]

A Belgium-based diamond company filed a law suit against the Beijing-registered agent of a Chinese air carrier for compensation for stolen goods.[66] Under a contract for the sale of a certain amount of rough diamonds, the plaintiff had shipped the goods in question to the Shanghai-based buyer through an international air carrier. While in the care of the defendant prior to their delivery to the buyer, they were stolen by an employee of the defendant. Before the Chinese court, the parties agreed on the defendant's liability for the resulting damage. The dispute was over whether this liability was limited to the declared value of the stolen diamonds in light of Art. 22 of the 1929 Warsaw Convention or unlimited under Art. 25 of the 1955 Hague Protocol for the Amendment of the Warsaw Convention.[67] During the proceedings, each of the parties invoked either of the two international conventions. In the end, the Court ruled that the plaintiff had failed to show that the theft committed by the defendant's employee was an act within the scope of his employment. The Court thereby denied the plaintiff's claim that Art. 25 of the Hague Protocol be the governing law, and decided that Art. 22(2,d) of the Warsaw Convention was to be applied instead. As a result, the defendant was held liable and convicted to pay damages as assessed by the value declared by the plaintiff in the airway bill of lading.[68]

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[65] For an English summary of this case, see 6 *China Law & Practice* (1992) No. 8.

[66] The law suit was filed with the Beijing Municipal Intermediate People's Court which, according to the PRC Civil Procedure Law, is the court of first instance in foreign-related economic dispute cases.

[67] China acceded to the 1929 Warsaw Convention in 1958 and to the Hague Protocol in 1975. According to Article 22 of the Convention, an agent of a carrier is liable to pay damages of which the sum should not exceed that of the declared value. However, Article 25 of the Protocol provides that there shall be no limit to the liability for a carrier's employee or agent if the damage resulted from an act or omission taking place with intent to cause damage or recklessly, and with knowledge that damage would probably result, and if the employee was acting within the scope of his employment when committing the act or omission.

[68] As no party appealed, this decision of the court became definitive. The case does not reveal the reasons why the court applied the Convention.

The absence of enabling provisions does not, however, necessarily bar treaties from being directly applied. When dealing with the Chinese practice one should bear in mind that it is not until one and a half decade ago that all-out efforts to rebuild a modern legal system in China started to be made. At the time of enactment of new law the Chinese legislative authorities, due to lack of experience and pressure of time, often do not envisage the necessity of taking the issue of direct application of treaties into account. Yet the question has become increasingly prominent, mainly because of the rapid expansion of China's treaty relations in recent years, coupled with the rise of new circumstances. This is particularly the case in the field of criminal law. In recent years, there has been a sharp increase in China of offences involving international elements, such as drug trafficking, terrorism, smuggling illegal immigrants, etc. In order to enhance international cooperation in fighting these transboundary crimes, China has acceded to a number of multilateral treaties which require the parties to exercise jurisdiction in the municipal sphere over certain, specified, offences. Moreover, China has concluded a number of bilateral treaties on judicial assistance for criminal matters. Yet the PRC Criminal Law (Penal Code) and the Criminal Procedure Law lack provisions enabling the Chinese authorities to directly apply these treaties in the Chinese municipal sphere. Therefore, questions relating to the direct application of these treaties have to be addressed through policy guidance and supplementary legislative acts.[69]

For example, on 19 December 1985 ALIMURADOV SHAMIL GADJI OGLY, a Soviet co-pilot, hijacked an airliner in flight in Soviet air space and forced it to land in Heilongjiang province in China. The hijacker was arrested by the Chinese authorities. When instituting criminal charges against him the Inter-Mediate People's Court of Harbin was apparently confronted with the absence in the Chinese Criminal Law of relevant provisions on the crime of hijacking, as well as provisions authorizing the Court to directly apply the provisions of treaties to which China was a party. Under these circumstances, the Chinese court sought policy guidance from the Chinese government. It referred to China's accession to the three international conventions on the safety of civil aviation[70] and to the policy statement which the State Council had made upon China's accession in the form of a Notice. The Notice directed that in case a

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[69] The vague term 'policy guidance' is my own. It refers to anything short of formally enacted and promulgated legal rules, including internal rules formulated by competent authorities for their internal use in dealing with various practical matters. These internal rules form a phenomenal aspect of the present Chinese legal system.

[70] China acceded to the 1963 Tokyo Convention in 1978, and to the 1970 Hague Convention and 1971 Montreal Convention in 1980.

hijacked foreign airplane lands on Chinese territory, the case be duly handled according to the relevant provisions of the Conventions and in conformity with the Chinese municipal law.[71] Although lacking formal legislative character, this Notice was read in conjunction with Article 3(1) of the Criminal Law, which prescribes: "The present law shall apply to all crimes committed within the territory of the People's Republic of China." As a result the Intermediate People's Court of Harbin found itself competent to try the case. It thereby decided that the unlawful and violent seizure of the aircraft in question and its subsequent forced landing on Chinese territory constituted a criminal offence under the international conventions and the Chinese Criminal Law.[72] As a result of this finding, the court sentenced the Soviet defendant to eight-year imprisonment, which was later upheld by the Supreme People's Court.[73]

In order to effectively and efficiently handle such internationally defined offences, the Chinese government decided to take *ad hoc* supplementary legislative action enabling the Chinese authorities to directly apply treaties in criminal proceedings. Thus the Standing Committee of the NPC adopted a decision on 23 June 1987, declaring that China would, "within the scope of its treaty obligations, exercise criminal jurisdiction over the crimes prescribed by international treaties concluded or acceded to by the People's Republic of China."[74] Attached to this decision were the international treaties in question.[75] It is clear that this decision was meant to supplement the PRC Criminal Law and to provide a more formal legal basis for the Chinese authorities in establishing jurisdiction over the crimes prescribed by direct

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[71] MA SHOUREN (ed.), *Zhongguo Jinnian Shewai She Gang Ao Anjian* [Recent Cases Involving Foreign Elements, Hong Kong and Maccao] (Beijing: Zhongguo Chengshi Jingji Shehui Chuban She, 1990) at 28.

[72] Article 79 of the PRC Criminal Law provides: "A crime not specifically prescribed under the specific provisions of the present law may be confirmed a crime and sentence rendered in light of the most analogous article under the specific provisions of the present law; provided however, that the case shall be submitted to the Supreme People's Court for its approval".

[73] MA SHOUREN, *supra* n. 70, at 29.

[74] Article 67(3) of the Constitution empowers the Standing Committee to partially supplement as well as amend laws enacted by the National People's Congress when the latter is not in session.

[75] They are: the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation, the 1980 Convention on the Physical Protection of Nuclear Materials and the 1979 Convention against the Taking of Hostages. In view of the decision of the Standing Committee to ratify the 1988 Convention on Suppression of Unlawful Acts against the Safety of Maritime Navigation and the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, these two treaties should also be added to the list.

reference to treaty provisions. As explained by the Premier of the State Council, when requesting the Standing Committee of the NPC to adopt the above decision:

> "In order to combine systematically China's international obligations under this kind of treaties concluded or acceded to by our country with the provisions of China's municipal law and before adjustment is made to the provisions concerning the scope of our present criminal law, the State Council views it necessary to request the Standing Committee of the NPC to decide that the People's Republic of China will regard the crimes prescribed by the international treaties which it concludes or accedes to as crimes under its municipal law, and will exercise criminal jurisdiction over these crimes within the scope of its obligations."[76]

It is noteworthy that to this date, certain criminal offences such as terrorism and hijacking have not yet been included in the PRC Criminal Law. However, the above decision of the NPC Standing Committee enables the Chinese authorities to establish criminal jurisdiction by direct reference to the relevant treaty provisions, and to convict and sentence the offenders in conformity with the most analogous provisions of the Criminal Law.

It thus appears that, even though not all statutes have enabling provisions allowing the direct application of treaties, policy guidance from the government and supplementary legislative acts play an important role in filling the gap. In the absence of a supplementary legislative instrument the role of policy guidance becomes more prominent.

When China acceded to the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations there was no legislative act to incorporate these two treaties into the Chinese municipal legal system, let alone enabling provisions permitting the municipal authorities to directly apply the treaty provisions.[77] Several years later the Chinese courts were able to directly apply certain provisions of the two conventions by virtue of Article 188 of the 1982 Civil Procedure Law (for Trial Implementation)[78]. However, direct application by virtue of this article was confined to civil

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[76] *Remin Ribao* [People's Daily], 17 June 1987, translated by this author.

[77] China acceded to the Vienna Convention on Diplomatic Relations in 1975 and to the Vienna Convention on Consular Relations in 1979.

[78] Article 188 provided: "In the event of civil lawsuits brought against foreign nationals, foreign organizations or international organizations that enjoy judicial immunity, the People's Court shall deal with them according to the laws of the People's Republic of China and any international treaties concluded or acceded to by China". *The Laws of the People's Republic of China 1979-1982*, *supra* n. 55 at 291.

lawsuits filed against foreign nationals, foreign organizations, or international agencies enjoying judicial immunity. Other cases involving diplomatic or consular privileges and immunities as provided for in the two Conventions remained to be handled under the policy guidance of the Supreme People's Court.

In 1985, the High People's Court of Shanghai had to request instructions from the Supreme People's Court in regard to whether the counsellor of the Swiss Embassy to China could in his official capacity hire Chinese lawyers to represent citizens of Switzerland in civil litigations in China. The Supreme People's Court replied: "Upon our studies, we consider that, in the light of the relevant provisions of the Vienna Convention on Diplomatic Relations and those of the Vienna Convention on Consular Relations to which China has acceded, it is within the scope of its official function that the Swiss Embassy to China can, upon the request of Li Meiti and Li Aiwei, citizens of Switzerland, hire lawyers on their behalf."[79] Under this guidance of the Supreme People's Court, the High People's Court of Shanghai thereupon applied the relevant provisions of the two Conventions to this case.

The rapid growth and development of civil and economic transactions between Chinese and foreign parties since the early 1980s have apparently rendered practices like these out of date. A more normative and efficient way to deal with such cases was badly needed, calling for legislative acts which incorporate the provisions of the conventions into the Chinese municipal system so that the competent Chinese authorities could in each specific case refer to them without delay. Hence, the Standing Committee of the NPC decided to enact the PRC Regulations for Diplomatic Privileges and Immunities and the PRC Regulations for Consular Privileges and Immunities, in 1986 and 1990 respectively. These two statutes contain provisions identical with the provisions concerned in the Vienna Conventions in every aspect[80] and, besides, reflect the Chinese practice in implementing the two Conventions. They both provide, for instance, that persons enjoying diplomatic or consular privileges and immunities shall not intervene in China's internal affairs. Even where the two statutes do not contain provisions conflicting with the Vienna Conventions, they still expressly state that the provisions of treaties concluded or acceded to by China shall prevail if they are found to differ from

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[79] *Zhonghua Renmin Gongheguo Falü Guifanxing Jieshi Jicheng*, *supra* n. 64, at 1066.

[80] The two statutes, as indicated by their titles, only deal with a part of the two Vienna Conventions, namely, the diplomatic and consular privileges and immunities.

those of the two statutes.[81] These enabling provisions are intended to "clarify the relationship" between the two statutes and the relevant parts of the two Vienna Conventions.[82]

Given the conspicuous silence of the Constitution and the lack of a general legislative regulation, it follows that, under the present Chinese system, the question of direct application of treaties is addressed generally by enabling provisions in statutes dealing with various subject matters of Chinese municipal law. Viewed from a formal legal perspective, such statutes act as the threshold to the direct applicability of treaties. From a substantive perspective, directly applicable treaty rules are thus confined to those relating to relations, interests, or activities occuring within the municipal legal sphere and within the normal scope of competence of the Chinese judicial and administrative authorities, and consequently providing sufficient cause of action under municipal law.

Thus, on a statute-by-statute basis, direct application of treaty rules is predicated on the following factors: (1) the treaty regulates a subject matter of the municipal legal sphere and provides the municipal legal subjects with a cause of action; (2) a statute contains an enabling provision permitting the municipal authorities to directly apply the treaty rules or, or lacking such provision, the existence of policy guidance or supplementary legislative acts having the same effect; (3) this permission is based on either the existence of a discrepancy between the treaty and municipal rules, or on the yielding of the subject matter to the authority of treaty law; (4) the treaty rule possesses mandatory quality in determining justiciable rights and obligations, as measured against the conflicting municipal law rule or, as the case may be, the corresponding rule in the yielding municipal law.

The dependence on an enabling clause or, for that matter, policy guidance, eventually coupled with supplementary legislative acts, introduces delay and uncertainty. Treaty rules might not be directly applied, however directly applicable they may be in terms of their mandatory quality. This is particularly the case in regard to treaties on human rights.[83]

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[81] Noticeably, the Regulations for Consular Privileges and Immunities provides in Article 27(2): "Matters concerning consular privileges and immunities provided for differently in bilateral treaties or agreements which China has concluded with foreign countries shall be handled in accordance with such treaties and agreements".

[82] *Remin Ribao* [People's Daily], 28 August 1986.

[83] LI ZHAOJIE, 'Cultural Relativity and the Role of Domestic Courts in the Enforcement of International Human Rights: a Survey of the Practice and Problems in China', paper to be published in the Proceedings of the International Symposium on the Role of Domestic Courts in

From a strictly legal perspective, the direct applicability of a municipally valid treaty rule should be restricted only by the competence of the relevant municipal authorities as set out by the Constitution and legislative instruments on the one hand,[84] and by the mandatory quality of the said treaty rule on the other. This view, however, is as yet incompatible with the present state of development of the Chinese municipal legal system (particularly the conspicuous silence of the Constitution), the limited experience of the judicial and administrative authorities in applying treaties, and the stereotyped mindset which recognizes the desirability of the municipal application of international treaties only when foreign interests are involved.[85] Thus the Chinese system is not quite 'international-law-friendly' from a strictly legal point of view. What really matters in this regard, however, is that the approach employed to distinguish between directly applicable treaties and indirectly applicable ones should not constitute a denial of the legally binding force of international treaties. The Chinese method of giving effect to a treaty in the municipal legal order should not compromise the legal obligations assumed under the treaty; refusal to implement a treaty on the ground of its indirect applicability in the municipal sphere would give rise to state responsibility for the breach of international obligations. Thus, if a treaty can not be directly applied due to the lack of mandatory quality, absence of a statutory enabling provision, or absence of legislative supplementation and policy guidance, the Chinese state is internationally obliged to take legislative and administrative acts either to enact new legislation or to adjust existing laws in order to give effect to the treaty. Unless, of course, the existing municipal law is already fully adequate for the implementation of the non-directly applicable treaty. In these circum-

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Adjudication of International Human Rights (held in Italy under the auspices of the University of Siena, 21 to 22 June 1993).

[84] Article 12 of the PRC Administrative Procedure Law provides:
"The people's courts shall not accept and hear cases instituted by citizens, legal persons or other organizations with regard to the following matters:
1. acts of state relating to such matters as national defense and diplomatic affairs; [. . .]"
This article delineates the competence of the Chinese courts in adjudicating administrative matters. Thus, if a treaty to which China is a party deals with these matters, it does not fall within the competence of a Chinese court on direct application, no matter how precise its wording might be.

[85] The phrase 'foreign interest' is a jargon of Chinese jurisprudence, denoting foreign-related legal relations, in which either the parties to the transaction are foreign nationals or stateless persons or the subject matter of the transaction involves foreign interests, such as a contract executed in a foreign country, property belonging to foreign nationals or situated in a foreign country, etc. The provisions of the Civil Procedure Law, the General Principles of Civil Law and the Administrative Procedure Law which allow the application of treaties are all contained in a special chapter dealing with legal proceedings involving foreign elements.

stances, the adherence to the treaty obligations is embodied in the enforcement of the municipal law.

A typical example of adopting new legislation to give effect to an indirectly applicable treaty is China's response to Article 6(5) of the 1980 Sino-American Agreement on Trade Relations. This provision reads:

> "Both Contracting Parties agree that each Party shall take appropriate measures, under its laws and regulations, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other party".[86]

After the Agreement came into effect on 1 February 1980, the PRC State Administration of Publications issued its opinion about how to implement this part of the Agreement. The opinion stated:

> "The obligation that China assumes under this article was not to provide the immediate copyright protection for the publications [published] in the United States upon the [coming into] effect of this Agreement. Instead, China is obliged to take measures appropriate to the concrete circumstances in China to create conditions for the copyright protection upon the [coming into] effect of this Agreement, and to provide the copyright protection for the publications published in the United States according to the laws and regulations of China, when such conditions are mature [. . .]. We will invite foreign experts to give lectures on copyright law, sponsor copyright workshops, send people abroad to study copyright business, establish copyright research institutions, and draw up copyright legislation (or regulations). These are the 'appropriate measures' that we take [under this agreement]".[87]

This statement suggests that, while Article 6(5) has acquired validity within the Chinese municipal legal order (otherwise there would be no legal ground for taking measures [. . .] "to provide copyright protection for the publications published in the United States according to the laws and relations of China", it only sets out a general obligation for each party to take measures under its law and regulations to ensure the copyright protection without specifying what these 'measures' are. Apparently, this obligation lacks the mandatory quality or definiteness that is indispensable to provide a cause of action or to create rights justiciable within the scope of the competence of the Chinese authorities.

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[86] 31 US Treaties and Other International Agreements, Part 6, at 4658.

[87] *Zhonghua Remin Gongheguo Falü Guifanxing Jieshi Jicheng*, *supra* n. 64, at 562-563.

The obligation which China assumed under this part of the Agreement is to enact new laws or to adjust its existing laws so far as necessary to give effect to the Agreement. In fact, since the Agreement came into force, China has adopted new copyright legislation. In 1990, the PRC Law on Copyright was promulgated and came into effect on 1 June 1991.[88] According to this statute, works published by a foreign person outside China shall be entitled to the copyright protection as required by the agreements between his or her country and China or by international treaties acceded to by both his or her country and China.

Upon its accession to the Berne Convention for the Protection of Literary and Artistic Works and the conclusion of bilateral copyright treaties[89], the Chinese government decided to make adjustments to its copyright legislation in order to implement its international obligations. On 25 September 1992, the State Council promulgated the Regulations for the Implementation of International Copyright Treaties.[90] These Regulations aimed at elevating the level of copyright protection accorded to foreign works as required by the minimum standards of the Berne Convention and by other bilateral copyright treaties. Many of the provisions prescribed by these Regulations are either absent from, or not clearly stipulated in, the existing copyright legislation. It is noteworthy that Article 19 of the Regulations reads: "If these Regulations contain provisions which differ from the international copyright treaties, the latter shall prevail".[91] Thus, through this enabling provision, international treaties on copyright protection to which China is a party become directly applicable within the scope of the Regulations.

Another example of new legislation to give effect to a non-directly applicable treaty in the Chinese municipal sphere is the PRC Law for the Protection of the Rights and Interests of Women. On 29 September 1980, China ratified the Convention on the Elimination of All Forms of Discrimination against Women, which came into force for China on 4 December of the same year. Whereas the Convention had thereby become part of the Chinese municipal legal order, the obligation assumed under the Convention was to

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[88] See 4 *China Law & Practice* (1990) No.9 at 26-42. Subsequently the State Council enacted implementing rules and regulations for the protection of computer programs. See 5 *China Law & Practice* (1991) No.6 at 28-40.

[89] This mainly refers to the 1992 Sino-US Protocol on the protection of US copyrights in China.

[90] These Regulations came into effect on 30 September 1992. See 6 *China Law & Practice* (1992) No.10, at 6.

[91] According to Article 3, the term, 'international copyright treaties' refers to the Berne Convention and other bilateral copyrights agreements concluded by China.

"take all appropriate measures" to progressively eliminate all forms of discrimination against women. In order to fulfill such an apparently non-directly applicable treaty obligation, the Chinese government decided to, within a reasonable period of time, enact a new statute and adjust its institutions so far as necessary to give effect to the Convention.

In 1990, the State Council established a Working Committee on Women and Children, in order to coordinate and push forward the government institutions concerned toward effectively safeguarding the rights and interests of women and children. Besides, in order to inform the public of the contents of the Convention, the Chinese government also disseminated hundreds of thousands of pamphlets containing the Chinese version of the Convention.[92] Moreover, on 3 April 1992 the NPC adopted the PRC Law on the Protection of the Rights and Interests of Women, which entered into force six months later. This new legislation, which contains 54 articles, specifies women's rights ranging from equal participation in political and economic activities to education, work, property, marriage, family, and other personal interests which women should particularly enjoy. In formulating the text, the drafting committee paid close attention to China's international obligation under the Convention. In its statement to the NPC the drafting committee, among other things, noticed that: "China is under an international treaty obligation to adopt legislation for the protection of the rights and interests of women. As a socialist state, China must perform this obligation".[93] Obviously, the term 'international treaty' referred to the above-mentioned Convention. The new legislation does not contain an enabling provision permitting the competent Chinese authorities to directly apply the Convention. By incorporating the provisions of the Convention into the statute, however, the municipal effect of the Convention has been ensured.[94]

An indirectly applicable treaty can also exert a strong impact on the interpretation and application of the existing municipal law. This is due to the assumption that a state does not intend to violate its treaty obligations. Thus, whenever it is possible to interpret the municipal law in accordance with a state's treaty obligations, the provisions of the treaty can serve as an interpretative aid.

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[92] *Remin Ribao* [People's Daily], 11 October 1994 at 3.

[93] *Fazhi Bao* [The Law Daily], 10 April 1992.

[94] It is important to note that this statute, though formulated with reference to China's international obligation under the Convention, does not contain an enabling clause to apply treaties. This implies the intention of the Chinese government to keep matters of this nature completely within the domain of its municipal legal order.

For example, let us assume that the aforesaid UN Convention on Torture is not directly applicable in the Chinese municipal legal order. In that case the relatively explicit definition of 'torture' under the Convention can have a strong impact on the interpretation of the relevant provisions of the Criminal Law and the Criminal Procedure Law, and thus contribute to keeping the Chinese municipal law in conformity with the Convention. The Convention thus also contributes to the awareness that the fight against torture and other cruel, inhuman or degrading treatment is required not only by the Chinese criminal law but also by international obligations under the Convention. This, coupled with the Chinese profession that China will keep its municipal law in line with the provisions of the treaty, will certainly provide victims of torture with much stronger arguments before the court. It is this author's opinion that in China the conferment of international law status to a value by way of its inclusion in a treaty testifies to the high degree of importance attached to that value.[95]

3.3. Conflict between Treaties and Municipal Law

As discussed earlier, under the Chinese system internationally valid treaties become automatically part of the Chinese municipal legal order. This implies that, when enacting new laws or concluding new treaties, China should take full account of the compatibility of its international treaties with its municipal law and try its best to keep them consistent with each other. In practice, however, the considerations underlying the two do not always coincide, resulting in conflict between the two branches of law. An example can be found in the 1988 Sino-French Agreement for Judicial Assistance in Civil and Commercial Matters. Article 20 of this Agreement provides:

> "The request for recognition and enforcement of decisions rendered by the court of one Contracting Party shall be submitted directly by the party concerned to the court of the other Contracting Party".[96]

On the other hand, Articles 203 and 204 of the then Civil Procedure Law (for Trial Implementation) stipulated that judicial assistance could be provided only between a PRC court and a foreign court either on a treaty basis or in

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[95] LI ZHAOJIE, *supra* n. 83.

[96] Chinese text in *Zhonghua Renmin Gongheguo Guowuyuan Gongbao* [Gazette of the State Council of the People's Republic of China], Vol. 8, No. 561, (15 April 1988), at 228-34. English translation in *East Asian Executive Reports*, December 1988, at 20-22.

accordance with the principle of reciprocity. Apparently this provision precluded the litigating parties from directly seeking judicial assistance from a PRC court.

In solving a conflict between two municipal rules of law the generally followed doctrines are that the statute with a higher status in the hierarchy of the legal system prevails over the one with a lower status and, if the two rules belong to the same rank in the hierarchy, *posteriori derogat priori* should apply. When applying these doctrines to a conflict between a treaty and municipal law, however, special attention should be paid to the following two problems: As to the first doctrine, its operation presupposes the ranking of treaties in the municipal legal hierarchy. In some states, this question is regulated by the constitution. As to the second doctrine, a subsequently enacted municipal law may prevail over a previously concluded treaty, thus giving rise to state responsibility for the violation of an international obligation.[97] To avoid this situation, the latter doctrine is often complemented by a fiction that law-makers do not intend to override treaty obligations by subsequent municipal law.

As indicated earlier, though for different purposes, China's practice in this regard is to give treaties a trumping effect over municipal law. Although the Constitution is silent on the matter, Article 67(14) provides that the Standing Committee of the NPC is empowered to decide on the ratification of '*treaties and important agreements*'.[98] Under Article 7 of the PLCT, '*treaties and important agreements*' include those that "contravene the laws of the People's

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[97] In the Netherlands, the constitution requires the courts not to apply either prior or subsequent legislative provisions, including the constitution, if they conflict with self-executing provisions of international agreements. Art.55 of the 1958 French constitution provides: "Treaties or agreements duly ratified or approved shall, upon their publication, have authority superior to that of laws, subject, for each agreement, to its application by the other party". It is not clear whether, under Art.55, self-executing treaties would prevail over subsequent inconsistent legislation. The German and Italian constitutions provide that the general rules of international law take precedence over domestic law. In both countries, however, subsequent inconsistent laws prevail over prior international treaties. In the United States, the Restatement of the Law (Third) § 115 states: "1. (a) An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled. (b) That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation. 2. A provision of a treaty of the United States that becomes effective as law of the United States supersedes as domestic law any inconsistent preexisting provision of a law or treaty of the United States".

[98] *Supra* n. 17.

Republic of China". Based on these two articles, all treaties which contain provisions differing from the laws of China must be submitted to the Standing Committee of the NPC for its decision on ratification. As treaty-making is part of the law-making powers of the Standing Committee, these treaties have the same rank as the law by which it is enacted within the Chinese municipal legal order: they are lower than the Constitution but higher than regulations and rules enacted by state organs of a lower rank than the NPC and its Standing Committee. At this level of the hierarchy, treaties are accorded supremacy over the conflicting provisions of statutes, and their trumping effect is not affected by the fact that they are concluded prior or subsequent to the conflicting statutes. The doctrine *posteriori derogat priori*, therefore, has no place in the Chinese system so far as the relationship between 'treaties and important agreements' and municipal law is concerned.[99] In the above-mentioned example of discrepancy between the 1988 Sino-French agreement and the PRC Civil Procedure Law (for Trial Implementation), Article 189 of the Law prescribed the trumping effect of treaties over conflicting municipal rules. As a result, Article 20 of the Sino-French Agreement prevailed over Articles 203 and 204 of the Law, though the former was formulated subsequent to the statute.[100]

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[99] LI HAOPEI, *supra* n. 5, at 395. A test case is China's attitude towards the law of the sea. In 1992, the NPC Standing Committee adopted the PRC Law on the Territorial Sea and Contiguous Zones. Article 6(2) of the Law provides: "Foreign ships for military purposes shall be subject to approval by the Government of the People's Republic of China for entering the territorial sea of the People's Republic of China". (translation by the Legislative Affairs Commission of the Standing Committee of the NPC, see 2AsYIL at 165). It was believed that this provision was the result of pressure from Chinese military circles. It raises the question of how China is to bring this municipal law regulation into line with the 1982 UN Law of the Sea Convention, which China may soon ratify. Under the UN Convention, ships of all States have the right of innocent passage; passage is considered innocent so long as it is not prejudicial to the peace, good order or security of the State; and such passage must be conducted in conformity with the other rules of international law. Accordingly, as a general rule, a coastal state has no right to require prior notification from or authorization for foreign warships passing through its territorial sea as a condition for innocent passage. Some Chinese scholars hold that the article should be revised if China finally decides to ratify the Convention, to the extent that it would not apply to the States parties to the Law of the Sea Convention. Note, however, that despite the rule in the UN Convention, about 40 of the 139 states which participated in the negotiation of the Convention prescribe the requirement of permission in their municipal laws as a condition for innocent passage for warships. See US Department of State, Office of the Geographer, *National Maritime Claims: 1958-85* (Geographic Research Study No. 20-21, Oct. 1985) at 9.

[100] Article 189 of the 1982 Civil Procedure Law (for Trial Implementation) provided: "If an international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those found in this law, the provisions of the international treaty shall apply, unless the provisions are ones on which China has announced reservations". *The Laws of the People's Republic of China 1979-1982*, *supra* n. 55, at 291. The present PRC Civil Procedure Law has

4. INTERPRETATION OF TREATIES

It is generally agreed that relevant rules as provided for in the 1969 Vienna Convention on the Law of Treaties should be equally followed in China for the interpretation of treaties.[101] In case of application of a treaty in the municipal legal order, however, questions as to who has the authority to interpret and how the interpretation is to be carried out remain the discretion of the municipal legal system.[102] While the question of application of treaties in the Chinese municipal system is related to the existence of a conflict between a treaty and the municipal law, the question of whether or not such conflict exists depends, to a large extent, upon how treaties are interpreted and by whom. Since no adequate data in this regard are available yet,[103] this part of our inquiry will confine itself to look into some general principles on interpretation of laws in China, from which one may get some hints for the answer to our question.

As a general rule, the local people's courts in China have no competence to interpret the law which they apply.[104] In accordance with the Law for the Organization of the People's Courts and the Decision on Strengthening the Work of Interpretation of Laws, which was adopted by the Standing Committee of the NPC in 1981, when a local people's court is faced with a situation that requires interpretation of a law, it must submit the question to the Supreme People's Court. The Supreme People's Court is the sole authority with competence to render interpretation of a legal rule for judicial proceedings. Such interpretation is aimed at, and limited to, how a legal rule or doctrine should be applied in a specific situation. This type of interpretation takes the form of judicial notice and has binding effect upon all the subordinate

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added a provision which allows parties concerned to seek recognition and enforcement of a foreign judgment or arbitral award before a Chinese court. Article 267 provides: "If a legally effective judgment or ruling made by a foreign court requires recognition and execution by a People's Court of the People's Republic of China, the party concerned may directly apply for recognition and execution to the competent intermediate People's Court of the People's Republic of China".

[101] WANG and WEI, *supra* n. 5, at 349.

[102] According to JACKSON, interpretation of international treaties by domestic authorities is far more common and in many cases more important than the interpretation by international tribunals. JACKSON, in: JACOBS and ROBERTS, *supra* n. 4, at 164.

[103] Neither is enlightenment to be obtained from Chinese court decisions, since the courts usually give no legal reasoning of their judgments.

[104] WU DAYING and SHEN ZONGLING, *Zhongguo Shehui Zhuyi Falü Jiben Lilun* [Basic Theory of China's Socialist Legal System] (Beijing: Falü Chuban She, 1987) at 261.

courts. If the law in question is a treaty, it should certainly be subject to the judicial interpretation by the Supreme People's Court.

When China acceded to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it declared, in accordance with Article 1 of the Convention, that China will apply the treaty "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law".[105] The Supreme People's Court in an earlier mentioned notice on the implementation of the Convention[106] rendered a detailed interpretation as to what constitutes "legal relationships, whether contractual or not, which are considered as commercial under its national law". According to this interpretation, the phrase refers to relationships implying economic rights and obligations arising from contracts or torts relating to certain subject areas, including:

> "sale of goods; lease of property; contractual projects and manufacturing; transfer of technology; equity joint ventures; cooperative joint ventures; exploration and exploitation of natural resources; insurance; credit and loan; labor service; agency; consultation service; transport of passengers and goods by sea, air, rail, and road; product liability; environmental pollution; maritime accidents; and ownership disputes, etc.; but not including disputes between foreign investors and the government of the host country".[107]

Apparently, it is difficult for a local court to apply the Convention to a given case without such a detailed interpretation.

Another type of interpretation under China's municipal legal system is characterized as legislative interpretation. This means that under the doctrine *ejus est interpretari cujus est condere*, when questions arise in regard to the purpose of a statute, the scope of its application, and the meaning of its provisions, the competency to interpret rests with those who have enacted the statute. Thus, if a treaty is ratified by the Standing Committee of the NPC, interpretation of that treaty falls within the power of the Standing Committee of the NPC to 'interpret statutes' as defined by Article 67 of the Constitution. By the same token, the State Council is empowered by Article 89 of the Constitution to interpret treaties it has approved. Such legislative interpretation has binding force not only for the judicial organs but also all other government institutions of China. As the legislative power of the Standing Committee of the NPC extends to "annul those administrative rules and regulations, decisions

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[105] For the text of the Convention, see 21.3 TIAS, at 2518.

[106] *Supra*, text at n. 63.

[107] *Zhonghua Remin Gongheguo Falü Guifanxing Jieshi Jicheng*, *supra* n. 64, at 1027.

or orders of the State Council that contravene the Constitution or the statutes", and to decisions on the ratification of treaties which contravene the laws of China according to Article 7 of the PLCT,[108] the competence to decide on the existence of a conflict between a treaty and a municipal statute is certainly in the hands of the Standing Committee of the NPC.

5. CONCLUSIONS

The Chinese practice on dealing with the question of the effect of treaties in the municipal legal system is closely related to how best to solve the conflict between treaties and municipal law. As a Chinese official document states:

> "Cases involving foreign elements shall be dealt with under the law of China so as to maintain China's sovereignty. Meanwhile, the provisions of multilateral and bilateral treaties concluded or acceded to by China shall also be strictly complied with. Where the municipal law and other internal rules come into conflict with China's treaty obligations, the provisions of treaties shall prevail. In the light of the general principles of international law, China shall not refuse to perform the obligations it assumes under international treaties. This [policy] is advantageous both to maintain China's prestige and to protect Chinese's citizens' interests abroad."[109]

This being state policy, China attaches great importance to legal relationships which have acquired international character by virtue of a treaty and, consequently, the balance between treaty obligations and the municipal law is always tipped in favor of the former. This policy reflects China's attitude towards its international legal obligations in general. Such attitude finds its origin in China's long history. Indeed, Confucius himself once said some 2,500 years ago: "Of the three essentials, the greatest is good faith. Without revenue and without an army, a state can still exist, but it can not exist without good faith".[110] China's present practice follows this historical legacy.

Beyond that, however, the Chinese practice is conducted within a rapidly growing but not yet fully-fledged municipal legal system. The PRC Constitu-

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[108] See *supra*, text at nn. 39-40.

[109] Regulations on Certain Issues of Handling Cases Involving Foreign Elements, promulgated jointly by the Ministry of Foreign Affairs, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice on 27 August 1987. See *Zhonghua Remin Gongheguo Falü Guifanxing Jieshi Jicheng*, *supra* n. 65, at 1029-30.

[110] WANG TIEYA, *supra* n. 5, at 315.

tion still abstains from prescribing the effect of treaties in the Chinese municipal legal order. From a strictly legal perspective, much has yet to be accomplished in order to achieve a more 'international-law-friendly' municipal law mechanism that puts the entire issue of implementing international treaty obligations under the rule of law.

NOTES

LEGAL DEVELOPMENTS IN THE UNITED NATIONS: THE EMERGENCE OF INTER-ORGANIZATIONAL INSTITUTIONS

Roy S. Lee (Lee Shih Guang)*

The increased demands on the United Nations for peace-keeping, peace-making and peace-building operations have presented a great challenge to the capacity, logistics, equipment, personnel and finance of the Organization. It has become important for it to seek active support from other competent international organizations in at least two areas: (a) their participation in peace-keeping and peace-making operations taking place within their geographic regions; (b) their cooperation in implementing mandatory measures prescribed by the Security Council. Some of the legal issues involved are discussed in the first two sections. The third section relates to legal questions arising from the creation of inter-organizational institutions.

1. REGIONAL ARRANGEMENTS UNDER CHAPTER VIII OF THE UN CHARTER

Chapter VIII of the UN Charter recognizes that regional arrangements or agencies are appropriate means for maintaining international peace and security, provided that their activities are consistent with the purposes and principles of the Charter. But who are these institutions?

At the San Francisco Conference in 1945, an attempt to define what constitutes a regional arrangement or agency failed.[1] The absence of a definition has, however, allowed the United Nations to adopt a pragmatic approach. Thus, for example, the North Atlantic Treaty Organization (NATO) and the League of Arab States had previously *not* considered themselves as collective

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[1] See *United Nations Conference on International Organizations*, Vol. 12, pp. 673 and 850. Also, L.M. GOODRICH *et al.*, *Charter of the United Nations* (3d edn., 1969) 356.

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self-defense organizations under Article 51. But in due course, the Arab League joined the United Nations in peace-keeping operations in Lebanon. NATO is now assisting the United Nations in the maintenance of the 'no-fly zone" in the air space of Bosnia and Herzegovina,[2] and in the maintenance of the 'safe areas" declared by the Security Council by its resolution 824 (1993) of 6 May 1993.[3] In response to the Secretary-General's request in February 1994, the North Atlantic Council decided that, ten days from 10 February 1994, heavy weapons of any of the parties found within the Sarajevo exclusion zone, unless controlled by UNPROFOR, would be subject to NATO air strikes if they were not withdrawn within the deadline fixed. Because of NATO's decision, the Federal Republic of Yugoslavia (FRY), on 16 March 1994, filed an application against the Member States of NATO in the Registry of the International Court of Justice, claiming that the adoption of the decision of air strikes breached Article 2, paragraph 4 and Article 53, paragraph 1 of the UN Charter, by "threatening to use force without the authorization of the Security Council and in the form of an ultimatum."[4] Since the Government of the FRY based the jurisdiction of the Court on consent to be given by the respondent States, the Court decided to take no action on the Application until and unless the latter expressed consent to the Court's jurisdiction for the purpose of the case. In the absence of such consent, the case was later removed from the Court's list.

Whether the European Community could act as a regional organization with an interest in the maintenance of international peace and security is no longer a question. On 24 July 1992, the Security Council invited the European Community, in cooperation with the Secretary-General of the United Nations, to examine the possibility of broadening and intensifying the European Community's Conference on Yugoslavia with a view to providing a new momentum in the search for negotiated settlements of the various conflicts and disputes in the former Yugoslavia. Subsequently, the International Conference on the Former Yugoslavia was convened in London in August 1992 under the co-chairmanship of the UN Secretary-General and the President of the European Community. The Conference adopted, *inter alia*, the Statement of Principles for a negotiated settlement of the problems of the former Yugoslavia. It also created a Steering Committee to prepare the basis for a general settlement and associated measures. The current Co-Chairmen of the Steering

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[2] Security Council Resolution 781 (1992) of 9 October 1992.

[3] The Security Council declared that Sarajevo and other such threatened areas, in particular the towns of Tuzla, Zepa, Gorazde, Bihac, Srebrenica and their surroundings should be treated as safe areas and "should be free from armed attacks and from any other hostile act".

[4] See *ICJ Communiqúe* no. 94/11 of 21 March 1994.

Committee (Mr. DAVID OWEN and Mr. STOLTENBERG) have proceeded on the basis of the principles of the 1992 Conference and have held a series of complex and difficult talks with the parties concerned. While no peace agreement has yet been accepted by all parties concerned, the joint efforts of the Co-Chairmen of the Steering Committee represent a close cooperation between the United Nations and the European Community[5] in the search for a solution for Bosnia and for the Former Yugoslav Republic of Macedonia.

Recently, the Organization of American States (OAS) and the Economic Community of West African States (ECOWAS) have also been brought into the framework of cooperation of the United Nations. Previously, OAS had recommended to its members to "suspend their economic, financial and commercial ties with Haiti and any aid and technical cooperation except that provided for strictly humanitarian purposes" as well as "action to bring about the diplomatic isolation of all those who held power illegally in Haiti".[6] ECOWAS had on its own organized a peace-keeping operation in Liberia.[7] But in due course, the OAS' role in Haiti and ECOWAS' role in Liberia have been acknowledged by the Security Council[8] and have been brought into cooperation with the United Nations in its peace-keeping operations in Haiti and Liberia.

2. IMPLEMENTING MANDATORY MEASURES

The need to ensure the implementation of Security Council mandatory measures has once again raised the question of cooperation between the United Nations and those inter-governmental agencies providing economic, financial or development assistance to states on which the United Nations has imposed sanctions.

Pursuant to Article 48, paragraph 1 of the UN Charter, all members of the United Nations are obligated to take the action required to carry out the decisions of the Security Council for the maintenance of international peace

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[5] For detailed work of the Co-Chairmen, see *The United Nations and the Situation in the Former Yugoslavia*, a reference paper, UNDPI publication, 15 March 1994.

[6] See resolution MRE/REs. 1/91, MRE/REs. 3/92 and MRE/REs. 4/92 adopted by the Foreign Ministers of the Organization of American States, and CP/RES. 594 (923/92), and declarations CP/DES.81, CP/DES.9 adopted by the permanent Council of OAS.

[7] See Statements by the President of the Security Council of the United Nations on 22 January 1991 (S/22133) and 7 May 1992 (S/23886) and the Report of the Secretary-General on the question of Liberia.

[8] See, for example, Security Council resolutions 841 (1993), 861 (1993), 875 (1993), 917 (1994) with respect to Haiti and resolutions 788 (1992), 813 (1993), 866 (1993) with respect to Liberia.

and security. But what about independent inter-governmental organizations such as the Bretton Woods Institutions (the World Bank and the Fund) which have their own constitutions, memberships, budgets, governing bodies and decision-making processes? Can the Security Council require them to comply with the mandatory measures? Though the Charter recognizes the specific role of regional organizations in maintaining peace and security, the relationship between the Security Council and the specialized agencies is, however, not specified. Reference should be made to Article 48, paragraph 2 and Articles 57 and 63 of the UN Charter.

Article 48, paragraph 2 provides that decisions of the Security Council for the maintenance of international peace and security "shall be" carried out by UN members "through their action in the appropriate international organizations" of which they are members. Clearly, a duty is imposed on UN members. A conflict of treaty obligations may, however, arise since other organizations of which they are also members may impose different obligations. Article 103 of the Charter thus provides that the obligations under the Charter prevail over other treaty obligations. Consequently, it is not a legal excuse for UN Members not to ensure observance of decisions of the Security Council under Chapter VII of the UN Charter in those institutions to which they are also members.

Articles 57 and 63 of the UN Charter provide that specialized agencies established by inter-governmental agreement and having international responsibilities in the economic, social, cultural, educational, health and the related fields 'shall be brought' into relationship with the United Nations. The Economic and Social Council may enter into agreements with those agencies defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Pursuant to these Articles, the United Nations entered into Relationship Agreements with all seventeen UN agencies, including the Bank and the Fund.

These Relationship Agreements usually contain provisions for reciprocal representation, proposal of agenda items, consultations and recommendations, exchange of information, relations with the Security Council, the International Court of Justice, administrative relationships and statistical services. Thus, for example, the Relationship Agreements with ILO, FAO, UNESCO and ICAO contain an undertaking whereby the agency:

> "[. . .] agrees to cooperate with the Economic and Social Council in furnishing such information and rendering due assistance to the Security Council as the Council may request, including assistance in carrying out decisions of the Security Council for the maintenance or restoration of international peace and security."

These agencies have thus undertaken to assist the Security Council in implementing its decisions in the field of peace and security.

The wording of Article VI of the Relationship Agreement between the Bank and the United Nations is, however, different. It states that the Bank 'takes note' of the obligations of members of the United Nations in accordance with Article 48, paragraph 2 of the Charter to carry out the decisions of the Security Council through their action in the appropriate specialized agencies of which they are members; and that the Bank in the conduct of its activities 'will have due regard' for decisions of the Security Council under Articles 41 and 42 of the Charter. The wording of Article VI is therefore not as positive as in other Relationship Agreements mentioned earlier, but the Bank at least acknowledges that most of its members (who are also members of the United Nations) have certain specific obligations towards the United Nations, by virtue of Article 48 paragraph 2 of the Charter, and that the Bank 'will have due regard' for Security Council resolutions.

In the past, the Bank has taken the position that the words 'takes note' and 'due regard' were specifically intended to avoid any possible suggestion that there was any obligation between the two organizations.[9]

In 1965, the General Assembly requested the specialized agencies (including the World Bank and the Fund) to refrain from granting Portugal any financial, economic or technical assistance as long as the Portuguese Government failed to implement the Assembly's resolution 1514 of 20 December 1960 on the granting of independence to colonial countries and peoples. A similar recommendation was made regarding assistance to South Africa on account of its policy of apartheid. The Bank, however, rejected both requests. It should be noted that the decisions in question related to General Assembly resolutions (not Security Council decisions under Articles 41 and 42). It is nevertheless of interest to note briefly the legal arguments raised at the time.

The President of the Bank circulated copies of the resolutions to the Bank's Executive Directors and at the same time reminded them that only economic considerations shall be relevant to the decisions of the Bank and its officers, and that they were not to interfere in the political affairs of any member. An exchange of legal arguments then took place between the Secretary-General and the president of the Bank.[10]

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[9] The full drafting history of Article IV, section 10, is to be found in *Proceedings and Documents of the United Nations Monetary and Financial Conferences*, Vol. I (1948) 202 *et seq.*

[10] For details on the exchange between the United Nations and the Bank, see *United Nations Juridical Yearbook* (1967) 106-132, which reproduces the arguments on both sides.

The Bank's principal argument for refusing the General Assembly's requests to deny loans to Portugal and South Africa was that it was prevented from doing so by Section 10, Article IV of the Bank's Articles of Agreement:

> "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or the members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I."

The United Nations disagreed with the Bank's interpretation of Section 10 and pointed out that Section 10 only prohibited interference in the internal political affairs of member States and discrimination against any member country because of the political character of its government. This was one of the reasons why that Section goes on to provide that only 'economic considerations' shall be relevant to the decisions of the Bank and its officers. This latter provision, therefore, merely served to elaborate and emphasize those factors which must be excluded from consideration (i.e. internal political affairs), by making express reference to certain factors (economic considerations) which obviously must be taken into consideration. The last sentence of the Section should therefore not be regarded in isolation from the first sentence and interpreted as expressly confining the Bank to a consideration of nothing but the economic facts relevant to a particular loan, and obliging it to disregard other material factors such as the international conduct of a member country and its repercussions upon international peace and security.

The United Nations further pointed out that under Article VI of the Relationship Agreement, the Bank actually assumed an undertaking to 'have due regard' in the conduct of its activities for the decisions of the Security Council relating to matters of peace and security, and had indeed extended this undertaking to General Assembly resolution 377(V) entitled 'uniting for peace'.[11] In that case, the Bank considered that in the conduct of its activities it 'shall have due regard' for recommendations of the General Assembly made pursuant to the 'uniting for peace' resolution. To reject the Assembly's request regarding Portugal and South Africa would therefore be inconsistent with its previous decision.

The above exchange between the Bank and the United Nations continued for some time without, however, resolving the difference. At the end, the Secretary-General acknowledged the Bank's assurances of its desire to

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[11] Adopted by the General Assembly of the United Nations on 3 November 1950.

cooperate with the United Nations by all 'legitimate means'.[12] Quite clearly, the Bank took the position that United Nations resolutions are not automatically applicable to the Bank and it is for the Bank itself to decide.

Since 1990, the Security Council has imposed under Chapter VII (though no specific articles were cited) comprehensive or specific sanctions against Iraq, the former Yugoslavia, Somalia, Libya, Liberia, Haiti and Angola. Such punitive measures ranged from severing diplomatic relations to prohibition of the imports or exports of certain commodities, to freezing financial assets and to a total arms embargo. Clearly, the implementation of these decisions requires cooperation from UN agencies, particularly the Bank.

A common paragraph is normally included in most of the Security Council resolutions imposing sanctions,[13] reading as follows:

> "*Calls upon* all States, including States not members of the United Nations, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreements or any contract entered into any or any license or permit granted prior to the present resolution;"

It may be noted that in this regard, the Security Council treats the States and international organizations in the same manner and that they are all called upon to act in conformity with its resolutions.[14]

As mentioned earlier, most of the UN agencies have agreed, under their respective Relationship Agreement with the United Nations, to assist the Security Council in implementing its resolutions regarding peace and security. Legally speaking, their obligations to comply with the relevant Security Council resolutions stem therefore from the Relationship Agreement concerned, not directly from the UN Charter or from the specific resolutions of the Security Council. In the case of the Bank, even though the Bank does not consider that it has a legal obligation to comply with such Security Council

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[12] See UN Document A/6825 Annexes IV and V which are reproduced in the *United Nations Juridical Yearbook* (1967) 131-132.

[13] See for example resolution 757 paragraph 11, regarding Yugoslavia; SC resolution 748 paragraph 7, and resolution 883 paragraph 12, regarding Libya; SC resolutions 841 paragraph 9, and 917 paragraph 12, regarding Haiti.

[14] In Security Council resolution 670 which imposed comprehensive economic sanctions on Iraq, the Council:

> *Affirms* that the UN organization, specialized agencies and other international organizations in the UN system are required to take such measures as maybe necessary to give effect to the terms of resolution 661 (1990) and this resolution;

Resolution 670 may be regarded as a special case.

decisions, it has nevertheless accepted to have 'due regard' for Security Council resolutions adopted in the field of peace and security. Mandatory measures prescribed under Chapter VII would seem to fall within the scope of what the Bank has undertaken to pay 'due regard for'.

3. THE CREATION OF INTER-ORGANIZATIONAL INSTITUTIONS (IOIs)

Inter-governmental organizations (IGOs) themselves are created by States and are the products of States. They have now gathered together and created inter-organizational entities or have granted international status to entities under national laws. The Consultative Group on International Agricultural Research (CGIAR) is an example. CGIAR was created in 1971 to support a system of agricultural research centres and programmes around the world, and was set up jointly by the United Nations Development Programme (UNDP), the Food and Agriculture Organization (FAO) and the World Bank, and financed by 12 sovereign States, three regional development banks as well as private and public foundations. The World Bank and FAO are independent inter-governmental organizations. UNDP, however, is a subsidiary organ of the United Nations and is controlled by a Governing Council composed of States. CGIAR itself comprises nine research centres and four institutions of which (a) seven are organized under national law but with 'international status', (b) one is an inter-governmental organization, (c) three are inter-organizational organizations established by inter-IGO agreements, and (d) one institution was established by CGIAR itself. All these institutions seem to operate at a somewhat imprecise interface between the national and the international, the former reflecting their actual site of operation and the latter the source of their financing, their direction and, generally, of at least some of their staff. Some of the legal issues thus raised are mentioned here to illustrate the range of the problems.

Do IGOs have the necessary competence to create new international entities or to confer international status to entities incorporated under local law? Normally, the constitutive instruments of the relevant IGOs grant them the right to conclude contracts and to create subsidiary organs, though there is no express provision for creating institutions in cooperation with third parties. It may be argued that only States have the necessary competence to create or confer personality or international status, and that IGOs, by their very nature, have only limited functional capabilities which do not include the competence to create independent bodies beyond its control. On the other hand, it may be contended that such arrangements are merely instruments or

tools for the purpose of promoting or furthering certain specific functions entrusted to the IGOs concerned. The creation of institutions to carry out specific functions is therefore not inconsistent with the original goals. A third argument may be that the participation and involvement of States, either as founding members of such creation and/or as the host state to such institutions legitimize such creations.

What is the liability of the founding organizations for an inter-organizational institution (IOI), particularly when the former has no effective control over the latter? Similarly, what, if any, is the liability of the member States of the founding organizations? Most of the constituent instruments of institutions so created have provided that the institutions are to be free from outside influence and to be autonomous, and that the founding members are not expected to exercise any substantial control over the Board of Trustees after the initial period. Thus, should the founding organizations be held responsible even if they have no control over the new entities? Most statutes or constitutions of those institutions contain a provision exempting any liability or responsibility of the founding organizations and member governments thereof. Is it legally sufficient to insulate themselves from liability for acts and debts of an organization they create, merely by saying so? It seems that such provisions in the constituent instruments would serve as an estoppel to entities that contract with those institutions in full knowledge of such exemptions. But what about third-party liability? In the case of CGIAR, agricultural chemicals can cause damage to environment and third parties; crop failures may be caused by improper advice given to farmers. These questions should therefore be studied.

Another category of issues relates to the law applicable to their activities. Of course, their respective statutes serve as the primary guide. But since these institutions are carrying out activities both inside and outside the host countries, numerous legal issues can arise. Unless expressly provided, it is questionable if the rules and regulations of the founding organizations can be applied to them (e.g., auditing, procurement, staffing). Even if they were, which one of the founding organizations should apply?

Another set of issues relate to the host government. As mentioned above, some of the research centres are essentially national institutions governed by the laws of the host countries, but they have informally enjoyed substantive tax and customs exemptions for their imports of scientific and technical equipment, and for goods imported by their foreign staff. At a change of government, some of them have been threatened with the loss of those facilities, unless they could be reorganized as international entities which the respective host government would be prepared to grant international privileges and immunities. But, the possibility of elevating such centres to true international status

(i.e., by agreements to be concluded between those governments and one or more of the IGO sponsors) has proven unacceptable to the other member governments either for political or for financial reasons.

Questions have also been raised regarding the appropriateness of leaving the decisions for creating such entities essentially to international civil servants. It has been contended that Member States of the founding organizations must first be informed and that their approval should be required.

The creation of inter-organizational institutions has therefore generated many legal problems. It is an area that requires further study.

LEGAL MATERIALS

STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW*

IRAN

LEGISLATION

Marine areas

Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea, 1993[1]

Introductory note[2]

On 20 April 1993 the Iranian Parliament (the *Majlis*) adopted the present Act, by which Iran joined the bulk of coastal states claiming an exclusive economic zone.

Iran has not ratified the 1982 Law of the Sea Convention, nor is Iran a party to the 1958 Geneva Conventions on the law of the sea. The claim to maritime areas is, therefore, based on customary law for its validity.

Iran has a number of earlier laws on its maritime areas, including an exclusive fishing zone. Initially, an Act of July 1933 established a six-mile territorial sea and a six-mile contiguous zone. In 1959 this Act was amended and the breadth of the territorial sea was extended to twelve miles. Meanwhile,

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* Edited by Ko Swan Sik, General Editor.

[1] Official Gazette No. 14044 of 26 May 1993. English translation transmitted by the Permanent Mission of Iran to the United Nations in *note verbale* No. 152, dated 6 July 1993. Reproduced in *Law of the Sea Bulletin* No. 24 - December 1993. In a protest-note of 11 January 1994 (reproduced in *Law of the Sea Bulletin* No. 25 - June 1994 p. 101) the United States of America presented its view that certain provisions of the present Act and the Iranian Decree-Law No. 2/250-67 of 31 Tir 1352 [22 July 1973] (referred to in Art. 3 of the present Act) are inconsistent with international law and reserved its rights and the rights of its nationals in that regard. In *note verbale* No. 224 of 24 May 1994 (reproduced in *Law of the Sea Bulletin* No. 26 - October 1994 p. 35) the Islamic Republic of Iran commented on the US viewpoints.

[2] Contributed by JAMAL SEIFI, Faculty of Law, Shahid Beheshti (National) University of Iran, Tehran.

Asian Yearbook of International Law, Volume 4 (Ko Swan Sik *et al.*, eds.; 90-411-0872-6 © 1995 Kluwer Law International; printed in Great Britain), pp. 239-300

a statute of 1955[3] had declared Iran's exclusive right to the exploitation of the continental shelf resources of the Persian Gulf and the Sea of Oman, and accordingly most parts of Iran's continental shelf have been delimited through bilateral agreements with Saudi Arabia, Bahrain, Qatar and Oman.[4] Thereupon an exclusive fishing zone in the superjacent waters of its continental shelf was established in 1973. The significance of the present Act, therefore, lies in the claim to an exclusive economic zone. The Act is also important from the point of view of the consolidation of all the laws on the country's maritime zones and by defining Iran's attitude to such issues as the right of innocent passage.

From its title and the provision of its Article 1 it can be deduced that the Act has no application in the maritime areas of Iran in the Caspian Sea, a closed sea which has acquired increased importance in view of the new littoral states that have emerged from the collapse of the Soviet empire.

In the Articles 5 to 11 the Iranian law has, for the first time, regulated the exercise of and the limitations to the right of innocent passage by foreign vessels. The provisions are mostly in line with the 1982 Convention. Compare, for example, Article 6 of the Act with Article 19 of the Convention. Yet there are two significant points.

First, Article 9 reflects a long held Iranian position that the passage of foreign warships through Iranian territorial waters is subject to the prior permission of the coastal state. Accordingly the By-law of 1933 'Relating to the Passage and Stoppage of Foreign Warships through Iranian Waters and in Iranian Ports' already stipulated the requirement of authorization.

Another interesting point in relation to the right of innocent passage is that the Act does not prescribe any separate treatment for the right of passage through the Strait of Hormuz, thus giving rise to the presumption that in the Iranian view the right of passage through international straits is subject to the normal regime of innocent passage through the territorial sea.

Articles 14 to 20 of the Act are devoted to the regulation of the Iranian EEZ in the Persian Gulf and the Sea of Oman. The concept of exclusive economic zone did not form part of international customary law before the commencement of negotiations at UNCLOS III. However, the provisions on the EEZ regime in the 1982 Convention obviously contributed to the general acceptability of the regime and the number of states now claiming an EEZ

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[3] Act of 18 June 1955 on the Exploration and Exploitation of the Natural Resources of the Continental Shelf of Iran, UN Legislative Series ST/LEG/SER.B/16 at 15.

[4] Iran-Saudi Arabia, 24 October 1960, UN Legislative Series ST/LEG/SER.B/18 at 403; Iran-Qatar, 20 September 1969, UN Legislative Series ST/LEG/SER.B/16 at 416; Iran-Bahrain, 17 June 1971, ibid. at 428; Iran-United Arab Emirates, 15 March 1975, *New Directions on the Law of the Sea*, Vol.5 p. 242; Iran-Oman, 28 May 1975, ibid. at 235.

leaves little doubt that the concept is now indeed part of that law. In 1985 the International Court of Justice affirmed in the Libya/Malta Continental Shelf Case that "the institution of the exclusive economic zone [. . .] is shown by the practice of States to have become part of customary law".

Interestingly, the Act has not established an outer limit of the Iranian EEZ. This is largely because the geographical areas to which the Act applies are far narrower than the generally accepted 200-mile limit and, in most cases, the Iranian EEZ will have to be delimited from the maritime zones falling under the jurisdiction of the other littoral states. Article 19 is to be understood from this perspective.

Finally, it should be noted that the Act does not provide detailed provisions on the enforcement of Iran's regulations in the EEZ and has confined itself in Article 20 to a general claim of exercise of criminal and civil jurisdiction.

Text of the Act

PART I
Territorial sea

Article 1
Sovereignty

The sovereignty of the Islamic Republic of Iran extends, beyond its land territory, internal waters and its islands in the Persian Gulf, the Strait of Hormuz and the Oman Sea, to a belt of sea, adjacent to the baseline, described as the territorial sea.

This sovereignty extends to the airspace over the territorial sea as well as to its bed and subsoil.

Article 2
Outer limit

The breadth of the territorial sea is 12 nautical miles, measured from the baseline. Each nautical mile is equal to 1,852 metres.

The islands belonging to Iran, whether situated within or outside its territorial sea, have, in accordance with this Act, their own territorial sea.

Article 3
Baseline

In the Persian Gulf and the Oman Sea, the baseline from which the breadth of the territorial sea is measured is that one determined in Decree No. 2/250-67 dated 31 Tir

1352 [22 July 1973] of the Council of Ministers[5]; in other areas and islands, the low-water line along the coast constitutes the baseline.

Waters on the landward side of the baseline of the territorial sea, and waters between islands belonging to Iran, where the distance of such islands does not exceed 24 nautical miles, form part of the internal waters and are under the sovereignty of the Islamic Republic of Iran.

Article 4
Delimitation

Wherever the territorial sea of Iran overlaps the territorial seas of the States with opposite or adjacent coasts, the dividing line between the territorial seas of Iran and those states shall be, unless otherwise agreed between the two parties, the median line every point of which is equidistant from the nearest point on the baseline of both States.

Article 5
Innocent passage

The passage of foreign vessels, except as provided for in Article 9, is subject to the principle of innocent passage so long as it is not prejudicial to the good order, peace and security of the Islamic Republic of Iran.

Passage, except as in cases of *force majeure*, shall be continuous and expeditious.

Article 6
Requirements of innocent passage

Passage of foreign vessels, in cases when they are engaged in any of the following activities, shall not be considered innocent and shall be subject to relevant civil and criminal laws and regulations:

(a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the Islamic Republic of Iran, or in any other manner in violation of the principles of international law;
(b) Any exercise or practice with weapons of any kind;
(c) Any act aimed at collecting information prejudicial to the national security, defence or economic interests of the Islamic Republic of Iran;
(d) Any act of propaganda aimed at affecting the national security, defence or economic interests of the Islamic Republic of Iran;
(e) The launching, landing or transferring on board of any aircraft or helicopter, or any military devices or personnel to another vessel or to the coast;

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[5] [Ed. note]: Not reproduced. English translation in UN legislative Series ST/LEG/SER.B/19 at 55.

(f) The loading or unloading of any commodity, currency or person contrary to the laws and regulations of the Islamic Republic of Iran;
(g) Any act of pollution of the marine environment contrary to the rules and regulations of the Islamic Republic of Iran;
(h) Any act of fishing or exploitation of the marine resources;
(i) The carrying out of any scientific research and cartographic and seismic surveys or sampling activities;
(j) Interfering with any systems of communication or any other facilities or installations of the Islamic Republic of Iran;
(k) Any other activity not having a direct bearing on passage.

Article 7
Supplementary laws and regulations

The Government of the Islamic Republic of Iran shall adopt such other regulations as are necessary for the protection of its national interests and the proper conduct of innocent passage.

Article 8
Suspension of innocent passage

The Government of the Islamic Republic of Iran, inspired by its high national interests and to defend its security, may suspend the innocent passage in parts of its territorial sea.

Article 9
Exceptions to innocent passage

Passage of warships, submarines, nuclear-powered ships and vessels or any other floating objects or vessels carrying nuclear or other dangerous or noxious substances harmful to the environment, through the territorial sea is subject to the prior authorization of the relevant authorities of the Islamic Republic of Iran. Submarines are required to navigate on the surface and to show their flag.

Article 10
Criminal jurisdiction

In the following cases, the investigation, prosecution and punishment in connection with any crimes committed on board the ships passing through the territorial sea is within the jurisdiction of the judicial authorities of the Islamic Republic of Iran:
(a) If the consequences of the crime extend to the Islamic Republic of Iran;
(b) If the crime is of a kind to disturb the peace and order of the country or the public order of the territorial sea;

(c) If the master of the ship or a diplomatic agent or consular officer of the flag State asks for the assistance and investigation;
(d) If such investigation and prosecution is essential for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

Article 11
Civil jurisdiction

The competent authorities of the Islamic Republic of Iran may stop, divert or detain a ship and its crew for the enforcement of attachment orders or court judgements if:
(a) The ship is passing through the territorial sea after leaving the internal waters of Iran;
(b) The ship is lying in the territorial sea of Iran;
(c) The ship is passing through the territorial sea, provided that the origin of the attachment order or court judgement rests in the obligations or requirements arising from the civil liability of the ship itself.

PART II
Contiguous zone

Article 12
Definition

The contiguous zone is an area adjacent to the territorial sea, the outer limit of which is 24 nautical miles from the baseline.

Article 13
Civil and criminal jurisdiction

The Government of the Islamic Republic of Iran may adopt measures necessary to prevent the infringement of laws and regulations in the contiguous zone, including security, customs, maritime, fiscal, immigration, sanitary and environmental laws and regulations and [for the] investigation and punishment of offenders.

PART III
Exclusive economic zone and continental shelf

Article 14
Sovereign rights and jurisdiction in the exclusive economic zone

Beyond its territorial sea, which is called the exclusive economic zone, the Islamic Republic of Iran exercises its sovereign rights and jurisdiction with regard to:

(a) Exploration, exploitation, conservation and management of all natural resources, whether living or non-living, of the seabed and subsoil thereof and its superjacent waters, and with regard to other economic activities for the production of energy from water, currents and winds. These rights are exclusive;

(b) Adoption and enforcement of appropriate laws and regulations, especially for the following activities:

  (i) The establishment and use of artificial islands and other installations and structures, laying of submarine cables and pipelines and the establishment of relevant security and safety zones;

  (ii) Any kind of research;

  (iii) The protection and preservation of the marine environment;

(c) Such sovereign rights as granted by regional or international treaties.

Article 15

Sovereign rights and jurisdiction in the continental shelf

The provisions of article 14 shall apply *mutatis mutandis* to the sovereign rights and jurisdiction of the Islamic Republic of Iran in its continental shelf, which comprises the seabed and subsoil of the marine areas that extend beyond the territorial sea throughout the natural prolongation of the land territory.

Article 16

Prohibited activities

Foreign military activities and practices, collection of information and any other activity inconsistent with the rights and interests of the Islamic Republic of Iran in the exclusive economic zone and the continental shelf, are prohibited.

Article 17

Scientific activities, exploration and research

Any activity to recover drowned objects and scientific research and exploration in the exclusive economic zone and the continental shelf is subject to the permission of the relevant authorities of the Islamic Republic of Iran.

Article 18

Preservation of the environment and natural resources

The Government of the Islamic Republic of Iran shall take appropriate measures for the protection and preservation of the marine environment and proper exploitation of living and other resources of the exclusive economic zone and the continental shelf.

Article 19
Delimitation

The limits of the exclusive economic zone and the continental shelf of the Islamic Republic of Iran, unless otherwise determined in accordance with bilateral agreements, shall be a line every point of which is equidistant from the nearest point on the baselines of two States.

Article 20
Civil and criminal jurisdiction

The Islamic Republic of Iran shall exercise its criminal and civil jurisdiction against offenders of the laws and regulations in the exclusive economic zone and continental shelf and shall, as appropriate, investigate or detain them.

Article 21
Right of hot pursuit

The Government of the Islamic Republic of Iran reserves its right of hot pursuit against offenders of laws and regulations relating to its internal waters, territorial sea, contiguous zone, exclusive economic zone and the continental shelf, in such areas and the high seas.

PART IV
Final provisions

Article 22
Executive regulations

The Council of Ministers shall specify the mandates and responsibilities [powers and duties] of different ministries and organizations charged with the enforcement of this Act.

The said ministries and organizations shall, within one year after the approval of this Act, prepare the necessary regulations and have them approved by the Council of Ministers.

Pending the adoption of new executive regulations, the existing rules and regulations shall remain in force.

Article 23

All laws and regulations contrary to the present Act, upon its ratification, are hereby abrogated.

The above Act, comprising 23 articles, was ratified at the plenary meeting of Tuesday, the Thirty-First day of Farvardin, One Thousand Three Hundred and Seventy-Two [20 April 1993], of the Islamic Consultative Assembly and was approved by the Council of Guardians on Ordibehesht 12, 1372 [2 May 1993].

JAPAN

JUDICIAL DECISIONS*

Fishing operation by Japanese corporation in coastal waters of Northern Territories, occupied by the former Soviet Union without fishing permit from the Japanese authorities; Scope of application of the Japanese Fishery Regulations

Kushiro District Court, 15 February 1991
Hanrei Jiho [Judicial Reports] No. 1383, 1991, p. 173

STATE OF JAPAN V. X

Defendant X was president of a Japanese company, Utari Kyodo Corporation, which engaged in the catching, processing and sale of marine products. In 1989 Utari Kyodo and a number of Soviet companies entered into a joint venture, founding the Aniwa Corporation under Soviet Law. Utari Kyodo and Aniwa then concluded a contract committing themselves to engage jointly in the catching and processing of certain kinds of crabs in an area claimed by the Soviet Union as its exclusive economic zone.

Catching activities were carried out in waters around Shikotan Island, one of the four islands north of Kokkaido which are known in Japan as the 'Four Northern Islands of Japan' and which have been under Soviet – later, Russian – occupation since the end of the Second World War and which are being claimed back by Japan since the 1960s. The fishing boat used for the activities was registered in Japan and held a fishing permit from the Soviet Department of Fisheries.

The defendant in the present case was charged with violation of the Hokkaido Rules for the Regulation of Ocean Fisheries [Rules 1964 No. 132].

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* Contributed by TANAKA NORIO, Ryukoku University, Kyoto; member of the Study Group on Decisions of Japanese Courts relating to International Law.

Under these Rules a fishing licence from the Governor of Hokkaido is required for engaging in certain kinds of fisheries, including crab-fishing, in the offshore waters of Hokkaido, without defining the precise scope of the waters concerned. However, according to a 1971 Supreme Court decision (22 April 1971, *Keishu* [Supreme Court Reports: Criminal Cases] Vol.25 (1971) 451), the Rules were deemed applicable not only to the fisheries in the territorial sea of Japan, but also, on the basis of personal jurisdiction, to acts committed by Japanese on the high seas as well as in foreign territorial waters.

X asserted that the Hokkaido Rules, being Japanese domestic law, were not applicable to the fishing activities in the present case, arguing that the activities were carried out by Aniwa which was a legal person under Russian municipal law, and therefore the Hokkaido Rules, being Japanese domestic law, were not applicable. Under a verbal contract between Utari Kyodo and Aniwa the latter would charter the boat while Utari Kyodo would supply the captain and the crew.

The Court, however, on the basis of a detailed investigation of the substance of the fishing activities found that all the activities took place in accordance with the captain's judgement and under the command of the captain who was an employee of Utari Kyodo and who received directions from X. The Court also rejected the alleged existence of a contract between Utari Kyodo and Aniwa permitting Aniwa to charter the boat as there was no evidence confirming the payment of the charter-party by Aniwa. Therefore, the activities were deemed to be carried out by Utari Kyodo itself and governed by the Hokkaido Rules. The Court then held, in conformity with the 1971 Supreme Court decision, that, even though the activities were not carried out in Japanese territorial waters nor on the high seas, the area concerned is included within the scope of Article 5 of the Hokkaido Rules so that a fishing licence under these Rules was required.

Sapporo High Court, 16 April 1992
Hanrei Taimuzu [Law Times Reports] No. 801, 1993, p. 251

X v. STATE OF JAPAN

X appealed to the High Court against the above sentence on two grounds, arguing that the lower court had (1) erroneously taken the fishing activity to be the activity of Utari Kyodo instead of Aniwa's, and (2) wrongfully applied Japanese municipal law, i.e. the Hokkaido Rules, to fishing activities carried out in the exclusive economic zone of the Soviet Union and, consequently, within the latter's jurisdiction.

The High Court dismissed the appeal. First, following the court below, it rejected X's assertion that the fishing activities in the present case were carried out by Aniwa. It found, on the contrary, that the activities were carried out as a business of Utari Kyodo in the pursuit of its earnings. Secondly, it emphatically emphasized, as the first Japanese court to do so, and not by way of *obiter dictum*, that the 'Four Northern Islands of Japan' including Shikotan Island are Japanese territory, the sea area within 12 nautical miles from these islands being Japanese territorial sea and the area within 200 nautical miles being the fishery zone of Japan. The Court, did not, however, offer a detailed reasoning, nor did it refer to Article 2 paragraph (c) of the Japanese Peace Treaty of 1951 which stipulated the abandonment of territorial title to the islands by Japan. The Court simply referred to the fact that neither the Territorial Sea Act of 1977, proclaiming 12 nautical miles as the breadth of the territorial sea of Japan, nor the Fishery zone (Temporary Measures) Act of the same year, makes specific mention of the Four Northern Islands and that this may be taken as evidence that from the Japanese perspective the islands are part of the territory of Japan.

The Court thus held that the Hokkaido Rules were doubtlessly applicable to fishing in the territorial sea and the fishery zone of Japan irrespective of the Soviet occupation of the 'Four Northern Islands of Japan'. The Court also concluded that, to the extent that in the present case Japanese nationals had engaged in crab-fishing in an area constituting part of the exclusive economic zone of the Soviet Union without a license under the Hokkaido Rules, they would still be subject to these Rules on the basis of personal jurisdiction.

Competence of Consul under the Soviet-Japanese Treaty on Consular Relations and under general international law; Legal effect of interdiction declared by the Soviet consul in Japan.

Tokyo District Court, 20 December 1991
Hanrei Taimuzu [Law Times Reports] No. 792, 1992, p. 207

SOVIET UNION v. Y

A Soviet national, X, who had been resident in Japan since 1923, died there in 1984. X was not married and had no children. Under a first will X had bequeathed his whole property to the Soviet Union. Under a later will, however, his whole property, including his bank accounts, was bequeathed to Y, a Japanese national. This second will was expressed as *testamentum publi-*

cum[6] as X had been declared interdicted by the Soviet consul in Tokyo from managing his property.

Immediately after X's death, the executor of his second will claimed the disbursement of X's bank accounts to which the bank refused to comply on the ground of invalidity of the second will as a result of the consul's interdiction. On a suit brought by the executor, in which case the Soviet Union intervened as an interested party, the Tokyo District Court held in its decision of 25 April 1988[7] that the Soviet consul lacked competence to declare an interdiction under the Soviet-Japanese Consular Treaty of 1967[8] in the absence of any provision on the subject in the Treaty, while under general international law the consular competence is limited to whatever is recognized by the receiving state. Consequently the second will which was expressed in accordance with the procedures set forth in Japanese law for a *testamentum publicum* remained valid.

Not being satisfied with the decision, the Soviet Union brought an action in the present case claiming the transfer of the whole property of X in conformity with the first will. In 1991, the Tokyo District Court dismissed the Soviet claim on the same grounds as those of 1988.

The Court emphasized that, first, the interdiction declared by the Consul was a kind of exercise of state authority and that the exercise of such competence by a foreign consul within the territory of the receiving state is only exceptionally recognized with the consent of the receiving state. Secondly, it was not necessary for the Court to consider the Vienna Convention on Consular Relations since the Soviet Union was not a party to the Convention, and consequently the important question in the present case was whether the competence was in fact conferred upon the Soviet consul under the Soviet-Japanese Treaty. Thirdly, the Treaty did not contain any provision which explicitly stipulated such competence for the consul. Article 29(1) of the Treaty provides that the consul may perform 'other functions not contrary to the laws and regulations of the receiving state', but it was not appropriate to interpret this provision in such a way as to regard the competence to declare interdiction as one of these 'other functions'. Such competence should be recognized explicitly on account of the nature of interdiction as performance of state authority in a foreign state.

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[6] This is a will in the form of an official instrument drawn up by a notary public and provided in Art.969 of the Japanese Civil Code [Law 1896 No. 89].

[7] *Hanrei Jiho* No. 1274, 1988, p. 30.

[8] *Horei Zensho* [Compilation of the Laws and Regulations of Japan] No. 8, 1967, p. 118.

For the aforementioned reasons the Court held, as in 1988, that the interdiction declared by the Soviet consul had no effect, and that X's second will, which was expressed legitimately in accordance with the procedures set forth in the Japanese civil law for a *testamentum publicum*, remained valid.

MALAYSIA

JUDICIAL DECISIONS*

Extradition; Extraterritorial offences; Whether punishable under the laws of Malaysia

High Court, Malaya, at Kuala Lumpur, 19 January 1993
[1993] 2 MLJ 34

MOKHTAR SIDIN, J.

PUBLIC PROSECUTOR v. LIN CHIEN PANG

Public Prosecutor v. *Lien Chien Pang* is one of the first few cases decided under the new Extradition Act of Malaysia[9] ('the Act') which is relevant to the practice of Malaysia in international law.

The case arose out of a request by the United States government for the extradition of one LIN CHIEN PANG (the respondent) for two offences: (1) conspiracy to import more than 1 kg. of heroin into the United States between May 1991 and March 1992; and (2) aiding and abetting the importation of more than 1 kg. of heroin into the United States on or about 13 January 1992.

The evidence against the respondent consisted entirely of an affidavit by one LI YONG LING (the deponent). According to the affidavit, the deponent had met the respondent several times in Bangkok and it was through the respondent that the deponent met one SHIAO WU with whom the deponent had

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* Selected by WAN ARFAH HAMZAH, University of Malaya, Kuala Lumpur.

[9] Extradition Act 1992 (Act 479) which came into force on 10 February 1992. This Act replaces and supersedes two statutes previously existing governing extradition, viz. Extradition Ordinance 1958 and Commonwealth Fugitive Criminals Act 1967. It is a comprehensive Act which not only incorporates but also revises and re-arranges the provisions of the pre-existing legislation. It also contains new provisions to bring it in line with new developments in international practice, in particular, the Commonwealth Extradition Scheme and international conventions on narcotic drugs and psychotropic substances to which Malaysia is a party.

some discussions in Bangkok and Hong Kong about exporting heroin to the United States. It was SHIAO WU who informed the deponent of the shipment details of the heroin. The deponent passed on these details to one AH NAM who, unknown to the deponent, was a government informer. The heroin was seized when the shipment arrived in the United States and the deponent was eventually arrested. It was after his arrest that the deponent cooperated with the authorities and informed them that the respondent was his boss. At the instigation of and under supervision by the authorities, the deponent telephoned the respondent and the telephone conversations were taped. The conversations mentioned money to be paid and also heroin.

On these facts, the judge of the Sessions Court held that a *prima facie* case was not made out in support of the requisition by the United States government and ordered the respondent to be discharged under section 19(4) of the Act. The learned Judge held that the respondent fell outside the Act because the alleged offences were extraterritorial, it being an accepted fact that the respondent had not once set foot in the United States either before, during or after the commission of the alleged offences. As the Dangerous Drugs Act of Malaysia had no extraterritorial effect, the alleged offences were not punishable under the laws of Malaysia and did not come within the definition of extradition offences as set out in the proviso to section 6(2) of the Extradition Act 1992.

The Public Prosecutor applied under section 37 of the Act for a review of the decision of the Sessions Court Judge, in particular, the findings of the said Judge on two questions of laws:

(1) Are the offences alleged against the fugitive criminal extraterritorial offences?
(2) If so, are they punishable under the laws of Malaysia if they took place in corresponding circumstances outside Malaysia?

The High Court Judge before whom the application for review came, held it important to consider, first of all, whether the alleged offences in respect of which the request for extradition was made were offences in Malaysia, before proceeding to consider the particular questions posed by the Public Prosecutor in the application. The Judge, therefore, considered whether there was, in fact, a conspiracy and aiding and abetting on the part of the respondent. Examining the evidence in the light of Malaysian law, the learned Judge came to the conclusion that there was no evidence (other than the uncorroborated evidence of an accomplice) of conspiracy, aiding or abetting on the part of the respondent. Thus, in the opinion of the learned Judge, the Sessions Court Judge had erred in law in holding that there was evidence of conspiracy, aiding or abetting because that finding was against the weight of the evidence.

On the question whether the alleged offences, assuming there was in fact evidence of conspiracy, aiding or abetting, were extraterritorial, the High Court Judge affirmed the finding of the Sessions Court. The High Court Judge dismissed the argument of the applicant that since the heroin was imported into the United States pursuant to the conspiracy, aiding and/or abetment by the respondent, the respondent had committed the offences in the United States, by holding that there was no evidence of any connection between the imported heroin and the respondent.

The High Court Judge also affirmed the conclusion reached by the Sessions Court Judge on the second question posed by the Public Prosecutor. He affirmed that the alleged offences were not punishable under the laws of Malaysia if they took place in corresponding circumstances outside Malaysia and that the Sessions Court Judge was correct to refuse ordering the extradition of the respondent.

PAKISTAN

JUDICIAL DECISIONS*

Conflict of laws; Arbitration clause in a contract executed in Pakistan; Jurisdiction of courts in Pakistan to entertain proceedings in respect of arbitration conducted and award rendered by the arbitrator in a foreign country; Principles of private international law are subject to the municipal laws of Pakistan; Courts of Pakistan are bound to decide the question of jurisdiction in accordance with the law operating in Pakistan; Jurisdiction vested in the courts cannot be taken away even by express agreement of the parties.

High Court, Lahore, 29 June 1994
PLD 1994 Lahore 525

MALIK MUHAMMAD QAYYUM, J.

MESSRS. RUPALI POLYESTER LTD. – Petitioners v. DR. NAEL G. BUNNI AND OTHERS – Respondents

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* Contributed by JAMSHED HAMID, Islamabad.

JUDGMENT

This Judgment shall dispose of C.R. No. 34/94 and C.R. No. 83/94 in which an important question of law as to the jurisdiction of the Courts in Pakistan to entertain proceedings in respect of arbitrations conducted and awards rendered by the Arbitrators in a foreign country, falls for decision.

2. [. . .] Messrs. Rupali Polyester Ltd. (the petitioner) is a Company incorporated under the Companies Ordinance, 1984, in Pakistan, having its registered office at I.I. Chundrigar Road, Karachi. Respondent No. 1, Dr. Nael G. Bunni, is the Chairman of the Arbitral Tribunal having been appointed as such by the International Court of Arbitration of [the] International Chamber of Commerce at its Session held in November, 1991. Respondent No. 2, Rt. Hon. Sir Michael Kerr, is a Member of the Tribunal appointed by the petitioner and respondent No. 3, Professor John Uff, Q.C. is the Arbitrator nominated by respondents Nos. 4 and 5. Respondent No. 4, Mitsui & Company is a Corporation incorporated under the Laws of Germany while respondent No. 5, Hitachi Ltd., is a Company incorporated and registered in Japan.

3. On 20-5-1985, an agreement/contract was entered into between the petitioner, and respondents Nos. 4 and 5 whereunder these respondents undertook to supply to the petitioner plant, equipment, material, engineering-know-how, and supervisory services for erection, construction, installation and commissioning of a plant for production of ordinary chips of Polyester for filament yarn for apparel use with a daily production capacity of 80 metric tons against the price of Japanese Yen 2,262,500,000. It is a common ground between the parties that this agreement was executed in Pakistan and also that all the works thereunder were to be performed in District Sheikhupura.

4. Two clauses of the said contract which are relevant for the purpose of the present dispute are contained in Articles 16.7 and 13 which read as under:

. . .

"16.7

CONTRACT shall be governed and construed by the Pakistan Law."

"Article 13.

13.1 In case any dispute, controversy or difference arises out of or in connection with contract, the parties shall firstly endeavour to settle such dispute, controversy or difference amicably.

13.2 If both parties fail to reach such amicable settlement, all disputes, controversies or differences shall be finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three Arbitrators appointed in accordance with the Rules. The arbitration shall be conducted in English language. If the defendant in such dispute is Buyer, the arbitration shall take place in Karachi and in case that the defendant is Seller, the arbitration shall take place in London.

13.3 The awards thereof shall be final and binding upon both parties hereto."

5. Unfortunately disputes and differences arose between the parties. It was claimed by the petitioner that the plant and equipment supplied by respondents Nos. 4 and 5 was defective, not of the requisite standard and not in conformity with the specifications. It was further alleged that due to the wrongful and wilful acts and neglect of the respondents, the petitioner had suffered huge losses which were continuing. After having made efforts to settle these disputes amicably as required by the Contract, the petitioner invoked clause 13 of the Contract and asked for arbitration. Dr Nael G. Bunni, respondent No. 1, herein was appointed as Chairman, while respondent No. 2, Rt. Hon. Sir Michael Kerr and respondent No. 3, Professor John Uff were nominated as Arbitrators by the petitioner and respondents Nos. 4 and 5 respectively. The Arbitrators commenced proceedings at London and drew up Terms of Reference on 10-5-1991. Two partial awards, one on 28-5-1993 and the other on 13-7-1993 were delivered by the Arbitrators holding that the petitioner was not entitled to consequential damages arising out of breaches of the contract.

6. On 2nd August, 1993, the petitioner filed an application under section 14 and 17 of the Arbitration Act, 1940 in the Court of [the] Senior Civil Judge, Sheikhupura impleading the three Arbitrators and contractors as parties. In this application, it was prayed that Arbitrators be directed to file the two partial awards in Court so as to enable the petitioner to challenge their validity under the Arbitration Act, 1940. On 6th December, 1993, another application under sections 5, 11 and 12 of the Arbitration Act, 1940 was moved by the petitioner seeking removal of the Arbitrators on the ground of their misconduct.

7. These applications were resisted by respondents Nos. 4 and 5 who in their reply raised a preliminary objection as to the jurisdiction of the Courts in Pakistan to entertain the applications in respect of the arbitration proceedings conducted at London and awards rendered there. Respondents Nos. 1 to 3 did not appear before the Court but placed their point of view in writing.

8. The learned Senior Civil Judge, Sheikhupura, who was seized of the matter, treated the issue as to jurisdiction as a preliminary issue and after hearing the parties upheld the objection of respondents Nos. 4 and 5 and decided that he had no jurisdiction to entertain the application under sections 14 and 17 and sections 5, 11 and 12 of [the] Arbitration Act, 1940 filed by the petitioner. Resultantly, both the applications were dismissed on 22-12-1993. The reasons which prevailed with the trial Court for coming to this conclusion were: firstly, that in the contract dated 20-5-1985, the venue of arbitration was chosen by the parties to be London and as such they are deemed to have accepted the jurisdiction of English Courts over the arbitration proceedings; secondly, that the provisions of [the] Arbitration Act, 1940 and the Code of Civil Procedure were not applicable and, lastly, that the awards were foreign awards within the meaning of [the] Arbitration (Protocol and Convention) Act, 1937.

9. Mr. S.M. Zafar, the learned counsel for the petitioner at the very outset contended that even though the arbitration proceedings were held in London and the awards were also made there but the awards in question were in law domestic awards and could be challenged before the Civil Courts in Pakistan. It was explained by the learned counsel that the classification of the awards as 'foreign' or 'domestic' does not depend upon the place at which the same were delivered but, on the other hand, the determining factor would be the law applicable. He pointed out that in the contract itself the parties had expressly chosen the law applicable to be the law of Pakistan, vide Article 16.7, and as [a result the] Arbitration Agreement was governed by Pakistani Law and, therefore, notwithstanding any other consideration, the awards were domestic awards even though made in London. On these premises it was argued that the awards and the arbitration in question would fall outside the purview of the Arbitration (Protocol and Convention) Act, 1937 and would have to be dealt with under the Arbitration Act, 1940. The learned counsel referred to the definition of 'Foreign Award' as given in Act VI of 1937 and also to the exclusion clause contained in section 9(b) thereof which provides that nothing in that Act shall apply to arbitration governed by the law of Pakistan.

10. Referring to Arbitration Act, 1940, the learned counsel submitted that as per section 47 of the Act itself, it applies to all arbitrations and not necessarily

only to those held in Pakistan. He explained that an application for filing or setting aside the awards can be made in the Court as defined by section 2(c) of the Arbitration Act, 1940 which would be the Court within the local limits of which [the] subject-matter to which [the] award relates is situated or located.

. . .

16. The argument raised by Mr. S.M. Zafar, the learned counsel for the petitioner, that the Courts of a particular country are bound to decide a cause in accordance with its municipal laws, is unexceptionable. The Courts in Pakistan cannot refuse to give effect to its domestic law merely on the ground that it comes into conflict with the law of another country or the principles of conflict of laws/private international law. . . .

17. While on this subject, it may be stated that each country has its own rules of private international law and such rules are subject to its domestic laws. The principles of conflict of laws cannot claim any precedence over the Municipal Law of a country. Therefore, even though the principles of Private International Law of England are entitled to great respect but these principles cannot be pressed into service to take away the jurisdiction vesting in a Court of this country by its own laws. . . .

. . .

22. [T]he principles of Private International Law are applied by the Courts of a country as a part of its domestic law and, therefore, differ from country to country. These principles cannot claim primacy or ascendancy over the domestic law of a particular country but have to be applied subject to its Municipal Laws. Consequently, if the Courts in Pakistan have jurisdiction to entertain a cause, they cannot refuse to do so, merely on the ground that under the principles of Private International Law such a matter was triable by another Court. In somewhat similar circumstances, it was observed by the Patna High Court in Suresh Narain Sinha v. Akhuari Balbhadra Prasad (AIR 1957 Patna 256) that:

> "It was true that according to the principles of International Law a Court has no jurisdiction to entertain a suit against a foreigner who did not permanently or temporarily reside within its jurisdiction and who had not submitted to its jurisdiction. But if the legislature confirms jurisdiction upon the Court situated in a particular territory to entertain suits against [a] foreigner, where cause of action, wholly or partly arises within its jurisdiction, thus such a Court

undoubtedly has jurisdiction, if the conditions provided by the law to which it is subject exist."

23. At this stage, it may also be noticed that it is an acceptable principle that if the jurisdiction vests in Pakistani Courts, it cannot even be taken away by the consent of the parties and [. . .] such an agreement would be void being against public policy under section 28 of the Contract Act. The leading judgment on this point is that of the Supreme Court of Pakistan in N.A. Chowdhury v. M/s. Mitsui O.S.K. Lines Ltd. and 3 others, PLD 1970 SC 373.

24. This principle was followed by the Supreme Court itself in M/s. Uzin Export and Import Enterprises for Foreign Trade v. M/s. Iftikhar & Company Limited (1993 SCMR 866). Reference may also be made to the judgment of this Court in Abdul Majid v. Ch. Bahawal Bakhsh and another (AIR 1950 Lah. 174) and that of [the] Patna High Court in Rambilas Matho and others v. Babu Durga Bijal Prasad Singh and others (AIR 1965 Patna 239). . . .

. . .

26. It is also to be stated that the arbitration agreement between the parties does not have the effect of depriving a Court of its jurisdiction which it otherwise possesses. In M/s. Uzin Export and Import Enterprises for Foreign Trade v. M/s. M. Iftikhar & Company Ltd. (1993 SCMR 866), it was observed that "in this case in the contract there was provision for arbitration of [the] International Chamber of Commerce in Paris. This provision does not oust the jurisdiction of Courts in this country and this clause is to be treated at par with provision for arbitration within the country".

27. The principles which emerge from the above discussion are:
(i) that the principles of Private International Law are subject to the Municipal Laws of Pakistan,
(ii) that the Courts of Pakistan are bound to decide the question of jurisdiction in accordance with the law operating in Pakistan,
(iii) that jurisdiction vested in the Courts cannot be taken away even by express agreement of the parties and, lastly,
(iv) that the arbitration agreement even where Rules of [the] International Chamber of Commerce apply do not have the effect of depriving the Courts of their jurisdiction.

28. Keeping in view the above principles, the case may now be examined with reference to the Municipal Laws of Pakistan. On the subject of arbitration,

there are two laws which operate in this country, namely, the Arbitration Act, 1940 and the Arbitration (Protocol and Convention) Act, 1937. The latter Act [. . .] was promulgated on 4-3-1937 to give effect to the Geneva Convention on Arbitration and provides for enforcement of 'Foreign Awards' as defined in section 2 thereof. It makes provisions in section 4 for the effect of foreign awards, in section 5 for filing of foreign awards and [in] section 6 for enforcement of foreign awards. Subsection (1) of section 7 enumerates the conditions for enforcement of foreign awards, while subsection (2) of section 7 provides circumstances in which the Court may refuse to enforce the award. Another important provision in this regard is in section 9 which ordains that the Arbitration (Protocol and Convention) Act, 1937 shall not be applicable to an award made on an arbitration agreement governed by the law of Pakistan.

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. . .

30. It will be remembered that [the] arbitration agreement in the present case is not contained in an independent or separate document, but in Article 13 which is a part of and is embedded in [the] main contract executed between the parties. The contract itself specifically provides in Article 16.7 that it shall be governed and construed by the laws of Pakistan. That being so, the arbitration agreement which is a part of the same contract is also governed by the law of Pakistan. It is a well-established principle, and indeed has not been disputed by the learned counsel for respondents Nos. 4 and 5, that it is open for the parties to the international agreement to make a choice of law which would apply to the contract, and autonomy of the parties in this behalf is respected by the Courts and there is, therefore, no reason to hold that clause 13 would not be governed by Pakistani law.

31. Both the learned counsel are agreed that in a contract having [an] international element, there are four potential laws which may apply. Those are, (a) [the] proper law of [the] contract, (b) [the] proper law of [the] arbitration agreement, (c) [the] proper law of reference and (d) [the] curial or procedural law. See Mustill and Boyd's Commercial Arbitration, 2nd Edn., pages 61 and 62, and Sumitomo Heavy Industries Ltd. v. Oil and Natural Gas Commission ((1994), 1 Lloyd's Law Rep.45 at pages 56 and 57).

. . .

33. More important question, however, is as to what would be the proper law of the arbitration agreement. The answer to this question depends on the

applicability of the Arbitration (Protocol and Convention) Act, 1937, as section 9(b) provides that the Act shall not apply to awards made on the arbitration agreements governed by the law of Pakistan.

34. The principle which is deducible from the various textbooks and the decisions of the Courts is that [the] proper law of [the] arbitration agreement is the law expressly chosen by the parties. If, however, no express choice of proper law of [the] arbitration agreement is made, it will be the same as [the] proper law of [the] contract if [the] arbitration agreement is embedded and contained in the main contract itself, especially when the parties have, as in the present case, expressly given their choice about [the] law applicable to the contract.

35. In National Thermal Power Corporation v. Singer (1992) 2 Comp. LJ 256, the principles for determination of the proper law of the arbitration agreement have been enunciated by the Indian Supreme Court. . . .

. . .

45. Examined in the light of the above principles, there cannot be any doubt that the proper law of [the] arbitration agreement in the present case is the law of Pakistan which has been expressly chosen by the parties to be the proper law of the contract in Article 16.7. The word 'contract' used in that Article would obviously include all the clauses including Article 13 which embodies in itself the arbitration agreement between the parties. . . .

46. However, even if it be assumed that there is no express choice of law regarding [the] proper law of [the] arbitration agreement, yet on the principle cited above, [the] proper law of [the] arbitration would be the same as the proper law of [the] contract, more so, when the arbitration agreement is contained and embedded in the same contract. . . .

. . .

48. The next question which, therefore, arises, is as to whether the Arbitration Act, 1940 is applicable to the awards in question and the arbitration proceedings being conducted by the Arbitrators. The Act, according to its preamble, was framed with a view to consolidating and amending the law relating to Arbitration. The arbitration agreement has been defined in section 2(a) as meaning a written instrument to submit present or future differences to arbitration. 'Award', according to section 2(b) means an arbitration award.

Section 2(c) defines 'Court' as a Civil Court having jurisdiction to decide the question forming the subject matter of the reference if the same had been the subject matter of a suit but it does not include a Small Causes Court. Section 5 of the Act empowers the Court to revoke the authority of the Arbitrator while under sections 9 and 10, power is vested in it to appoint Arbitrators in certain cases. The Court is authorised by section 11 to remove the Arbitrator or Umpire in the circumstances mentioned therein. Section 12 provides, where the Arbitrator is removed or the authority revoked, the Court can fill in the vacancy. Section 14 of the Arbitration Act requires the Arbitrators or the Umpire, as the case may be, to make the award and, if so called upon by the parties or the Court, to file the same in the Court. Section 15 authorises the Court to modify the award, by section 16 to remit the award or by section 17 to make a rule of the Court and pronounce a decree in terms of the award. After the award has been filed, it can be set aside by the Court under section 30 of the Arbitration Act on the grounds mentioned therein. Section 31 defines the jurisdiction of the Court where the award can be filed. It is further provided that all questions regarding validity, effect or existence of an award or an arbitration agreement between the parties shall be decided by the Court in which the award under the agreement has been, or may be, filed and by no other Court. Section 32 bars the filing of a suit to challenge the validity of the award or the arbitration agreement while section 33 vests a right in a party to [the] arbitration agreement to apply to [the] Court for a decision on the question of existence or validity of an arbitration agreement or an award or its effect.

49. Other important provisions which deserve notice in the context of the present controversy, are sections 46 and 47 of the Arbitration Act, 1940. These two sections read as under:

> "46. *Application of Act to statutory arbitrations.* The provisions of this Act except subsection (1) of section 6 and sections 7, 12, 36 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules may thereunder.
>
> 47. *Act to apply to all arbitrations.* Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:

> Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending."

50. From a reading of the Arbitration Act, 1940 as a whole, especially sections 46 and 47, it is obvious that it applies to all arbitrations except as otherwise provided by any law. There is nothing in this Act which restricts or confines its applicability only to awards rendered in Pakistan or made in proceedings conducted here. The Act applies to all awards irrespective of the place where the same has been made or delivered. All awards are liable to be filed in the Court having jurisdiction over the subject-matter of reference, which in the present case, was Sheikhupura.

51. It may also be stated at this stage that the legal error into which the trial Court fell was that while holding that Courts in Pakistan have no jurisdiction, it treated the two awards as 'foreign' and not 'domestic' awards on the ground that the awards were made in proceedings for arbitration held in London. Unfortunately, the trial Court failed to appreciate that the answer to the question as to whether a particular award is domestic or foreign award does not depend upon the venue of arbitration but upon the law applicable to it. If the arbitration agreement is governed by [the] laws of Pakistan, then notwithstanding the awards have been made abroad, the awards shall be deemed to be domestic awards and shall as such be governed by [the] domestic law of Pakistan.

. . .

56. It would thus appear from the above that the English Courts as well as the Indian Supreme Court have come to the same conclusion that the basis for holding an award to be 'domestic' or 'foreign' is the governing law of the arbitration agreement.

57. Another reason as to why the jurisdiction of the Courts in Pakistan does not stand excluded is that the contract in question has the closest connection with Pakistan. To use the words by the Indian Supreme Court in Singer's case (supra), it is redolent of Pakistan. It is a common ground between the parties that the agreement was executed in Pakistan, all works thereunder were to be performed by the respondents in Pakistan, the breach, if any, was also committed in Pakistan. Consequently, the cause of action also arose wholly in Pakistan. . . .

58. As observed earlier, the fact that the contract has the closest relation with Pakistan cannot be disputed or denied. Consequently the dispute raised in the two applications before the trial Court was clearly amenable to the jurisdiction of Pakistani Courts. Another important factor to be noticed in this regard is that as the contract involved payment of consideration in foreign exchange, it was subject to the approval of the Government of Pakistan as was provided in Article 15.1 of the Contract, which was in fact in the nature of a condition precedent to [the] contract becoming effective. On 19th May, 1985, the Government of Pakistan approved the contract with certain conditions mentioned in its letter bearing No. IBP/CH/R-Polyester/Con.II/84, one of which was that the agreement and arbitration should be made subject to the laws of Pakistan. . . . The arbitration contained in the contract having been made subject to the law of Pakistan, it cannot be contended that the laws of Pakistan stood excluded as regards arbitration proceedings.

59. It may also be mentioned that the award rendered by an arbitrator is lifeless and is not capable of being executed till such time the life is infused in it by the Court by passing a decree in accordance with the same. (See Oil and Natural Gas Commission v. The Western Companies of North America ((1987) 1 Arbitration Law Report 60) and Rambilas Matho and others v. Babu Durga Bijal Prasad Singh and others (AIR 1965 Patna 239)). Similarly, it is also well settled that the arbitration agreement between the parties does not have the effect of depriving a Court of its jurisdiction. (Also see M.A. Chowdhury v. M/s. Mitsui O.S.K. Lines Ltd. and 3 others PLD 1970 SC 373). Again in M/s. Uzin Export and Import Enterprises for Foreign Trade v. M/s. M. Iftikhar & Company Ltd. (1993 SCMR 866), it was observed that even if [the] I.C.C. Arbitration Rules are chosen by the parties to apply to arbitration, it does not take away the jurisdiction of the Pakistani Courts. It was further observed that Pakistani Courts have jurisdiction under the Arbitration Act, 1940 to deal with the matter if they have jurisdiction over the subject-matter forming reference. Consequently, even if the plea of Mr. Khalid Anwar that the parties had agreed to exclude the jurisdiction of Pakistani Courts by choosing the seat of arbitration to be London is accepted, yet this exclusion has no validity in law and cannot be given effect to.

60. The case can also be examined from another angle. As the subject-matter of the dispute between the parties, namely the plant and equipment, was located at Sheikhupura, according to section 2(c) of the Arbitration Act, 1940, any proceedings under the Arbitration Act could be brought before the Civil Court which would be competent to try a suit in respect of the subject-matter. Under section 20 of the C.P.C. a suit can be filed in a Civil Court within the

local limits of which [the] cause of action partly or wholly arises. In matters of contract, it cannot be disputed that the place where the agreement is entered into or is to be performed or is broken are the places where [the] cause of action wholly or partly arises. That being so, no valid objection can be taken to the jurisdiction of the Courts at Sheikhupura where the petitioner has filed two applications under the Arbitration Act, 1940. . . .

61. The contention [. . .] that as the respondents do not reside and are not located in Pakistan, the two applications in question could not be filed at Sheikhupura, has no force. It is well settled that the jurisdiction of the Courts is not dependent upon the residence of the defendants but also upon other considerations, like accrual of cause of action or part thereof. The residence of the respondents or the possession of nationality other than that of Pakistan is not of much consequence in this behalf.

. . .

63. It follows from the above discussion that under the Municipal Law of Pakistan, the two applications filed by the petitioner were competent and the learned Civil Judge, Sheikhupura was not correct in refusing to entertain the same. If the arbitration agreement is governed by the law of Pakistan, as indeed it is, the applicability of Arbitration Act, 1940 or any provision contained therein cannot be doubted. On no principle can it be held that though according to the laws of Pakistan. Pakistani Courts have jurisdiction in the matter but by virtue of Private International Law, even if it be to the contrary, this jurisdiction stands ousted. It may also be mentioned that the question as to whether the Courts of a particular country have or have no jurisdiction in the matter can only be decided by that Court and it is neither appropriate nor proper . . . [for] the Courts of any other country to hold that it has jurisdiction over the matter to the exclusion of that country, for in such an event there is nothing in law which stops the Courts of the other country from ruling to the contrary.

64. Although the findings recorded above [are] sufficient in themselves for the acceptance of these petitions but as Mr. Khalid Anwar [advocate for respondents Nos. 4 and 5] has argued with great vehemence that under the principles of Private International Law/Conflict of Laws English Courts alone have jurisdiction in the matter, this aspect may also be examined. In support of this submission, the main reason advanced was that as the seat/situs of arbitration was chosen by the parties to be London, the procedural law/curial law is deemed to be [the] *lex arbitri* or *lex fori*, i.e. the law of England under which

the English Courts alone have jurisdiction in respect of proceedings for arbitration conducted in that country.

65. The first thing to be noticed in this behalf is that though the principle pressed into service by the learned counsel as will be presently seen is to some extent, but not invariably, supported by the English Law [. . .] it has no universal application and is not accepted by many other countries like those in continental Europe where the modern trend appears to be to delocalise the arbitration. (See Dicey and Morris, *Conflict of Laws*, Vol. 1 (11th Edn., page 541).

66. Secondly, if this principle is applied with rigidity,it can lead to anomalous results. For example under the Belgian Law, the Courts of the country disown any jurisdiction over the arbitration or proceedings which is not between [. . .] parties [at least] one of whom is a national of that country.
[. . .] If the contention of Mr. Khalid Anwar is accepted, then, in such a case, the aggrieved person would be left with no remedy.

67. Having heard the learned counsel for the parties, considered their arguments and examined the various textbooks and the precedents cited by them, I am of the view that the correct principle is that which has been expressed by the Indian Supreme Court in National Thermal Power Corporation v. Singer Company and others ((1992) 2 Comp. L.J. 256 (SC)), wherein it has been ruled that the control over the arbitration vests in the Courts of the country where seat of arbitration is located as also in the country with which the contract/agreement has the closest connection.

. . .

84. There is thus no warrant for [the] assumption that either under the laws of Pakistan or under its Private International Law or even under the English Private International Law the Courts of the country where the arbitration proceedings are held alone have the exclusive jurisdiction in respect thereto.

. . .

88. While on this subject, it is to be noted that the reason given as to why the curial law has in certain cases been held to be the law of the seat of arbitration is that in the absence of any choice of the parties, that law should be applied as it has [the] closest connection with the arbitration proceedings. This theory may hold good in cases where there is an unequivocal and invariable choice of seat of arbitration are contemplated. In this case, under clause 13 of the Contract, arbitration can take place either at Karachi or London depending

upon the fact as to who was the claimant. There are, as such, two seats of arbitration to be chosen by the parties. While Karachi has the closest connection with the contract as the contract was executed in Pakistan and the works were also performed here, London has no connection whatsoever with the subject-matter of reference. Consequently, even if the principle advocated by Mr. Khalid Anwar is applied, still the jurisdiction of Pakistani Courts cannot be ousted. In the present case, apart from contesting the claim of the petitioner, the respondents [. . .] have made a counter-claim before the Arbitrators. Supposing instead of filing the counter-claim, they had separately invoked the arbitration clause by filing a claim, in that event the seat of arbitration had to be Karachi. This brings clearly into [light] the infirmity of the plea of exclusive jurisdiction of the English Courts and I find myself unable to hold that the English Courts had exclusive jurisdiction in the matter of procedure on account of curial law being English law. Indeed as already observed in many countries of the world, especially of Europe, the seat of arbitration has no relevance to the determination of [the] procedure for arbitration. The discussion at page 81 of *Law and Practice of International Commercial Arbitration*, by Redfern and Hunter (2nd Edn.) is relevant and instructive.

89. This, however, does not conclude the controversy as the next question which arises is that even if it be held that in matter of procedure, the Courts of the country where [the] seat of arbitration is located have exclusive jurisdiction, the next question which would then arise is as to whether [the] right to challenge an award can be said to be a matter merely of procedure or does it affect the substantive right of the parties.

90. Having heard the learned counsel for the parties, to me it appears that at least so far as the laws of Pakistan are concerned, the right to challenge an award cannot be considered to be a matter of procedure but is one of substance. This right has been granted by sections 30 and 33 of the Arbitration Act, 1940 and is more akin to the right of appeal and review which have throughout been held to be substantial rights and not matters of procedure. In the Province of Punjab v. Nadeem & Company (PLD 1976 Lah. 1273) it was observed by this Court that it would not be correct to say that section 33 of Arbitration Act, 1940 is [. . .] procedural in nature. It may also be mentioned that the Arbitration Act, 1940 applies as a whole to Pakistan and there is no distinction as regards the applicability of substantial and procedural provisions.

. . .

93. It follows from the above discussion that even if it be held that English Courts have jurisdiction in respect of procedural matters, yet the jurisdiction of the Pakistani Courts over substantive matters which affects the rights of the parties [. . .], not being matters of procedure, would be governed by the law of Pakistan which is the law chosen by the parties to be the law . . . [by] which the Contract is governed and also for the reason that the agreement has [the] closest connection with Pakistan.

94. At this stage, the prejudice which is likely to be caused to the petitioner in case it is held that it is only the English Courts which have jurisdiction in the matter and not the Courts of Pakistan may be pointed out. . . .

. . .

98. As observed earlier in the case of contract involving foreign element, four potential laws which may apply are (i) proper law of contract, (ii) proper law of arbitration agreement, (iii) procedural/curial law and (iv) proper law of reference. While detailed discussion as regards the first three laws have been made above, not much has been said about the proper law of reference for the reason that it is a common ground between the parties that [the] proper law of reference is invariably the same as the proper law of arbitration agreement. . . . This law is, therefore, of not much relevance in the present case.

. . .

103. In conclusion, therefore, it is held that as in the present case, the cause of action had arisen in Sheikhupura; the proceedings under the Arbitration Act could validly be commenced before that Court in view of section 2 (c), sections 30, 33, 41 and 47 of the Arbitration Act read with section 20 of the Code of Civil Procedure; that the jurisdiction of the Courts in Pakistan could only be taken away by another Statute of that country and not by any principles of any other law, that the awards were domestic awards made on [an] arbitration agreement governed by Pakistani law and, therefore, the Arbitration (Protocol and Convention) Act, 1937 was not applicable; that the awards were domestic in nature for the same reason; that even under the principles of private International Law that jurisdiction of the Courts in Pakistan do not stand excluded, the trial Court was, therefore, not correct in holding that it has no jurisdiction to proceed with the two applications filed by the petitioner. [. . .]

THE PHILIPPINES

JUDICIAL DECISIONS*

Diplomatic immunity

Southeast Asian Fisheries Development Center v. *Acosta*
G.R. Nos. 97468-70, 2 September 1993, 226 SCRA 49

Two cases for wrongful termination of employment or dismissal were filed before the National Labour Relations Commission (NLRC) against the Southeast Asian Fisheries Development Center (SEAFDEC). SEAFDEC, contending to be an international inter-governmental organization composed of various Southeast Asian countries, moved to dismiss the cases on ground of lack of jurisdiction of the NLRC.

The Supreme Court ruled that, beyond question, SEAFDEC is an international agency enjoying diplomatic immunity. The Court reiterated its decision in *Southeast Asian Fisheries Development Center Aquaculture Department* v. *NLRC* (G.R. No. 86773 [1992]) that SEAFDEC is beyond the jurisdiction of the NLRC. Being an intergovernmental organization, established by the Governments of Burma (as it then was), Cambodia, Indonesia, Japan, Laos, Malaysia, the Philippines, Singapore, Thailand and (South) Vietnam, SEAFDEC enjoys functional independence and freedom from control of the State in whose territory its office is located.

The Court recognized the personality of permanent international commissions and administrative bodies that have been created by the agreement of a considerable number of States for a variety of international purposes, economic or social and mainly non-political. In so far as they are autonomous and beyond the control of any one State, they have a distinct juridical personality independent of the municipal law of the State where they are situated. As such, they must be deemed to possess a species of international personality of their own.

The Court also cited Opinion No. 139 of the Minister of Justice, Series 1984:

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* The summaries of judicial decisions and of the opinions of the Department of Justice have been selected and prepared by LEONOR DICDICAN, Institute of International Legal Studies, University of the Philippines Law Center, under the supervision of R.P.M. LOTILLA, Director of the Institute.

"One of the basic immunities of an international organization is immunity from local jurisdiction, i.e. that it is immune from the legal writs and processes issued by the tribunals of the country where it is founded. The obvious reason for this is that the subjection of such organization to the authority of the local courts would afford a convenient medium through which the host government may interfere in their operations or even influence or control its policies and decisions of the organization; besides, such subjection to local jurisdiction would impair the capacity of such body to discharge its responsibilities impartially on behalf of its member-states."

State immunity; Act of State

US v. *Reyes*
G.R. No. 79253, 1 March 1993, 219 SCRA 192

A complaint for damages was filed against the Activity Exchange manager of the US Navy Exchange (NEX) at the Joint United States Military Assistance Group (JUSMAG) headquarters in Quezon City, Philippines, for discriminatory and oppressive acts committed by said manager outside the scope of her authority. The Supreme Court ruled that the case constituted an exception to the doctrine of state immunity.

The rule that a State may not be sued without its consent is one of the generally accepted principles of international law that has been adopted as part of Philippine law. In the case of *Shauf* v. *Court of Appeals* (191 SCRA 713 [1990]), the Supreme Court laid down the following:

"While the doctrine appears to prohibit only suits against the State without its consent, it is also applicable to complaints filed against officials of the State for acts allegedly performed by them in discharge of their duties. The rule is that if the judgment against such officials will require the State itself to perform an affirmative act to satisfy the same, such as the appropriation of the amount needed to pay the damages awarded against them, the suit must be regarded as against the state itself although it has not been formally impleaded.
. . .

It is a different matter where the public official is made to account in his capacity as such for acts contrary to law and injurious to the rights of plaintiff. As was clearly set forth by Justice ZALDIVAR in *Director of the Bureau of Telecommunications, et al.* v. *Aligaen, etc., et al.* (33 SCRA 368 [1970]) 'Inasmuch as the State authorizes only legal acts by its officers, unauthorized acts of government officials or officers are not acts of the State, and an action against the officials or officers by one whose rights have been invaded or

> violated by such acts, for the protection of his rights, is not a suit against the State within the rule of immunity of the State from suit . . .' The rationale for this ruling is that the doctrine of state immunity cannot be used as an instrument for perpetrating an injustice."

Therefore, the doctrine of immunity from suit will not apply and may not be invoked where the public official is being sued in his private and personal capacity as an ordinary citizen. A public official may be liable in his personal private capacity for whatever damage he may have caused by his act done with malice and in bad faith, or beyond the scope of his authority or jurisdiction. The agents and officials of the United States Armed Forces stationed in the Philippines are no exception to the rule.

The defendant in this case is therefore not immune from civil liability for personal and private acts done beyond the scope and even beyond the place of official functions. Further, even if she is presumed to enjoy diplomatic immunity, which she did not in fact have, Article 31(c) of the Vienna Convention on Diplomatic Relations admits of exceptions. Thus, a diplomatic agent does not enjoy immunity from a receiving state's jurisdiction in actions relating to any professional or commercial activity exercised outside his official functions.

Municipal law and international law

Cathay Pacific Airways,Ltd. v. *Court of Appeals*
G.R. No. 60501, 5 March 1993, 219 SCRA 520

A Filipino was a first class passenger of petitioner Cathay on its flight from Manila to Hongkong and onward from Hongkong to Jakarta. Upon his arrival in Jakarta, he discovered that his luggage was missing. He then filed a complaint in a Philippine court for breach of contract of carriage.

Cathay contended that the extent of its liability for breach of contract should be limited absolutely to that set forth in the Warsaw Convention.

The Supreme Court negated Cathay's contention. Although the Warsaw Convention has the force and effect of law in the Philippines, being a treaty commitment assumed by the government, said convention does not operate as an exclusive enumeration of the instances for declaring a carrier liable for breach of contract of carriage or as an absolute limit to the extent of that liability. The Warsaw Convention declares the carrier liable for damages in certain cases and under certain limitations. However, it does not preclude the operation of the Civil Code and other pertinent laws of the Philippines. It does

not regulate, much less exempt the carrier from liability for damages for violating the rights of its passengers under the contract of carriage, especially if wilful misconduct on the part of the carrier's employee is established, as in this case.

Philip Morris, Inc. v. *Court of Appeals*
G.R. No. 91332, 16 July 1993, 224 SCRA 576

Philip Morris, Inc., Benson & Hedges, Inc. and Fabriques of Tabac Reunies, Inc. are all foreign corporations not doing business in the Philippines. Philip Morris, *et al.* commenced a suit against Fortune Tobacco Corporation, a corporation created and organized under Philippine laws, for infringement of registered marks. They alleged that such trademarks which have been registered in their respective countries of origin, as well as in other countries of the world, were used by Fortune in the manufacture, advertisement and sale of its own cigarettes, without authority from Philip Morris, *et al.* and with knowledge of the popularity of the said trademarks.

Section 21-A of the Trademark Law of the Philippines provides that any foreign corporation or person to which a trade mark or trade-name has been registered or assigned under this Law may bring an action for infringement, unfair competition, or false designation of origin and false description, whether or not it has been licensed to do business in the Philippines. In the case of *La Chemise Lacoste S.A.* v. *Fernandez* (129 SCRA 373 [1984]), the Supreme Court declared that a foreign corporation not doing business in the Philippines has a right to sue before Philippine courts, provided that qualifying circumstances necessary for the assertion of such right have been first affirmatively pleaded. A foreign corporation should not simply allege its alien origin but must additionally allege its personality to sue under Philippine law.

It was contended by Philip Morris, Inc., Benson and Hedges (Canada), Inc. and Fabriques of Tabac Reunies, S.A. that actual use of their trademarks in Philippine commercial dealings is not an indispensable element under the Paris Convention.

Article 2 of the Paris Convention of 1965, to which the Philippines is a signatory provides that :

> "(2) [. . .] no condition as to the possession of a domicile or establishment in the country where protection is claimed may be required of persons entitled to the benefits of the Union for the enjoyment of any industrial property rights."

Nonetheless, Sections 2 and 2-A of the Trademark Law of the Philippines require the actual commercial use of the trademark in the local forum :

> "Section 2. What are registrable [. . .] Trademarks, tradenames and service marks owned by persons, corporations, partnerships or associations domiciled in the Philippines and by persons, corporations, partnerships or associations domiciled in any foreign country may be registered in accordance with the provisions of this Act; Provided, that said trademarks, tradenames, or service marks are actually used in commerce and services not less than two months in the Philippines before the time the applications for registration are filed; And provided further, that the country of which the applicant for registration is a citizen grants by law substantially similar privileges to citizens of the Philippines, and such fact is officially certified, with a certified true copy of the foreign law translated into the English language, by the government of the foreign country to the government of the Republic of the Philippines.
>
> Section 2-A. Ownership of trademarks, tradenames and service marks; how acquired - Anyone who lawfully produces or deals in merchandise of any kind, who engages in any lawful business, or who renders any lawful service in commerce, by actual use thereof in manufacture or trade, in business, and in the service rendered, may appropriate to his exclusive use a trademark, a tradename, or a service mark not so appropriated by another, to distinguish his merchandise, business or service from the merchandise, business, or service of others. The ownership or possession of a trademark, tradename, service mark, heretofore or hereafter appropriated, as in this section provided, shall be recognized and protected in the same manner and to the same extent as are other property rights known to the law.'

The Supreme Court ruled that, although in this case a foreign corporation may have the personality to file a suit for infringement of its trademark, it may not necessarily be entitled to protection due to absence of actual use of the emblem in the local market which is required by Philippine law.

> "Following universal acquiescence and comity, our municipal law on trademark regarding the requirement of actual use in the Philippines must subordinate an international agreement inasmuch as the apparent clash is being decided by a municipal tribunal. Withal, the fact that international law has been made part of the law of the land does not by any means imply the primacy of the international law over national law in the municipal law in the municipal sphere. Under the doctrine of incorporation as applied in most countries, rules of international law are given standing equal, not superior to national legislative enactments."

Therefore, the issue of whether or not an infringement suit filed by a foreign corporation not engaged in business in the Philippines will prosper, depends on compliance by the corporation with the requirements of the Trademark Law of the Philippines.

Foreign law: proof; Applicability of *lex loci contractus*

Zalamea v. *Court of Appeals*
G.R. No. 104235, 18 November 1993, 228 SCRA 23

Due to Trans World Airlines, Inc.'s refusal to accommodate them in a flight from New York to Los Angeles despite possession of confirmed tickets, petitioners filed an action for damages before a Philippine court based on breach of contract of carriage characterized by bad faith. Trans World Airlines contended that there was no bad faith nor fraud because, under the Code of Federal Regulations issued by the Civil Aeronautics Board of the United States of America, it is allowed to overbook flights.

The Supreme Court ruled in favour of the passengers on the ground that there was in fact bad faith on the part of the airline. The US law or regulation allegedly authorizing overbooking was not proved by the airline. Under Philippine law, foreign laws do not prove themselves nor can the courts take judicial notice of them. Like any other fact, they must be alleged and proved. Written law may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has custody. The certificate must be made by a secretary of an embassy or legation, consul general, consul, vice-consul, or consular agent or by an officer in the foreign service of the Philippines stationed in the foreign country in which the record is kept, and authenticated by the seal of his office.

Even if the claimed US Code of Federal Regulations does exist, it is not applicable to this case. Based on the principle of *lex loci contractus*, the law of the place where the airline ticket was issued should be applied by the court where the passengers are residents and nationals of the forum and the ticket is issued in such State by the defendant airline. Since the tickets were sold and issued in the Philippines, Philippine law and not American law is the law applicable in this case.

Jurisdiction over contracts with foreign elements

Philippine-Singapore Ports Corporation v. *National Labour Relations Commission*
G.R. No. 67035, 29 January 1993, 218 SCRA 77

The Philippine-Singapore Ports Corporation (PSPC), organized and existing under Philippine laws, entered into a contract of employment with a Filipino, employing the latter as a winchman/signalman at the Commercial Islamic Port of Jeddah, Saudi Arabia. A year later, the Filipino worker was sent back to the Philippines for medical treatment. He was later advised to resign from the company, whereupon he filed a case for illegal dismissal with the Ministry of Labor in the Philippines. PSPC moved to dismiss the case on the ground that the Ministry of Labor had no jurisdiction over the case as the case concerned the overseas employment of a Filipino worker.

The Supreme Court ruled that the Ministry of Labor had jurisdiction over the case. 'Overseas employment' is defined by Article 13(h) of the Labor Code of the Philippines as 'employment of a worker outside the Philippines'. The definition makes no distinction regarding the nationality of the employer. Therefore, Filipino employers who deploy their employees abroad should be deemed covered by the definition.

Puromines, Inc. v. *Court of Appeals*
G.R. No. 91228, 22 March 1993, 220 SCRA 287

Puromines, Inc. and Makati Agro Trading, Inc. entered into a contract with Philipp Brothers Oceanic, Inc. for the sale of urea in bulk. The sales contract provided for an arbitration clause, according to which any disputes arising from the contract shall be settled by arbitration in London.

When the shipment reached Manila, it was in bad order and condition. Petitioner filed a complaint for breach of contract of carriage against the shipper and against Philipp Brothers. The respondents moved to dismiss the case on the ground that it was prematurely filed and that petitioner should first comply with the arbitration clause in the sales contract.

The Supreme Court upheld the arbitration clause on the ground that the parties are obligated to respect the arbitration provisions in the sales contract. Petitioner being a signatory and party to the sales contract cannot escape from his obligation under the arbitration clause. The rule is that unless the agreement is such as to absolutely close the doors of the courts against the parties, which would be a void agreement, the courts look with favour upon

such amicable agreements and will only interfere with great reluctance to anticipate or nullify the action of the arbitrator.

Foreign corporations

Citibank, N.A. v. *Chua*
G.R. No. 102300, 17 March 1993, 220 SCRA 75

Petitioner is a foreign commercial banking corporation duly licensed to do business in the Philippines. It entered into a restructuring agreement with private respondents in this case. Private respondents sued the bank for specific performance for failure of the bank to comply with such agreement.

During the pre-trial conference, Citibank was declared in default for failing to present a special power of attorney executed by its board of directors, as required by Philippine law. Citibank appealed on the ground that under its by-laws, no board resolution was necessary for its legal counsel to act as the bank's attorney-in-fact because its by-laws grant to its Executing Officer and Secretary Pro-Tem the power to delegate to a Citibank officer, the authority to represent and defend the bank and its interests.

Section 125 of the Corporation Code of the Philippines requires that a foreign corporation applying for a license to transact business in the Philippines must submit to the Securities and Exchange Commission (SEC), among other documents, a copy of its articles of incorporation and by-laws. Unless these documents are submitted, the application cannot be acted upon by the SEC. Section 126 of the same Code provides that if the SEC is satisfied that the applicant has complied with all the requirements, it shall then issue a license to the applicant to transact business in the Philippines.

Since the SEC grants a license only when the foreign corporation has complied with all the requirement of law, it follows that when it issues such license, it is satisfied that the applicant's by-laws, among other documents, meet the legal requirements under Philippine law. This is, in effect, an approval of the foreign corporation's by-laws. Citibank's by-laws, although originating from a foreign jurisdiction, are therefore valid and effective in the Philippines.

Citizenship: loss; proof

Surban v. *Court of Appeals*
G.R. No. 98457, 1 March 1993, 219 SCRA 309

The spouses SURBAN emigrated to Guam and resided there permanently. A house and lot situated in the Philippines was sold to the couple. Thereafter, an action for quieting of title and damages was filed against the couple with respect to the property sold to them. It was alleged that the couple were American citizens at the time they acquired the property. Under the Philippine Constitution, save in cases of hereditary succession, no private lands may be conveyed or transferred to citizens of other states.

The Supreme Court held that there was no proof that the couple were no longer Filipino citizens when they acquired the property. In any case, the determination that a person has ceased to be a Filipino is so momentous and far-reaching that it should not be left to summary proceedings. Neither may it be raised as a collateral issue in a complaint for quieting of title and damages, where it cannot be properly ventilated.

Residence (in the country): loss

Romualdez v. *Regional Trial Court, Branch 7, Tacloban City*
G.R. No. 104960, 14 September 1993, 226 SCRA 408

Petitioner, a natural born Filipino citizen, is the nephew of the former First Lady of the Philippines, IMELDA ROMUALDEZ MARCOS. After the 1986 'EDSA's People Power Revolution', petitioner together with some relatives of the deposed President FERDINAND E. MARCOS and his wife, left the Philippines and sought 'asylum' in the United States which the United States government granted. In 1991, he received a letter from the US Immigration and Naturalization Service informing him that he should depart from the US at his own expense or risk being deported. He then departed for the Philippines. In 1992, he registered as a voter for the scheduled national and local elections. His registration was questioned on the ground that he was in fact a resident of Massachusetts, USA and that he failed to comply with the minimum residence requirement for voters. ROMUALDEZ contended that he remained a resident of the Philippines even if he had been absent from 1986 to 1991, since he never abandoned his residence.

In election cases, the Supreme Court has treated domicile and residence as synonymous terms. 'Residence' is synonymous with 'domicile' and refers not only to an intention to reside in a fixed place but also to personal presence in that place, coupled with conduct indicative of such intention. It denotes a fixed permanent residence to which, when absent for business or pleasure, one intends to return. Residence, once acquired, may, however, be lost by acquiring a new domicile under the following conditions: (1) residence or

bodily presence in the new locality, (2) an intention to remain there or *animus manendi*, and (3) an intention to abandon the old domicile or *animus non revertendi*.

Petitioner's sudden departure from the country cannot be described as a voluntary abandonment of residence. He left the country because of a serious concern for his safety and welfare under the conditions then prevailing.

The Court also emphasized that the right to vote is a most precious political right, as well as a duty of every citizen, enabling and requiring him to participate in government to ensure that the government derives its powers from the governed.

Environmental protection: right to a balanced and healthful ecology; Class suit in behalf of present and future generations

Oposa v. *Factoran, Jr.*
G.R. No. 101083, 30 July 1993, 224 SCRA 408

This case raised the novel issue of whether petitioners had a cause of action to 'prevent the misappropriation or impairment' of Philippine rain forests and 'arrest the unabated hemorrhage of the country's vital life-support systems and continued rape of Mother Earth'.

Petitioners, all minors duly represented and joined by their parents, filed a taxpayers' class suit against the Secretary of the Department of Environment and Natural Resources (DENR) alleging that as citizens and taxpayers, they were entitled to the full benefit, use and enjoyment of the natural resource treasure that is the country's virgin tropical rain forests. Petitioners claimed that they represented their generation as well as generations yet unborn. They asserted such right based on the Constitution of the Philippines, which provides that "[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature". (Article II, Section 16, Philippine Constitution).

The Supreme Court upheld petitioners' personality to file a class suit for themselves, others of their generation and those of succeeding generations (*locus standi*):

> "Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right considers the 'rhythm and harmony of nature'. Nature means the created world in its entirety. Such rhythm and harmony indispensably include, *inter alia*, the

> judicial disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. . . . [T]he minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come."

The complaint focused on the people's constitutional right to a balanced and healthful ecology. The Supreme Court declared that such a right concerns nothing less than self-preservation and self-perpetuation, the advancement of which may even be said to predate all governments and constitutions. Thus, the state has a solemn obligation to preserve and protect the environment, otherwise, the day would not be too far when all else would be lost not only for the present generation, but also for generations to come.

The said right necessarily requires the judicious management and conservation of the country's forests. Without such forests, the ecological or environmental balance would be irreversibly disrupted.

International adoption: capacity to adopt

Republic v. *Court of Appeals*
G.R. No. 100835, 26 October 1993, 227 SCRA 401

A natural born citizen of the United States of America and his wife, a former Filipino citizen who was naturalized as an American citizen, sought to adopt the minor niece and nephews of the wife, who were Filipino citizens. The Supreme Court held that the American citizen was not qualified to adopt under Philippine law. The Family Code of the Philippines, Executive Order No. 209, provides for the following:

> "Article 184: The following persons may not adopt:
> . . .
> (3) An alien, except:
> (a) A former Filipino citizen who seeks to adopt a relative by consanguinity;
> (b) One who seeks to adopt the legitimate child of his or her Filipino spouse; or
> (c) One who is married to a Filipino citizen and seeks to adopt jointly with his or her spouse a relative by consanguinity of the latter.

> Aliens not included in the foregoing exceptions may adopt Filipino children in accordance with the rules on inter-country adoption as may be provided by law."

While the alien husband could not adopt, the wife, being a former Filipino citizen, was qualified to adopt. However, under the Family Code, a husband and a wife must jointly adopt except when one spouse seeks to adopt his own illegitimate child or when one spouse seeks to adopt the legitimate child of the other. Therefore, the wife could adopt without the participation of her husband.

OPINIONS OF THE DEPARTMENT OF JUSTICE

Treaties and executive agreements

Opinion No. 1, Series 1993 - Constitutional feasibility of holding in the Philippines a joint military exercise between the Armed Forces of the Philippines and Singapore

The AFP [Armed Forces of the Philippines] proposed the conduct of a combined exercise between military forces of the two countries; the exercise would involve battalion-size units and be held at Fort Magsaysay for two weeks. The suggested activity was conceived to enhance security cooperation between ASEAN member states.

The Secretary of Justice opined that the planned military exercise is allowed under Article XVIII, Sec. 25 of the Constitution[10] since it would not require the stationing of foreign troops in the Philippines. The activity need not be covered . . . [by] a treaty and . . . if at all, would merely require a prior Executive Agreement between the governments of the Philippines and Singapore.

The Constitution sought to prevent only the establishment of foreign military bases and facilities and the stationing of foreign troops similar to those

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[10] Section 25, Article XVIII of the 1987 Constitution provides that:

"After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, *foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate*, and when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State". (Emphasis added)

introduced in the country by the United States bases. The transient entry of foreign military units and their temporary stay in the country do not fall within the prohibition against foreign military bases.

The Philippines adheres to the policy of peace, equity, justice, freedom, cooperation, and amity with all nations. The joint military exercise implements a commitment of the Philippine Government towards its co-ASEAN members aimed at enhancing security within the region and supporting cooperative efforts in this regard. Any agreement therefore entered into between the governments of the two nations need not be in the form of a treaty and does not require ratification by the Senate.

Opinion No. 95, Series 1993 - Constitutionality of a proposal for the AFP to host a regional Defense Resources Management Course to be conducted by a mobile education team composed of US military personnel

The aforesaid proposal will be funded under the US 'IMET Program'. It will require the presence of US military men who will serve as instructors, as well as the participation of some soldiers from other East Asian countries and from the AFP. The conduct of the course locally will enable the AFP to train more personnel at minimum costs, while providing it with an opportunity to establish and maintain goodwill with the armed forces of other Asian countries and the USA.

. . .

[. . .] [T]here were misgivings about the legality [constitutionality] of the subject proposal since it will require the presence of foreign military personnel in the country, namely, the American instructors and the other East Asian participants.

The Department of Justice opined that there is no violation of [Section 25, Article XVIII of] the Constitution. It affirmed a previous opinion [*see supra*] where it declared that what is [. . .] prohibited is the presence of alien military units with some degree of permanency and magnitude.

The subject proposal does not fall within the ambit of the constitutional injunction, because it merely calls for the provisional stay of a few US military servicemen who will serve as course instructors, and about twenty soldiers from other East Asian countries as participants.

State succession with respect to treaties

Opinion No. 23, Series 1993 - Effect of the unification of two Germanies upon the international treaties and agreements between the Philippines and the former German Democratic Republic

The Office of the Legal Advisor of the Department of Foreign Affairs rendered an opinion that a state which acquires authority over land and people from another State succeeds to the rights and obligations of [that] State. The Embassy of the Federal Republic of Germany in a diplomatic note expressed its opinion that the RP-GDR agreements expired upon the establishment of German unity on 3 October 1990 but that for *bona fide* reasons, it is ready to honour the commitments for scholarships already assumed by the GDR.

There is therefore concurrence of the two positions: that RP-GDR agreements expired on 3 October 1990 but that rights that have accrued from said agreements should be respected by the FRG.

Under international law, in cases of universal succession of states, rights which have become vested in the territory of the extinct state, together with obligations created by treaties or contracts which are already executed in whole or in fact, pass by succession to the succeeding state.

As far as Germany is concerned, the German Unification Treaty of 31 August 1990 provides that international treaties concluded by GDR shall be discussed with contracting parties in terms of protection of *bona fide* rights and interests of the State concerned.

Rights of Citizens

Opinion No. 96, Series 1993 - Right to Return to the Country

Mrs. HELMA VER TUASON and her husband, REYNALDO TUASON requested for permission to be allowed to return to the Philippines after they had left the country in February, 1986, on the ground that no charges had been filed against her.

In the case of *Marcos* v. *Manglapus* (177 SCRA 668), the Supreme Court held that

> "the right to return to one's own country is not among the rights specifically guaranteed in the Bill of Rights, which treats only of the liberty of abode and

> the right to travel, but [. . .] that the right to return may be considered as a generally accepted principle of international law and, under our Constitution, is part of the law of the land (Art. II, Sec. 2 of the Constitution). However, it is distinct and separate from the right to travel and enjoys a different protection under the International Covenant of Civil and Political Rights, i.e. against being arbitrarily deprived thereof [Art. 12(4)]".

In the aforecited case, the issue resolved by the Supreme Court is whether or not the President has legal authority to bar the MARCOSES from returning to the Philippines. The Court upheld the Presidential ban on the return of the former President MARCOS on the ground that the then President AQUINO had the power to promote and protect the general welfare. The court explained thus:

> ". . . [T]he request or demand of the Marcoses to be allowed to return to the Philippines cannot be considered in the light solely of the constitutional provisions guaranteeing liberty of abode and the right to travel. . . . It must be treated as a matter that is appropriately addressed to those residual unstated powers of the President which are implicit in and correlative to the paramount duty residing in that office to safeguard and protect general welfare. In that context, such request or demand should submit to the exercise of a broader discretion on the part of the President to determine whether it must be granted or denied."

Said decision is not applicable to the TUASON spouses. The couple are not similarly situated with the former President MARCOS who was forced out of office after causing twenty years of political, economic and social havoc in the country. Therefore, where a Philippine citizen's return to the Philippines will not pose a threat to national security, public order or general safety, there would be no legal basis to bar them from doing so. Under international law, a citizen cannot be arbitrarily deprived of the right to enter his own country. The Universal Declaration of Human Rights [Article 13(2)] provides that

> "(e)veryone has the right to leave any country, including his own, and to return to his country" while the International Covenant on Civil and Political Rights [Article 12(4)] clearly declares that "[n]o one shall be arbitrarily deprived of the right to enter his own country".

Recognition and enforcement of foreign court decisions; change of name under foreign law

Opinion No. 133, Series 1993 - Legal Efficacy of the change of name of a Filipino residing in another state, pursuant to a Court order of said state

The guardian of a Filipino minor residing in California, USA, petitioned for a change of said minor's name before a California superior court. A judgment was rendered by the Superior Court of the State of California for the City and County of San Francisco, granting the petitioner to change his name. Said Filipino minor then applied for the renewal of his passport under his new name.

Under Philippine law, the real name of a person is that found in the civil register and such name may be changed only by means of appropriate proceedings filed under Act No. 1386 in relation with Rule 103 of the Rules of Court. Hence, a passport may normally be issued in the instant case only in the name of the person which appears in the civil register. But since there appears to have been issued a foreign judgment directing the change of name of the Filipino minor, the question to be resolved in this case is whether or not this decree may be enforced in the Philippines.

In its Opinion No. 190 series 1971, [the Secretary of Justice] opined that a foreign court decision authorizing the change of name of a person born in the Philippines may be complied with in this jurisdiction on the ground of comity. Said opinion reads in part:

> "Considering that in the present case, it is a foreign judgment that decrees the change of name and in the light of the familiar principle in Private International Law against the extension of a foreign judgment if unwarranted by the law or the fundamental policy of the forum, I believe that a new birth certificate may not be issued in this case; nonetheless, on the ground of comity, upon the presentation of a duly authenticated copy of the decision of the court of Hawaii, the local civil registrar may record the said change of name by making the necessary marginal annotations in the proper registry."

Moreover, in its Opinions No. 4-A, series 1987, and No. 52, series 1973, this Department has stated that the decision of a foreign court affecting a Filipino spouse may be recognized in [the Philippines] provided that the following conditions are complied with:

1. The foreign judgment must be proved in accordance with Philippine law.

2. The American court which pronounced judgment must have jurisdiction to do so, there must have been notice to the parties, and there must have been no collusion, fraud, or clear mistake of law or fact.
3. Pursuant to the recognized international law rule that in order that a foreign judgment may be entitled to acceptance in the court of the forum, it (the judgment) must not contravene a sound and established public policy of the forum.
4. The judgment must be final and conclusive in the state where it was rendered.

Based upon the above mentioned precedents, it is believed that in this case, the decision of the American court granting the change of name should be accorded recognition in this jurisdiction after it is established that the conditions above enumerated have been met.

Effect of divorce abroad; irrelevance of former citizenship of the foreign spouse

Opinion No. 134, Series 1993 - Foreign divorce obtained by an alien spouse, who was a former Filipino citizen; Effect on the Filipino souse

The Department is of the view that said Filipino spouse may legally remarry based on Article 26 of the Family Code of the Philippines (Executive Order No. 209, as amended), which reads as follows:

> ". . . Where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall likewise have capacity to remarry under Philippine law."

In Opinion No. 10, series 1989, the Department ruled that:

> "Divorce, as a general rule, is not recognized in the Philippines. However, in the situation contemplated in Article 26 of the Family Code, *supra*, and only in that instance, the effect of divorce, which is the severance of the marriage ties, is allowed to benefit the Filipino spouse who is thereby given capacity to remarry under Philippine law.
>
> It is said that the idea of inclusion of the second paragraph of Article 26 is to avoid the absurd situation of a Filipino being still legally married to his or her alien spouse, although the latter is no longer married to the Filipino spouse because he or she has obtained a divorce abroad which is recognized by his

> or her national law. It will, likewise, solve the problem of many Filipino women who, under the Civil Code, are still considered married to their alien husbands even after the latter have already validly divorced them under their (the husband's) national law and perhaps have already remarried."

It is believed that the above ruling equally applies to the instant case. The aforequoted Article 26 merely states 'alien spouse' without taking into consideration his nationality at the time of marriage. Therefore, the fact that the spouse who obtained the foreign divorce was a former Filipino citizen is not controlling. What is important is that the divorce was obtained by the spouse who is not a citizen of the Philippines, in order that the second paragraph of Article 26 of the Family Code can apply.

Irrelevance of nationality for applicability of family code article 34

Opinion No. 150, Series 1993 - Applicability of Article 34 of the Family Code of the Philippines (Executive Order No. 209 as amended)

Article 34 provides that:

> "No license shall be necessary for the marriage of a man and a woman who have lived together as husband and wife for at least five years and without any legal impediment to marry each other. The contracting parties shall state the foregoing facts in an affidavit before any person authorized by law to administer oaths. The solemnizing officer shall also state under oath that he ascertained the qualifications of the contracting parties and found no legal impediment to the marriage."

In this case, a Regional Trial Court Judge officiated 'a marriage under Article 34 of the Family Code' between a Chinese national and a Filipino citizen. The Chinese national, however, failed to secure a certificate of legal capacity to contract marriage from his Embassy as required under Article 21 of the said Code as well as to apply for a marriage license. The issue here is whether or not the foregoing provision of the Family Code can also be availed of by aliens.

It is apparent from the above quoted provision of law that there is no mention of the nationalities of the persons to whom it is applicable. A well-known doctrine in statutory construction states: *ubi lex non distinguit nec nos distinguere debemos*. Under this legal principle, there should be no distinction in the application of a statute where none is indicated. Equally pertinent is the rule that when the law is clear and unequivocal, it is not

susceptible to interpretation; the statute must be taken to mean exactly what it says.

The reason behind Article 34 of the Family Code is to encourage a man and woman living together to legitimize their cohabitation since under normal circumstances, such couples are discouraged from marrying each other owing to the publicity attending the application for, and issuance of, a marriage license. There is no cogent reason for denying non-Philippine citizens the salutary objective of Article 34 in facilitating the ratification of marital cohabitation. The law's interest in putting in order the social relationship among its citizens should likewise extend to foreigners who reside within its jurisdictional limits. Article 34 of the Family Code can be availed of by both Filipino citizens and aliens.

DECLARATIONS

Impact of the United Nations Convention on the Law of the Sea, 1982 on the rights and the law of the Philippines.

Declaration made upon ratification of the United Nations Convention on the Law of the Sea[11]

1. The signing of the Convention by the Government of the Republic of the Philippines shall not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of the Philippines;

2. Such signing shall not in any manner affect the sovereign rights of the Republic of the Philippines as successor of the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of 10 December 1898, and the Treaty of Washington between the United states of America and Great Britain of 2 January 1930;

3. Such signing shall not diminish or in any manner affect the rights and obligations of the contracting parties under the Mutual Defence Treaty Between the Philippines and the United States of America of 30 August 1951 and its related interpretative instruments; nor those under any other pertinent bilateral or multilateral treaty or agreement to which the Philippines is a party;

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[11] Law of the Sea Bulletin No. 25, June 1994.

4. Such signing shall not in any manner impair or prejudice the sovereignty of the Republic of the Philippines over any territory over which it exercises sovereign authority, such as the Kalayaan Islands, and the water appurtenant thereto;

5. The Convention shall not be construed as amending in any manner any pertinent laws and Presidential Decrees or Proclamation of the Republic of the Philippines; the Government of the Republic of the Philippines maintains and reserves the right and authority to make any amendments to such laws, decrees or proclamations pursuant to the provisions of the Philippines Constitution;

6. The provisions of the Convention on archipelagic passage through sea lanes do not nullify or impair the sovereignty of the Philippines as an archipelagic State over the sea lanes and do not deprive it of authority to enact legislation to protect its sovereignty, independence and security;

7. The concept of archipelagic waters is similar to the concept to internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation;

8. The agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under article 298 shall not be considered as a derogation of Philippines sovereignty.

A CONCISE DIGEST OF PHILIPPINE DECISIONS, OPINIONS AND PRACTICES ON MATTERS OF INTERNATIONAL LAW
(contributed by JORGE R. COQUIA[12])

1. INTRODUCTION

The Constitution of the Philippines states that the Philippines "recognizes the generally accepted principles of international law as part of the law of the land."[13] To

[12] Retired Associate Justice of the Court of Appeals and Legal Adviser of the Department of Foreign Affairs of the Philippines.

[13] Art. II, par. 2 Philippine Constitution (1986).

what extent has this provision been complied with by the courts and government agencies of the Philippines concerned with the application of international law?

Only recently, the Philippine Supreme Court made a rather disquieting statement in deciding a case involving a law on trademark, saying

> "withal the fact that international law has been made part of the law of the land does not by any means imply the primacy of international law over national law in the municipal sphere. Under the doctrine of incorporation as applied in most countries, rules of international law are given standing equal, not superior, to national legislative enactments."[14]

It is generally recognized that international law unquestionably takes priority over national law. It is to be assumed that a treaty, duly signed and ratified, is in accord with the national constitution. Otherwise the state will be guilty of bad faith in ratifying it. A treaty duly signed and ratified becomes automatically part of the 'law of the land'. Taking priority over all laws antecedent to its adoption, it is the duty of the national courts to enforce the provision of the treaty in cases calling for their application. Legislation passed or administrative determination subsequent to the adoption of the treaty in violation of its provisions is invalid and should be declared so by the appropriate agency of the government.[15] In like manner, in doubtful cases where the national legislative enactment or administrative ruling is open to different interpretations the courts of the state should give the benefit of the doubt to the provisions of the treaty. Where a municipal legislation contradicts a rule of customary international law or some provision of a treaty, or where a new rule of international law collides with the pre-existing municipal law, the state may not alter unilaterally the rules of international law by which it is bound. It follows that any municipal law incompatible with international law is invalid. Courts of most states seek to avoid conflicts by interpreting municipal law so as not to contradict international law on the basis that the state is not presumed to intend to fail in the discharge of its international obligations.[16]

2. IMMUNITIES

2.1. Sovereign Immunity

Shortly after the Philippines became an independent state, the Philippine Supreme Court ruled that the Hague Rules of War are based on accepted principles of international law and have force in the Philippines regardless of the fact that the Philippines was not a signatory of said Convention.[17] Subsequently, in a number of cases involving suits filed against US Armed Forces officials in their official capacity,

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[14] *Philip Morris* v. *C.A. and Fortune Tobacco*, 224 SCRA 576 (1993).

[15] C. FENWICK, *International Law* (4th Edn., 1965) p. 117.

[16] M. SORENSEN , *Manual of Public International Law* (1968), p. 168.

[17] *Kuroda* v. *Jalandoni*, 93 Phil. 171 (1949).

the Court applied the general principle of immunity of a foreign state from local jurisdiction.[18]

In *US* v. *Ruiz,*[19] the Supreme Court, in 1985, dismissed a petition for *certiorari* filed against the Commanding General of the US Naval Forces in Subic Bay concerning a contract for the improvement of marine and naval installations. The Court said:

> "The traditional rule of immunity exempts a State from being sued in the courts of another State without its consent or waiver. This rule is a necessary consequence of the principles of independence and equality of States. However, the rules of international law are not petrified; they are constantly developing and evolving. And because the activities of states have multiplied, it has been necessary to distinguish them - between sovereign and governmental acts (*jure imperii*) and private, commercial and proprietary acts (*jure gestionis*). The result is that State immunity now extends only to acts *jure imperii*. The restrictive application of State immunity is now the rule in the United States, the United Kingdom and other states in Western Europe.
>
> The restrictive application of State immunity is proper only when the proceedings arise out of commercial transactions of the foreign sovereign, its commercial activities or economic affairs. Stated differently, a State may be said to have descended to the level of an individual and can thus be deemed to have tacitly given its consent to be sued only when it enters into business contracts. it does not apply where the contract relates to the exercise of its sovereign functions. In this case the projects are an integral part of the naval base which is devoted to the defense of both the United States and the Philippines, indisputably a function of the government of the highest order; they are not utilized for nor dedicated to commercial or business purposes."[20]

In 1990, the Supreme Court also reiterated the traditional rule of foreign state immunity of suit in two cases.

In *US* v. *Ceballos,*[21] a barracks boy was arrested by US Air Force officers on accusation of 'buy bust' operations for distribution, possession and use of prohibited drugs. The complaint filed by CEBALLOS questioning his discharge from the service against US Air Force officers was dismissed by the Supreme Court on the ground that they were in the discharge of their duties as agents of the United States Government. They could not be impleaded for acts imputable to their principal which had not given its consent to be sued.

Similarly, in *US* v. *Alarcon,*[22] a complaint for damages was filed against US Armed Forces for alleged injuries suffered when dogs were unleashed on complainants

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[18] *Syquia* v. *Almeda Lopez*, 84 Phil. 312 (1949); *Raquiza* v. *Radford*, 75 Phil. 50 (1945); *Johnson* v. *Turner*, 94 Phil. 807 (1954); *Baer* v. *Tizon*, 57 SCRA 1 (1974); *Miquiabas* v. *Commanding General*, 80 Phil. 282 (1948); *Marvel Bldg.* v. *War Damage Commission*, 85 Phil. 27 (1949); *Parreño* v. *McGrannery*, 92 Phil. 79 (1953).

[19] 136 SCRA 487 (1985).

[20] Citing J. COQUIA and M.D. SANTIAGO, *Public International Law* (1984) p. 207.

[21] *US* v. *Ceballos* and *US* v. *Alarcon*, 182 SCRA 544 (1990). See also *Garcia* v. *Mathis*, 100 SCRA 250; *Sanders* v. *Veridiano*, 162 SCRA 88 (1988).

[22] G.R. No. 80258, 182 SCRA 644 (1990).

allegedly committing theft within the US military base. The US military commander invoked immunity from suit which was sustained by the Supreme Court.

2.2. Restrictive Immunity

The principle of state immunity from suit is not altogether absolute. Following the ruling in the early British case concerning the *Parlement Belge*[23] the Philippine Supreme Court in two cases held that foreign state officials may be sued in their private capacity for non-governmental or proprietary activities or for malicious acts.[24]

In *US* v. *Guinto,*[25] the Supreme Court ruled that contracts bidded out for barbering services in the US Air Force base were not governmental in nature. Hence the suit filed by one of the bidders against the US Air Force Commander was given due course by the Court. The barber establishments provided only for the grooming needs of their customers and offered not only the basic haircut and shave, but also amenities such as shampoo, massage, manicure, all for a fee. The US Air Force officials could not, therefore, plead immunity from suit as the contracts were decidedly commercial in nature.

In *US* v. *Rodrigo,*[26] the restrictive immunity from suit was likewise applied. The transaction involved restaurant services within the Camp John Hay Air Station which was opened not only to US servicemen but also to the public and tourists. It was a business enterprise, hence, the US Air Force officials who were sued by the restaurant cook could not invoke immunity from suit.

Likewise, an official of a foreign state may not invoke immunity of local jurisdiction if he was sued for damages due to malicious or tortuous acts which are beyond the scope of an official duty.[27]

3. PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

Reiterating its 1972 ruling in *World Health Organization* and *Dr. Leonce Verstuft* v. *Hon. Benjamin Aquino*[28] that an official of the World Health Organization is immune from the application of local law, the Philippine Supreme Court in 1990 held in two consolidated cases that recognized international organizations are exempted from the application of the Philippine labor law.

As an aftermath of the Vietnam war, the international community was concerned with the plight of Vietnamese refugees fleeing from Communist rule in South Vietnam.

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[23] L.R. 5 P.D. 197 (1880), cited in FENWICK, op. cit. p. 30.
[24] *Shauff* v. *Court of Appeals*, 191 SCRA 713 (1990).
[25] G.R. No. 76607, 182 SCRA 644 (1990); 1 AsYIL (1991) 168.
[26] G.R. No. 79470, 182 SCRA 644 (1990).
[27] *Shauff* v. *Court of Appeals*, 191 SCRA 713 (1990).
[28] 48 SCRA 242 (1972).

In response to this crisis an agreement was forged on 22 February 1981 between the Philippine Government and the United Nations High Commissioner for Refugees[29] whereby an operating center processing Indo-Chinese refugees for eventual resettlement to other countries was established in the Philippines. The International Catholic Migration Commission (ICMC), a non-profit international humanitarian agency incorporated in New York, was accredited by the Philippine Government to operate the refugee center in the Philippines. As a consultative agency of category II in the UN, the ICMC was granted status as a specialized agency with corresponding diplomatic privileges by the Philippine Government.

In view of a certification of election of an employees union of the ICMC, issued by the Director of Bureau of Labor Relations of the Philippine Government, the ICMC filed a petition for *certiorari* with the Philippine Supreme Court invoking its status as a recognized agency with corresponding diplomatic privileges and immunities. The Department of Foreign Affairs through its Legal Adviser intervened in the case asserting the diplomatic immunity of the ICMC over the apparition of the Solicitor General who appeared for the Secretary of Labor. The Supreme Court sustained the intervention of the legal adviser of the Department of Foreign Affairs.[30] The Supreme Court reiterated the principle in a previous decision,[31] and ruled that a categorical recognition by the Executive Branch of diplomatic immunity is essentially a political question which is conclusive on courts.

A similar ruling was rendered in a case involving the International Rice Research Institute, Inc., a Ford and Rockefeller Foundation-supported international organization, with the principal objective of conducting research on rice production. The Supreme Court ruled that an application of the Philippine Labor Law on the employees and laborers violated the immunities and privileges of IRRI as a recognized international organization.[32]

4. SOVEREIGNTY AND TERRITORIAL INTEGRITY

The struggle for independence, sovereignty and territorial integrity of the country since the 16th century by the Philippines was realized only in 1992. The Philippines was a colony of Spain since its 'discovery' in 1521 until its sovereignty was transferred to the United States under the Treaty of Paris of 1898. While US sovereignty was withdrawn on 4 July 1946, US military presence prevailed in the country by virtue of the US-PI Military Bases Agreement on 14 March 1947 for a period of 99 years. The MENDEZ-BLAIR Agreement in 1966 reduced the period to 25 years from 16 September

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[29] Unpublished, deposited at the Philippine Department of Foreign Affairs.

[30] *International Catholic Migration Commission* v. *Pura Calleja, et al.*, 190 SCRA 130 (1990).

[31] *World Health Organization and Dr. Leonce Verstuft* v. *Hon. Benjamin Aquino*, 48 SCRA 242 (1972).

[32] 190 SCRA 130 (1990).

1966. It was on this basis that Article XVIII Section 25 in the Transitory Provisions of the 1987 Philippine Constitution provided that after the 25th year which was on 16 September 1991

> "no foreign military bases, troops or facilities shall be allowed in the Philippines, except under a treaty concurred in by the Senate and when Congress so requires by a majority of the votes cast by the people in a national referendum held for that purpose and recognized as a treaty by the other contracting State."

This provision gave an opportunity for the Philippines to assert its sovereignty, independence and territorial integrity and eliminate foreign intervention, and for the Philippine Senate to reject a proposed treaty to extend the US-R.P. military bases agreement.

As a measure of avoiding interference with its domestic affairs and to maintain its sovereignty and territorial integrity Article II Section 7 of the Philippine Constitution provides that the state:

> "shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination."

Related to the maintenance of sovereignty and independence, Section 8 of Article II of the Constitution also provides that "consistent with national interest, the Philippines adopts a policy of freedom from nuclear weapons in its territory".

In reply to a query of the Office of the President, the Secretary of Justice in his letter to the President, dated 7 July 1988, gave his opinion to the effect that the phrase "consistent with the national interest meant that the President in his or her discretion may negotiate a modification or extension of the military bases agreement regardless of the provisions pertaining to nuclear weapons".[33]

5. LIMITATIONS ON DIPLOMATIC IMMUNITIES AND PRIVILEGES

The Director-General of the International Rice Research Institute (IRRI) was requested by the Department of Foreign Affairs to waive the diplomatic immunity of one of its officials who violated a local law in order that the criminal case filed against

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[33] Text reproduced in *World Bulletin* (1988) No. 3-4 p.53. Professor MERLIN MAGALLONA of the University of the Philippines College of Law contended that if the provision (Art. II Section 8) should be meaningful at all in the life of the Filipinos as a nation, this Constitutional policy can only be interpreted in one sense, namely: it is consistent with the national interest that the Philippines adopts and pursues the policy of freedom from nuclear weapon in its territory. MERLIN M. MAGALLONA, "National Interest on Nuclear Weapons - Rejoinder to the Secretary of Justice opinion", *World Bulletin* (1988) No. 3-4 p. 53.

him may be properly litigated. This is in consonance with Article 10 para. 2 of Presidential Decree No. 1620[34] which provides that the Director-General of the Institute shall have the right and duty to waive the immunity of any official whenever in his opinion, the immunity would impede the normal course of justice and can be waived without prejudice to the interest of the Institute.

A similar opinion was applied to a Netherlands diplomatic representative who had failed to pay the rentals for a residence, leased to him by a Filipino citizen, and had left the country. It was the opinion of the Legal Adviser of the Department of Foreign Affairs that the diplomat should be made to pay a just obligation.[35]

In view of the refusal of two agents of the United States Embassy in Manila to appear and testify before a fact finding body created by the President in connection with the killing of some local police officials in Makati on 10 July 1990, the Senate proposed a resolution to conduct an immediate review of the coverage of diplomatic privileges and immunities as provided for in the Vienna Convention on Diplomatic Relations.

The two US agents, who were registered with the Office of Protocol of the Department of Foreign Affairs with diplomatic visas, refused to testify in the investigation.

The legal adviser of the Department of Foreign Affairs stated in an opinion that the *rationale* behind the immunities and privileges granted to diplomatic agents, is to enable them to exercise their functions without impediment from local authorities.[36] These immunities and privileges are recognized not for the benefit of any individual but for the efficient performance of their missions or functions.

The personal inviolability of diplomatic agents, however, presupposes that they act and behave in such a manner as to harmonize with the internal order of the receiving state. They are, therefore, expected to voluntarily comply with the commands and injunctions of the municipal law which do not restrict them in the effective exercise of their functions. If the diplomatic agents violate the law and disturb the internal order of the State, the latter has the right to request their recall.[37]

6. PERSONA NON-GRATA

International law and practice demands that diplomatic officials should not interfere in the political affairs of the host state. A recent type of prohibition, as far as diplomatic activities are concerned, are acts of assisting or participating in terrorist activities in the host country.

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[34] Text in 66 *Philippine Presidential Decrees and other Vital Documents* 59.

[35] Opinion dated 2 June 1989.

[36] In order to assure due respect to diplomatic representatives, a public statute (Republic Act No. 75(1946) was enacted, severely penalizing any person who assaults, strikes, imprisons or in any other manner does violence to the person of an ambassador or public minister.

[37] Opinion dated 16 June 1990.

For the first time in the history of the Philippines, the Department of Foreign Affairs declared as *persona non grata* a diplomatic official (Iraqi) who was involved in a bombing incident in a public place during the Persian Gulf crisis. The diplomatic official was asked to leave the country. Although the law and practice in diplomatic relations do not require the receiving state to state the reason for the recall of a diplomatic officer, the Philippine government nevertheless stated its reasons in a diplomatic note.[38]

7. ASSISTANCE IN CRIMINAL MATTERS

The Philippines is gradually adhering to the growing development of mutual cooperation and assistance among states in the enforcement of their laws even outside their territorial boundaries.

Up to 1988, the Philippines had only one extradition treaty, which was with Indonesia,[39] when it concluded one with Australia.[40] Later extradition treaties were entered into with Canada,[41] Switzerland,[42] Micronesia,[43] and South Korea[44]. A treaty with the United States in being negotiated.

The treaties follow the type of extradition of the 'no list' or double criminality approach. It is an improvement on the traditional listing of crimes which is inflexible and may give rise to difficulties where offences are called under different names in different countries. Under the 'no list' type of treaty, extradition can be resorted to for any offence punishable under the laws of both states for a period of at least one year or more, except political crimes.

The Philippines also concluded a separate agreement on mutual assistance in criminal matters with Australia. Both states agreed to cooperate in the investigation, prosecution and suppression of crimes. Criminal matters will include violations of revenue laws, foreign exchange control, corruption, unlawfully acquired property, bribery, fraud, forfeiture of criminally acquired property. The assistance shall consist of taking evidence, production of documents, identification of persons, execution of requests for search and seizure, measures for the forfeiture of the proceeds of the

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[38] Diplomatic Note No. 910424 sent to the Embassy of Iraq on declaring as *persona non grata* Mr. SABAH S. SAID, on 31 January 1991.

[39] Entered into force 23 Oct. 1976. Text in 1031 UNTS 225, 7 PhTS No. 667, LN 1976 No. 38, 5 Phil.YIL(1976) 177.

[40] Entered into force 18 Jan. 1991.

[41] Entered into force 12 Nov. 1990.

[42] 19 October 1989, ratification pending.

[43] Entered into force 6 Sept. 1990.

[44] 25 May 1993, ratification pending.

crime, making persons available to assist in the investigations and service of documents.[45]

8. RATIFICATION OF INTERNATIONAL AGREEMENTS

The treaty-making power of the President as now provided in the 1987 Philippine Constitution will likely cause disputes between the President and the Philippine Senate. Article VII, Section 21 of the Constitution reads:

> "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate."

Shortly after the present (1987) Constitution took effect, a dispute arose when the last amendment to the US-RP Military Bases Agreement, popularly known as the 'MANGLAPUS-SHULTZ' agreement, was concluded. Some members of the Philippine Senate demanded a Senate ratification of what they considered to be an international agreement. An *Ad Hoc* Committee created by Senate President JOVITO R. SALONGA, however, rendered an opinion that the President may not be compelled to submit said agreement for Senate ratification since she considered it to be an executive agreement.[46]

The issue was raised for the first time in 1959 in the case *USAFE Veterans* v. *Treasurer of the Philippines, et al.*[47] involving the ROMULO-SNYDER Loan Agreement entered into in 1950 between the Philippines and the United States. The Supreme Court ruled that the ROMULO-SNYDER Loan Agreement, negotiated and signed by then Foreign Affairs Secretary CARLOS P. ROMULO, was an executive agreement, hence, it did not need the concurrence of the Philippine Senate to be valid and effective. A similar ruling was rendered in *Commissioner of Customs* v. *Eastern Trading*[48] where the Supreme Court also distinguished between a treaty and an executive agreement.

The issue likely to be raised under the present Constitution is, whether the sweeping phrase 'treaty or international agreement' will legally obligate the executive branch of the Government to submit all international agreements for concurrence by the Senate.

When is an international agreement deemed to be an executive agreement? Who will determine whether said document is a treaty or an executive agreement?

Executive agreements are the result of a unique American practice in establishing relations with other states. It is a binding international obligation made by the executive

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[45] Text in 8 *Foreign Relations Journal* (1993) 100. The treaty was ratified by the Philippine Senate in September 1993.

[46] The committee was composed of former Chief Justice PEDRO YAP, former Supreme Court Justice VICENTE ABAD SANTOS and Ateneo University President JOAQUIN BERNAS, S.J.

[47] 105 Phil. 1039 (1959).

[48] 3 SCRA 351 (1961).

branch on the basis of prior congressional authorization or even without such authorization but within the powers generally recognized as vested in the President.

International agreements embodying adjustments or details carrying out well-established national policies and traditions, amendments to existing treaties, those involving arrangements to existing treaties and those involving arrangements of a more or less temporary nature, usually take the form of executive agreements.

A circular of the US State Department provides that Executive Agreements shall not be used when the subject matter should be covered by a treaty (Memorandum from the Senate Legislative Counsel and the Legal Adviser of the State Department, 14 ILM (1975) 1588). The Executive Agreement shall be used only for agreements which fall into one or more of the following categories:

1. Agreements which are made pursuant to or in accordance with existing legislation or a treaty;
2. Agreements which are made subject to Congressional approval or implementation; or
3. Agreements which are made under and in accordance with the President's Constitutional Power.

(Department of State Circular No. 175, 13 Dec.1955, 50 AJIL(1956) 785).

When there is any serious question as to whether an international agreement should be made in the form of a treaty or in the form of an executive agreement, the US State Department circular provides that the matter shall be brought to the attention of the Secretary of State by a memorandum prepared by the officer responsible for the intended negotiations.

Following the US State Department practice the Legal Adviser of the Philippine Department of Foreign Affairs recommended the issuance by the Office of the President of Memorandum Circular No. 89 dated 19 December 1988, providing for guidelines on when an international agreement is a treaty which should be submitted to the Philippine Senate for concurrence in accordance with Constitution. The pertinent provision of the Circular reads:

> "In case of dispute as to whether an international agreement should be submitted to the Philippine Senate for its concurrence the matter should be referred to the legal Adviser of the Department of Foreign Affairs for comment. The Senate officials may also give their comment after consultations with the Secretary of the Department of Foreign Affairs for recommendation to the President."[49]

9. POLITICAL ASYLUM

In reply to the request of a Filipino national, who had become a naturalized citizen of the United States, for political asylum in the Philippines on the ground of alleged

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[49] Text in 2 *The Diplomatic Review* (1990)3.

threats to his life in the US, the Foreign Affairs Legal Adviser ruled that political asylum is not a right possessed by an alien.[50]

While the Constitution of a number of states expressly grants the right of asylum to persons persecuted for political reasons, it cannot yet be said that such a right has become a general principle of international law. At present asylum is just a privilege granted by a state to allow an alien escape from the persecution of his country for political reasons. Such an alien enjoys the hospitality of the state but it is the right of the state to place him under surveillance or even intern him if necessary.

It was found that the petitioner's reason for seeking refuge in the Philippines was due to his fear of the threats to his life by private individuals in connection with transactions, and not due to political reasons. While the Universal Declaration of Human Rights guarantees individuals the right to seek and enjoy in other countries asylum from persecution, this right may be invoked only in the case of persecutions genuinely arising from political crimes or acts contrary to the principles of the United Nations.[51]

A similar request was made by a US national married to a Filipino woman, seeking asylum in the Philippines on alleged political persecution in his home country. The Foreign Affairs Legal Adviser said in his ruling that if the alien is being politically persecuted in his home country, he may apply for a visa under section 47(b) of the Philippine Immigration Act of 1940, as amended, which authorizes the President

> "for humanitarian reasons, and when not opposed to the public interest, to admit aliens who are refugees for religious, political, or racial reasons. Such application must be submitted to the Department of Justice, the competent government agency to evaluate and approve said application."[52]

10. ADMISSION OF ALIENS

A query arose as to whether crewmen of a Russian vessel which had entered into an agreement with local nationals to engage in canning of fish caught in Philippine territorial waters, should secure visas. It was contended that since the crewmen of the Russian vessel would not disembark from their vessel, they need not secure visas to enter into the territorial waters.

It was the opinion of the Legal Adviser that since the Russian vessel was entering Philippine territorial waters, entry visas for the crew were required. The opinion recalled that the territory of the Philippines as provided for in Article I of the Philippine Constitution comprises the Philippine archipelago, with all the islands and waters embodied therein, that the territorial sea of the Philippines as now provided for in the UN Convention on the Law of the Sea is 12 nautical miles measured from the

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[50] Opinion dated 21 January 1990.

[51] Opinion dated 23 February 1990.

[52] Opinion rendered on 25 January 1991.

archipelagic baselines, and that the contiguous zone of 24 miles from the baselines is also within the jurisdiction of the Philippines for violations of immigration, customs, revenue and health laws.

The policy of the Philippines as to fishing and exploitation of marine resources is more specific and the fishing and securing of marine wealth exclusively to Filipino citizens. This is provided for in Article XII, Section 2, paragraph 2 of the 1987 Philippine Constitution.[53]

11. RESTRICTION ON TRAVEL OF CITIZENS; THE RIGHT TO RETURN TO ONE'S OWN COUNTRY

The issue on whether the state may prohibit or restrict travel abroad of its citizens arose when the late President MARCOS, his family and a number of his supporters who were in Hawaii, requested travel documents to return to the Philippines or go to other countries.

Four documents, namely, the United Nations Charter, the Universal Declaration of Human Rights, the Philippine Constitution and the International Covenant on Civil and Political Rights were cited by the legal Adviser of the Department of Foreign Affairs in his opinion.

Article III of the Philippine Constitution provides, *inter alia*:

> "Section 6. The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of *national security, public safety, or public health*, as may be provided by law." (emphasis added)

Article 13 of the Universal Declaration of Human Rights guarantees the right of the individual to leave his country and to return to it. Although Article 12 of the Covenant on Civil and Political Rights guarantees the right to travel, said right may be restricted on grounds of national security, public safety, public health or morals. The protection of human rights used to be only of domestic concern and regulated by municipal law. Due to worldwide violation of human rights during World War II, the rights became an international concern and are now the subject matter of international law. The statement in the preamble of the Charter of the United Nations is not only an academic proclamation. It derives from a concrete experience and the conviction that respect for human rights is a basic requirement for international peace.

The determination of the need of protection of national security or public order is lodged with the Executive. The Covenant on Civil and Political Rights [Article 4] allows a state to limit or suspend the enjoyment of certain rights in cases of officially proclaimed public emergency which threaten the life of the nation. Such limitations or

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[53] Opinion dated 1 March 1989.

suspensions are permitted only "to the extent strictly required by the exigencies of the situation" and may never involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[54]

The opinion of the Legal Adviser was sustained in a decision of the Supreme Court. In a petition filed by the late President FERDINAND MARCOS and his family praying that they be issued passports so they could return to the Philippines, the Supreme Court ruled that the right to return to one's country is not among the rights specifically guaranteed in the Bill of Rights of the Philippine Constitution. The liberty of abode and the right to return may be considered as a generally accepted principle of international law. According to the Court,

> "the constitutional guarantees they invoke are neither absolute nor inflexible. For the exercise of even the preferred freedoms of speech and of expression, although couched in absolute terms, admits of limits and must be adjusted to the requirements of equally important public interests."

The President in the exercise of her powers as Commander-in-Chief, to keep the peace and maintain public order and security, had decided against the return of the MARCOSES. The Supreme Court found that the President had not acted arbitrarily and whimsically in determining that the return of the MARCOSES posed a threat to national interest and welfare, and in prohibiting their return.[55]

Article III, Section 6 of the Philippine Constitution is now implemented by Chapter XIII, Section 50 of the Administrative Code which provides that the Secretary of the Department of Foreign Affairs shall have the authority to withhold the issuance or order the cancellation or restriction of passports upon lawful order of the court of when he deems it necessary in the interest of national security, public safety or public health, or in cases when a passport was secured through misrepresentation or fraud.

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[54] Opinion dated 2 March 1989.

[55] *Marcos et al.* v. *Manglapus et al.*, 177 SCRA 668 (1989).This ruling was reiterated in *Silverio* v. *Court of Appeals*, 195 SCRA 760 (1991).

THAILAND

ANNOUNCEMENTS

Baselines

Announcements of the Office of the Prime Minister concerning the Straight Baselines and Internal Waters of Thailand of 11 June 1970, 17 August 1992 and 18 February 1993

The Announcement of 11 June 1970 proclaimed the straight baselines and internal waters of Thailand in 3 areas and was published in the Official Gazette, Special Vol. 87, Chapter 52 of 12 June 1970.[56]

The Announcement of 17 August 1992 proclaimed the same items for another area, the details of which appeared in an annexed map. It was published in Official Gazette Vol.109, Chapter 89 of 19 August 1992.[57]

The Announcement of 18 February 1993, Official Gazette Vol.110, chapter 18, 18 February 1993[58] repealed and substituted the Announcement of 11 June 1970 in order to rectify certain errors in the latter Announcement regarding geographical coordinates and to bring the latter Announcement in accordance with the change of the name of an island.

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[56] Text in *The Law of the Sea, Baselines: National legislation with Illustrative maps* (UN publ. Sales No. E.89.V.10 p. 306).

[57] Text in *Law of the Sea Bulletin* No. 25, June 1994.

[58] Text in *Law of the Sea Bulletin* No. 23, June 1993, p. 29.

PARTICIPATION IN MULTILATERAL TREATIES*

Editorial introduction

This section is meant to record the participation of Asian states in open, multilateral law-making treaties which mostly aim at world-wide adherence. In view of the limited space available, a selection has been made of treaties of which the present status is available to the Editors. Others will be included in following volumes of the *Yearbook*. Treaties on which data have been included in a previous volume are referred to, but data once recorded will not be reincluded.

For the purpose of this section states broadly situated west of Iran, north of Mongolia, east of Papua New Guinea and south of Indonesia will not be covered.

The Editors wish to express their gratitude to all those international organizations which have so kindly responded to our request by making available information on the status of various categories of treaties.

Note:
- Where no other reference to specific sources is made, data are derived from Multilateral Treaties deposited with the Secretary-General - Status as at 31 December 1993 (ST/LEG/SER.E/12).
- No indication is given of reservations and declarations made.
- Sig. = signature; Cons. = consent to be bound.

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* Edited by Ko Swan Sik, General Editor and Karin Arts, Assistant Editor

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Judicial and administrative cooperation
Labour
Narcotic drugs
Nationality and statelessness
Nuclear material
Outer space
Privileges and immunities
Refugees
Road traffic and transport
Sea
Sea traffic and transport
Social matters
Telecommunications
Treaties
Weapons

ANTARCTICA

Antarctic Treaty
Washington, 1 Dec. 1959
Entry into force: 23 June 1961
(Status as included in A/46/604 and TIF)

State	*Cons.*	*State*	*Cons.*
China	yes	Korea (DPR)	yes
India	„	Korea (Rep.)	„
Japan	„	Papua New Guinea	„

COMMERCIAL ARBITRATION

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958: *see* Vol. 1, p. 184; Vol. 3 p. 222.

CULTURAL MATTERS

Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, Beirut, 10 December 1948 (*corrected*): *see* Vol. 3 p. 222.
Agreement on the Importation of Educational, Scientific and Cultural Materials, Florence 17 June 1950 (*corrected*): *see* Vol. 3 p. 222.
International Agreement for the Establishment of the University for Peace, 1980: *see* Vol. 3 p. 223.
Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and the Pacific, 1983: *see* Vol. 3 p. 223.

Convention concerning the International Exchange of Publications, 1958
(Cont'd from Vol. 3 p. 223)
(Status as included in UNESCO doc. CL/3343)

State	*Cons.* *(deposit)*
Tajikistan	28 Aug 92

Convention concerning the International Exchange of Official Publications and Government Documents between States, 1958
(Cont'd from Vol. 3 p. 223)
(Status as included in UNESCO doc. CL/3343)

State	*Cons.* *(deposit)*
Tajikistan	28 Aug 92

CULTURAL PROPERTY

Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954: *see* Vol. 3 p. 224.

Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1954
(Cont'd from Vol. 3 p. 224)
(Status as included in UNESCO doc. CL/3343)

State	*Cons.* *(deposit)*	*State*	*Cons.* *(deposit)*
Cambodia	4 Apr 62	Tajikistan	28 Aug 92

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970
(Cont'd from Vol. 2 p. 192, Vol. 3 p. 224)
(Status as included in UNESCO doc. CL/3343)

State	*Cons.* *(deposit)*
Tajikistan	28 Aug 92 *(corrected)*

Convention concerning the Protection of the World Cultural and Natural Heritage, 1972

(Cont'd from Vol. 3 p. 225)

(Status as included in UNESCO doc. CL/3343)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Nepal	20 Jun 78	Uzbekistan	13 Jan 93 (*corrected*)

DEVELOPMENT MATTERS

Charter of the Asian and Pacific Development Centre, 1982

(Cont'd from Vol. 3 p. 225)

State	*Cons.*
Macau (associate member)	3 Jun 93

DISPUTE SETTLEMENT

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965

(Cont'd from Vol. 3 p. 226)

(Status as at 15 February 1995, provided by the World Bank)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Cambodia	5 Nov 93		Nepal	28 Sep 65	7 Jan 69 (*corrected*)

Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court

State	*Date of (last) deposit*	*State*	*Date of (last) deposit*
Cambodia	19 Sep 57 (with res.)	Pakistan	13 Sep 60 (with res.)
India	18 Sep 74 (with res.)	Philippines	18 Jan 72 (with res.)
Japan	15 Sep 58 (with res.)		

ENVIRONMENT, FAUNA AND FLORA

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969: *see* Vol. 3 p. 226.
International Convention on Civil Liability for Oil Pollution Damage, 1969: *see* Vol. 3 p. 227.
Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969: *see* Vol. 3 p. 227.
International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971: *see* Vol. 3 p. 229.
Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other Than Oil, 1973: *see* Vol. 3 p. 227.
Protocol to amend the Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1982: *see* Vol. 3 p. 228.
Amendments to Articles 6 and 7 of the Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1987: *see* Vol. 3 p. 228.

International Convention for the Prevention of Pollution of the Sea by Oil, as amended, 1954

(Cont'd from Vol. 3 p. 226)
(Status as included in IMO doc. J/5631)

State	*Cons.*	*E.i.f.*
Japan	21 Aug 67	21 Nov 67

Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971

(Cont'd from Vol. 3 p. 228)
(Status as included in UNESCO doc. CL/3343)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Nepal	17 Dec 87	Papua New Guinea	16 Mar 93

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, as amended, 1972

(Cont'd from Vol. 3 p. 229)
(Status as included in IMO doc. J/5631)

State	*Cons.*	*E.i.f.*
Korea (Rep.)	21 Dec 93	20 Jan 94

Relating to the International Convention for the Prevention of Pollution from Ships, 1973, as amended, 1978
(Cont'd from Vol. 3 p. 229)
(Status as included in IMO doc. J/5631)

State	*Cons.*
Papua New Guinea	25 Oct 93

Convention for the Protection of the Ozone Layer, 1985
(Cont'd from Vol. 1 p. 185, Vol. 3 p. 230)

State	*Cons.*	*State*	*Cons.*
Myanmar	24 Nov 93	Uzbekistan	18 May 93

Protocol on Substances that Deplete the Ozone Layer, 1987
(Cont'd from Vol. 1 p. 186, Vol. 3 p. 230)

State	*Cons.*	*State*	*Sig.*	*Cons.*
Brunei	27 May 93	Philippines	14 Sep 88	17 Jul 91
Myanmar	24 Nov 93	Uzbekistan		18 May 93

Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989
(Cont'd from Vol. 2 p. 186, Vol. 3 p. 230)

State	*Cons.*	*State*	*Sig.*	*Cons.*
Bangladesh	1 Apr 93	Japan		17 Sep 93
Indonesia	20 Sep 93	Malaysia		8 Oct 93
Iran	5 Jan 93	Philippines	22 Mar 89	21 Oct 93

Amendment to the Montreal Protocol, 1990
(Cont'd from Vol. 1 p. 186, Vol. 2 p. 186, Vol. 3 p. 230)

State	*Cons.*	*State*	*Cons.*
Malaysia	16 Jun 93	Philippines	9 Aug 93
Myanmar	24 Nov 93	Singapore	2 Mar 93
Papua New Guinea	4 May 93	Sri Lanka	16 Jun 93

Framework Convention on Climate Change
New York, 9 May 1992
Entry into force: 21 March 1994
(Status as included in A/AC.237/INF.15)

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan	12 Jun 92		Mongolia	12 Jun 92	30 Sep 93
Bangladesh	9 Jun 92	15 Apr 94	Myanmar	11 Jun 92	
Bhutan	11 Jun 92		Nepal	12 Jun 92	2 May 94
China	11 Jun 92	5 Jan 93	Pakistan	13 Jun 92	1 Jun 94
India	10 Jun 92	1 Nov 93	Papua New Guinea	13 Jun 92	16 Mar 93
Indonesia	5 Jun 92		Philippines	12 Jun 92	2 Aug 94
Iran	14 Jun 92		Singapore	13 Jun 92	
Japan	13 Jun 92	28 May 93	Sri Lanka	10 Jun 92	23 Nov 93
Kazakhstan	8 Jun 92		Thailand	12 Jun 92	
Korea (DPR)	11 Jun 92		Uzbekistan	20 Jun 93	
Korea (Rep.)	13 Jun 92	14 Dec 93	Vietnam	11 Jun 92	
Malaysia	9 Jun 93	13 Jul 94			
Maldives	12 Jun 92	29 Nov 92			

Convention on Biological Diversity
Rio de Janeiro, 5 June 1992
Entry into force: 29 December 1993

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	12 Jun 92		Maldives	12 Jun 92	9 Nov 92
Bangladesh	5 Jun 92		Mongolia	12 Jun 92	30 Sep 93
Bhutan	11 Jun 92		Myanmar	11 Jun 92	
China	11 Jun 92	5 Jan 93	Nepal	12 Jun 92	23 Nov 93
India	5 Jun 92		Pakistan	5 Jun 92	
Indonesia	5 Jun 92		Papua New Guinea	13 Jun 92	16 Mar 93
Iran	14 Jun 92		Philippines	12 Jun 92	8 Oct 93
Japan	13 Jun 92	28 May 93	Singapore	10 Mar 93	
Kazakhstan	9 Jun 92		Sri Lanka	10 Jun 92	
Korea (DPR)	11 Jun 92		Thailand	12 Jun 92	
Korea (Rep.)		13 Jun 92	Vietnam	28 May 93	
Malaysia		12 Jun 92			

Amendment to the Montreal Protocol, 1992
Copenhagen, 25 November 1992
Entry into force: -

State	*Cons.*
Malaysia	5 Aug 93

FAMILY MATTERS

Convention on the Recovery Abroad of Maintenance, 1956: *see* Vol. 2 p. 191.
Convention on the Law Applicable to Maintenance Obligations Towards Children, 1956: *see* Vol. 3 p. 231.
Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, 1961: *see* Vol. 3 p. 231.
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962: *see* Vol. 2 p. 191.
Convention on the Law Applicable to Maintenance Obligations, 1973: *see* Vol. 3 p. 231.

FINANCE

Convention Establishing the Multilateral Investment Guarantee Agency, 1988

(Cont'd from Vol. 3 p. 232)

(Status as at 15 February 1995, provided by the World Bank)

State	*Sig.*	*Cons. (deposit)*	*State*	*Sig.*	*Cons. (deposit)*
Cambodia	1 Oct 93		Philippines	15 Sep 86	22 Nov 93
India	13 Apr 92	20 Sep 93	Vietnam	27 Sep 93	4 Apr 94
Nepal	23 Sep 92	23 Sep 93			

Agreement Establishing the Asian Development Bank

Manila, 4 December 1965
Entry into force: 22 August 1966

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	4 Dec 65	22 Aug 66	Maldives		14 Feb 78
Bangladesh		14 Mar 73	Myanmar		26 Apr 73
Bhutan		15 Apr 82	Nepal	4 Dec 65	21 Jun 66
Cambodia	4 Dec 65	30 Sep 66	Pakistan	4 Dec 65	12 May 66
China		10 Mar 86	Papua New Guinea		8 Apr 71
Hong Kong		27 Mar 69	Philippines	4 Dec 65	5 Jul 66
India	4 Dec 65	20 Jul 66	Singapore	28 Jan 66	21 Sep 66
Indonesia		24 Nov 66	Sri Lanka	4 dec 65	29 Sep 66
Iran	4 Dec 65		Taipei, China	4 Dec 65	22 Sep 66
Japan	4 Dec 65	16 Aug 66	Thailand	4 Dec 65	16 Aug 66
Korea (Rep.)	4 Dec 65	16 Aug 66	Vietnam	28 Jan 66	22 Sep 66
Laos	4 Dec 65	30 Aug 66			
Malaysia	4 Dec 65	16 Aug 66			

HEALTH

Protocol Concerning the Office International d'Hygiène Publique
New York, 22 July 1946
Entry into force: 20 October 1947

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		19 Apr 48	Myanmar		1 Jul 48
China		22 Jul 46	Pakistan		23 Jun 48
India	22 Jul 46	12 Jan 48	Philippines		22 Jul 46
Iran	22 Jul 46	27 Jan 47	Sri Lanka		23 May 49
Japan		11 Dec 51	Thailand		22 Jul 46

HUMAN RIGHTS, INCLUDING WOMEN AND CHILDREN

Convention on the Political Rights of Women, 1953: *see* Vol. 1 p. 188, Vol. 2 p. 189.
Convention on the Nationality of Married Women, 1957: *see* Vol. 1 p. 188.
International Covenant on Economic, Social and Cultural Rights, 1966: *see* Vol. 1 p. 187, Vol. 2 p. 189, Vol. 3 p. 232.
International Covenant on Civil and Political Rights, 1966: see Vol. 1 p. 187, Vol. 2 p. 189, Vol. 3 p. 233.
Optional Protocol to the International Covenant on Civil and Political Rights, 1966: see Vol. 1 p. 187, Vol. 2 p. 189.
International Convention on the Elimination of All Forms of Racial Discrimination, 1966: *see* Vol. 1 p. 186.

Convention against Discrimination in Education, 1960
(Cont'd from Vol. 3 p. 232)
(Status as included in UNESCO doc. CL/3343)

State	*Cons.* *(deposit)*
Tajikistan	28 Aug 92

Convention on the Elimination of All Forms of Discrimination against Women, 1979
(Cont'd from Vol. 1 p. 188, Vol. 2 p. 190, Vol. 3 p. 233)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
India	30 Jul 80	9 Jul 93	Tajikistan		26 Oct 93
Maldives		1 Jul 93			

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

(Cont'd from Vol. 1 p. 187, Vol. 2 p. 189, Vol. 3 p. 233)

(Status as included in CAT/C/2/Rev.3 and E/CN.4/Sub.2/1994/27)

State	*Cons.*
Sri Lanka	3 Jan 94

International Convention against Apartheid in Sports, 1985

(Cont'd from Vol. 3 p. 233)

State	*Sig.*	*Cons.*
Indonesia	16 May 86	23 Jul 93

Convention on the Rights of the Child, 1989

(Cont'd from Vol. 1 p. 189, Vol. 2 p. 190, Vol. 3 p. 233)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Papua New Guinea	30 Sep 90	2 Mar 93	Tajikistan		26 Oct 93
			Turkmenistan		20 Sep 93

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

UNGA, New York, 18 December 1990

Entry into force: -

State	*Sig.*
Philippines	15 Nov 93

Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination

14th Meeting of the states parties, 15 January 1992

Entered into force: -

State	*Sig.*
Korea (Rep.)	30 Nov. 1993

HUMANITARIAN LAW IN ARMED CONFLICT

International Conventions for the Protection of Victims of War, I-IV, 1949
(Cont'd from Vol. 1 p. 190, Vol. 3 p. 234)
(Status as included in E/CN.4/Sub.2/1994/27)

State	*Cons.*
Uzbekistan	8 Oct 93

Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977
(Cont'd from Vol. 1 p. 190, Vol. 2 p. 197, Vol. 3 p. 234)
(Status as included in UN doc. A/49/255 and E/CN.4/Sub.2/1994/27)

State	*Cons.*
Uzbekistan	8 Oct 93

Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977
(Cont'd from Vol. 1 p. 190, Vol. 2 p. 197, Vol. 3 p. 234)
(Status as included in UN doc. A/49/255 and E/CN.4/Sub.2/1994/27)

State	*Cons.*
Uzbekistan	8 Oct 93

INTELLECTUAL PROPERTY

Convention for the Protection of Literary and Artistic Works, 1886, most recently revised Paris, 1971: *see* Vol. 3 p. 235.
Protocols 1, 2 and 3 annexed to the Universal Copyright Convention, 1952: *see* Vol. 3 pp. 236-237.
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961: *see* Vol. 3 p. 237.

Convention for the Protection of Industrial Property, 1883 (most recently revised 1967)

(Cont'd from Vol 3 p. 235)

(Status as included in WIPO doc. 423(E) of 1 July 1994)

State	*Party*	*Latest Act to which State is party*	*State*	*Party*	*Latest Act to which State is party*
Kyrgyzstan	25 Dec 91	Stockholm (1967)	Tajikistan	25 Dec 91	Stockholm (1967)

Universal Copyright Convention, 1952 (revised 1971)

(Cont'd from Vol. 3 p. 236)

(Status as included in UNESCO doc. CL/3343)

State	*Cons. (deposit)*
Tajikistan	28 Aug 92

Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971

(Cont'd from Vol. 2 p. 192)

State	*Cons.*
China	5 Jan 93

Convention Establishing the World Intellectual Property Organization, 1967

(Cont'd from Vol. 3 p. 237)

(Status as included in WIPO doc. 423(E) of 1 July 1994)

State	*Membership*	*State*	*Membership*
Bhutan	16 Mar 94	Tajikistan	25 Dec 91
Brunei	21 Apr 94	Thailand	25 Dec 89
Kyrgyzstan	25 Dec 91		*(corrected)*

Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties
Madrid, 13 December 1979
Entry into force: -

State	*Cons.*
India	31 Jan 83 (except Arts. 1 to 4 and 17)

INTERNATIONAL CRIMES

Convention on the Prevention and Punishment of the Crime of Genocide, 1948: *see* Vol. 1 p. 191.
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968: *see* Vol. 2 p. 196.
Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988: *see* Vol. 1 p. 193.
Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988: *see* Vol. 1 p. 193.
International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989: *see* Vol. 2 p. 197.
Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991: *see* Vol. 2 p. 197.

Slavery Convention, 1926 as amended in 1953
(Cont'd from Vol. 2 p. 195)

State	*Cons.*
Nepal	7 Jan 63

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956
(Cont'd from Vol. 2 p. 196)

State	*Cons.*
Nepal	7 Jan 63

Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963
(Cont'd from Vol. 1 p. 191)
(Information provided by the ICAO Secretariat, 16 January 1995)

State	*Cons.*	*Effective date*
Papua New Guinea	6 Nov 75	16 Sep 75

Convention for the Suppression of Unlawful Seizure of Aircraft, 1970
(Cont'd from Vol. 1 p. 192)
(Information provided by the ICAO Secretariat, 16 January 1995)

State	*Cons.*
Uzbekistan	7 Feb 94

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971
(Cont'd from Vol. 1 p. 192, Vol. 2 p. 196)
(Information provided by the ICAO Secretariat, 16 January 1995)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Mongolia	18 Feb 72	14 Sep 1972 *(corrected)*	Uzbekistan		7 Feb 94

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 1973
(Cont'd from Vol. 3 p. 238)

State	*Cons.*
Maldives	21 Aug 90 *(corrected)*

International Convention on the Suppression and Punishment of the Crime of Apartheid
New York, 30 Nov. 1973
Entry into force: 18 July 1976

State	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	6 Jul 83	Maldives		24 Apr 84
Bangladesh	5 Feb 85	Mongolia	17 May 74	8 Aug 75
Cambodia	28 Jul 81	Nepal		12 Jul 77
China	18 Apr 83	Pakistan		27 Feb 86
India	22 Sep 77	Philippines	2 May 74	26 Jan 78
Iran	17 Apr 85	Sri Lanka		18 Feb 82
Laos	5 Oct 81	Vietnam		9 Jun 81

International Convention Against the Taking of Hostages, 1979
(Cont'd from Vol. 1 p. 193, Vol. 2 p. 196)

State	*Cons.*	*State*	*Cons.*
China	26 Jan 93	Mongolia	9 Jun 92

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1988
(Cont'd from Vol. 1 p. 194)
(Information furnished by the Secretariat of the ICAO, 16 January 1995)

State	*Cons.*
Uzbekistan	7 Feb 94 (effective 9 Mar 94)

INTERNATIONAL REPRESENTATION
(*see also*: Privileges and Immunities)

Vienna Convention on the Representation of States in their relations with International Organizations of a Universal Character
Vienna, 14 March 1975
Entry into force: -

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Iran		30 Dec 88	Mongolia	30 Oct 75	14 Dec 76
Korea (DPR)		14 Dec 82	Vietnam		26 Aug 80

INTERNATIONAL TRADE

Convention on Transit Trade of Land-locked States, 1965: *see* Vol. 3 p. 239.
Convention on the Limitation Period in the International Sale of Goods, 1974: *see* Vol. 1 p. 184.
UN Convention on Contracts for the International Sale of Goods, 1980: *see* Vol. 1 p. 185.
UN Convention on the Liability of Operators of Transport Terminals in International Trade, 1991: *see* Vol. 1 p. 185.

JUDICIAL AND ADMINISTRATIVE COOPERATION

Convention Relating to Civil Procedure, 1954: see Vol. 3 p. 239.
Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961: *see* Vol. 3 p. 239.
Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965: *see* Vol. 3 p. 240.
Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970: *see* Vol. 3 p. 240.

LABOUR

Abolition of Forced Labour Convention, 1957 (ILO Conv. 105): *see* Vol. 3 p. 242.

Forced Labour Convention, 1930 (ILO Conv. 29)

(Cont'd from Vol. 3 p. 240)
(Information furnished by the International Labour Office)

State	*Ratif. registered*	*State*	*Ratif. registered*
Kyrgyzstan	31 Mar 92	Tajikistan	26 Nov 93

Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87)

(Cont'd from Vol. 3 p. 241)
(Information furnished by the International Labour Office)

State	*Ratif. registered*	*State*	*Ratif. registered*
Kyrgyzstan	31 Mar 92	Tajikistan	26 Nov 93

Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98)
(Cont'd from Vol. 3 p. 241)
(Information furnished by the International Labour Office)

State	*Ratif. registered*	*State*	*Ratif. registered*
Kyrgyzstan	31 Mar 92	Tajikistan	26 Nov 93

Equal Remuneration Convention, 1951 (ILO Conv. 100)
(Cont'd from Vol. 3 p. 241)
(Information furnished by the International Labour Office)

State	*Ratif. registered*	*State*	*Ratif. registered*
Kyrgyzstan	31 Mar 92	Tajikistan	26 Nov 93
Sri Lanka	1 Apr 93		

Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111)
(Cont'd from Vol. 3 p. 242)
(Information furnished by the International Labour Office)

State	*Ratif. registered*	*State*	*Ratif. registered*
Kyrgyzstan	31 Mar 92	Tajikistan	26 Nov 93

Employment Policy Convention, 1964 (ILO Conv. 122)
(Cont'd from Vol. 3 p. 242)
(Information furnished by the International Labour Office)

State	*Ratif. registered*	*State*	*Ratif. registered*
Kyrgyzstan	31 Mar 92	Tajikistan	26 Nov 93

NARCOTIC DRUGS

International Opium Convention, 1925 and amended by the Protocol of 1946: *see* Vol. 2 p. 193.
Protocol bringing under International Control Drugs outside the Scope of the Convention of 1931, as amended by the Protocol of 1946: *see* Vol. 2 p. 193.
Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936, amended 1946: *see* Vol. 1 p. 194.
Single Convention on Narcotic Drugs, 1961: *see* Vol. 1 p. 195, Vol. 2 p. 194.
Protocol amending the Single Convention on Narcotic Drugs, 1961: *see* Vol. 2 p. 194.

Single Convention on Narcotic Drugs, 1961, as Amended by the Protocol of 25 March 1972: *see* Vol. 1 p. 195, Vol. 2 p. 194.
Convention on Psychotropic Substances, 1971: *see* Vol. 2 p. 195.

Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium and amended by Protocol, 1946
Geneva, 11 February 1925
Entry into force: 27 October 1947

State	*Cons.*	*State*	*Cons.*
Cambodia	3 Oct 51	Laos	7 Oct 50
India	11 Oct 46	Thailand	27 Oct 47
Japan	27 Mar 52		

Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931 and amended by Protocol, 1946
(Cont'd from Vol. 2 p. 193)

State	*Cons.*
Laos	7 Oct 50

Agreement Concerning the Suppression of Opium Smoking and amended by Protocol, 1946
Bangkok, 27 November 1931
Entry into force: 27 October 1947

State	*Cons.*	*State*	*Cons.*
Cambodia	3 Oct 51	Laos	7 Oct 50
India	11 Dec 46	Thailand	27 Oct 47
Japan	27 Mar 52		

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

New York, 11 December 1946
Entry into force: 11 December 1946

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		11 Dec 46	Papua New Guinea		28 Oct 80
China		11 Dec 46	Philippines	11 Dec 46	25 May 50
India		11 Dec 46	Thailand		27 Oct 47
Iran		11 Dec 46			
Japan		27 Mar 52			

Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, 1953

(Cont'd from Vol. 2 p. 194)

State	*Sig.*	*Cons.*
Philippines	23 Jun 53	1 Jun 55

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

(Cont'd from Vol. 1 p. 195, Vol. 2 p. 195, Vol. 3 p. 243)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Brunei	26 Oct 89	12 Nov 93	Malaysia	20 Dec 88	11 May 93

NATIONALITY AND STATELESSNESS

Convention relating to the Status of Stateless Persons, 1954: *see* Vol. 2 p. 190.
Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, 1961: *see* Vol. 2 p. 190.
Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, 1963: *see* Vol. 2 p. 191.

NUCLEAR MATERIAL

Joint Protocol Relating to the Application of the Vienna Convention (and the Paris Convention on Third Party Liability in the Field of Nuclear Energy, 29 July 1960 as amended): *see* Vol. 3 p. 244.
Convention on Civil Liability for Nuclear Damage, 1963: *see* Vol. 3 p. 244.
Convention on the Physical Protection of Nuclear Material, 1980: *see* Vol. 1 p. 196.

Convention on Early Notification of a Nuclear Accident, 1986

(Cont'd from Vol. 3 p. 244)
(Information furnished by the IAEA Secretariat)

State	*Sig.*	*Cons. (deposit)*
Indonesia	26 Sep 86	12 Nov 93

Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986

(Cont'd from Vol. 3 p. 245)
(Information furnished by the IAEA Secretariat)

State	*Sig.*	*Cons. (deposit)*
Indonesia	26 Sep 86	12 Nov 93

OUTER SPACE

Treaty on Principles Governing the Activities of the States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967: *see* Vol. 3 p. 245.
Convention on Registration of Objects Launched into Outer Space, 1974: *see* Vol. 2 p. 185.
Agreement governing the Activities of States on the Moon and other Celestial Bodies, 1979: *see* Vol. 2 p. 185.

PRIVILEGES AND IMMUNITIES

Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, 1961: *see* Vol. 2 p. 187.
Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963: *see* Vol. 2 p. 188.
Convention on Special Missions, 1969: *see* Vol. 2 p. 188.

Optional Protocol to the Convention on Special Missions concerning the Compulsory Settlement of Disputes, 1969: *see* Vol. 3 p. 246.

Convention on the Privileges and Immunities of the United Nations, 1946
(Cont'd from Vol. 2, p. 186, Vol. 3 p. 246)

State	*Cons.*
Pakistan	8 Jan 48 *(corrected)*

Convention on the Privileges and Immunities of the Specialized Agencies
New York, 21 November 1947, UNGA Res. 179 (II)
Entry into force for each state: on date of deposit or receipt of notification

State	*Cons.*	*applicable to*
Cambodia	15 Oct 53	UPU
	26 Sep 55	FAO, ICAO, UNESCO, WHO, ITU, WMO
China	11 Sep 79	FAO, ICAO, UNESCO, WHO, UPU, ITU, WMO, IMO
	30 Jun 81	IMF, IBRD, IFC, IDA
	9 Nov 84	ILO
India	10 Feb 49	ILO, FAO, ICAO, UNESCO, WHO
	19 Oct 49	IMF, IBRD, UPU
	9 Mar 55	WMO
	3 Jun 55	WHO (Annex rev.), ITU
	3 Jul 58	WHO (Annex rev.)
	3 Aug 61	IFC
	12 Apr 63	FAO (Annex rev.)
Indonesia	8 Mar 72	ILO, FAO, ICAO, UNESCO, IMF, IBRD, WHO, UPU, ITU, WMO, IMO, IFC, IDA
Iran	16 May 74	ILO, FAO, ICAO, UNESCO, IMF, IBRD, WHO, UPU, ITU, WMO, IMO, IFC, IDA
Japan	18 Apr 63	ILO, FAO, ICAO, UNESCO, IMF, IBRD, WHO, UPU, ITU, WMO, IMO, IFC, IDA
Korea (Rep.)	13 may 77	FAO, ICAO, UNESCO, IMF, IBRD, WHO, UPU, ITU, WMO
Laos	9 Aug 60	ILO, FAO, ICAO, UNESCO, IMF, IBRD, WHO, UPU, ITU, WMO, IMO, IFC
Malaysia	29 Mar 62	ILO, FAO, ICAO, UNESCO, WHO, UPU, ITU, WMO
	23 Nov 62	WHO (Annex rev.)
Maldives	26 May 69	WHO, UPU, ITU, IMO
Mongolia	3 Mar 70	ILO, UNESCO, WHO, UPU, ITU, WMO
	20 Sep 74	FAO
Nepal	23 Feb 54	WHO
	28 Sep 65	FAO, ICAO, UNESCO, IMF, IBRD, UPU, ITU
Pakistan	23 Jul 51	IBRD
	7 Nov 51	IMF

	15 Sep 61	ILO, ICAO, UNESCO, WHO, UPU, ITU, WMO
	13 Mar 62	FAO, IMO
	17 Jul 62	IFC, IDA
Philippines	20 Mar 50	ILO, FAO, ICAO, UNESCO, IMF, IBRD, WHO
	21 May 58	WMO
	12 Mar 59	WHO (Annex rev.)
	13 Jan 61	IFC
Singapore	18 Mar 66	ILO, FAO, ICAO, UNESCO, WHO, UPU, ITU, WMO
Thailand	30 Mar 56	FAO, ICAO
	19 Jun 61	ILO, FAO, UNESCO, IMF, IBRD, WHO, ITU, WMO, IFC
	28 Apr 65	UPU
	21 Mar 66	FAO

Vienna Convention on Diplomatic Relations, 1961
(Cont'd from Vol. 2 p. 187)

State	*Cons.*
Uzbekistan	2 Mar 92

Vienna Convention on Consular Relations, 1963
(Cont'd from Vol. 2 p. 188)

State	*Cons.*	*State*	*Cons.*
Maldives	21 Jan 91	Uzbekistan	2 Mar 92

REFUGEES

Convention relating to the Status of Refugees, 1951
(Cont'd from Vol. 1 p. 189, Vol. 3 p. 247)

State	*Cons.*
Tajikistan	7 Dec 93

Protocol relating to the Status of Refugees, 1967
(Cont'd from Vol. 1 p. 189, Vol. 3 p. 247)

State	*Cons.*
Tajikistan	7 Dec 93

ROAD TRAFFIC AND TRANSPORT

Convention on Road Traffic, 1968
(Cont'd from Vol. 3 p. 247)

State	*Cons.*
Turkmenistan	14 Jan 93

Convention on Road Signs and Signals, 1968
(Cont'd from Vol. 3 p. 247)

State	*Cons.*
Turkmenistan	14 Jan 93

SEA

Convention on the Territorial Sea and the Contiguous Zone, 1958: *see* Vol. 2, p. 184.
Convention on the High Seas, 1958: *see* Vol. 2 p. 184.
Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958: *see* Vol. 2 p. 184.
Convention on the Continental Shelf, 1958: *see* Vol. 2 p. 185.
Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958: *see* Vol. 2 p. 185.

United Nations Convention on the Law of the Sea, 1982
(Cont'd from Vol. 1 p. 184)
Entry into force: 16 November 1994

SEA TRAFFIC AND TRANSPORT

International Convention for the Safety of Life at Sea, 1960: *see* Vol. 3 p. 248.
Convention on Facilitation of International Maritime Traffic, 1965 (as amended): *see* Vol. 3 p. 249.
International Convention on Load Lines, 1966: *see* Vol. 3 p. 249.
International Convention on Tonnage Measurement of Ships, 1969: *see* Vol. 3 p. 250.
Special Trade Passenger Ships Agreement, 1971, *see* Vol. 3 p. 250.
International Convention for Safe Containers, as amended 1972: *see* Vol. 3 p. 251.
Protocol on Space Requirements for Special Trade Passenger Ships, 1973: *see* Vol. 3 p. 250.

Convention on a Code of Conduct for Liner Conferences, 1974: *see* Vol. 2 p. 192.
International Convention for the Safety of Life at Sea, 1974 (as amended): *see* Vol. 3 p. 251.
Protocol Relating to the International Convention for the Safety of Life at Sea, 1974 (as amended): *see* Vol. 3 p. 252.
UN Convention on the Carriage of Goods by Sea, 1978: *see* Vol. 1 p. 185.

Convention Regarding the Measurement and Registration of Vessels Employed in Inland Navigation
Bangkok, 22 June 1956
Entry into force: -

State	*Sig.*	*State*	*Sig.*
Cambodia	22 Jun 56	Laos	22 Jun 56
China	22 Jun 56	Thailand	22 Jun 56
Indonesia	22 Jun 56		

Convention on the International Regulations for Preventing Collisions at Sea, 1972 (as amended)
(Cont'd from Vol. 3 p. 251)
(Status as included in IMO doc. J/5631)

State	*Cons. and e.i.f.*	*State*	*Cons. and e.i.f.*
Brunei	5 Feb 1987	Hong Kong	30 Oct 1974 (by declaration UK) (e.i.f. 15 Jul 77)

SOCIAL MATTERS

International Agreement for the Suppression of the White Slave Traffic amended by Protocol 1949
Paris, 18 May 1904
Entry into force: 21 June 1951

State	*Cons.*	*State*	*Cons.*
China	4 May 49	Pakistan	16 Jun 52
India	28 Dec 49	Singapore	7 Jun 66
Iran	30 Dec 59	Sri Lanka	14 Jul 49

International Convention for the Suppression of the White Slave Traffic, amended by Protocol 1949
Paris, 4 May 1910
Entry into force: 14 August 1951

State	*Cons.*	*State*	*Cons.*
China	4 May 49	Pakistan	16 Jun 52
India	28 Dec 49	Singapore	7 Jun 66
Iran	30 Dec 59	Sri Lanka	14 Jul 49

Agreement for the Suppression of the Circulation of Obscene Publications, amended by Protocol 1949
Paris, 4 May 1910
Entry into force: 1 March 1950

State	*Cons.*	*State*	*Cons.*
Cambodia	30 Mar 59	Malaysia	31 Aug 57
China	4 May 49	Myanmar	13 May 49
India	28 Dec 49	Pakistan	4 May 51
Iran	30 Dec 59	Sri Lanka	14 Jul 49

International Convention for the Suppression of the Traffic in Women and Children
Geneva, 30 September 1921
Entry into force for each state: on date of deposit

State	*Cons.*	*State*	*Cons.*
Afghanistan	10 Apr 35	Japan	15 Dec 25
China	24 Feb 26	Pakistan	12 Nov 47
India	28 Jun 22	Singapore	7 Jun 66
Iran	28 Mar 33	Thailand	13 Jul 22

Convention for the Suppression of the Traffic in Women and Children, amended by Protocol in 1947
Geneva, 30 September 1921
Entry into force: 24 April 1950

State	*Cons.*	*State*	*Cons.*
Afghanistan	12 Nov 47	Pakistan	12 Nov 47
China	12 Nov 47	Philippines	30 Sep 54
India	12 Nov 47	Singapore	26 Oct 66
Myanmar	13 May 49		

Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, amended by Protocol in 1947
Geneva, 12 September 1923
Entry into force: 2 February 1950

State	*Cons.*	*State*	*Cons.*
Afghanistan	12 Nov 47	Malaysia	21 Aug 58
Cambodia	30 Mar 59	Myanmar	13 May 49
China	12 Nov 47	Pakistan	12 Nov 47
India	12 Nov 47	Sri Lanka	15 Apr 58

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications
Geneva, 12 September 1923
Entry into force: 7 August 1924

State	*Cons.*	*State*	*Cons.*
Afghanistan	10 May 37	Iran	28 Sep 32
China	24 Feb 26	Japan	13 May 36
India	11 Dec 25	Thailand	28 Jul 24

Convention for the Suppression of the Traffic in Women of Full Age, amended by Protocol 1947
Geneva, 11 October 1933
Entry into force: 24 April 1950

State	*Cons.*	*State*	*Cons.*
Afghanistan	12 Nov 47	Singapore	26 Oct 66
Philippines	30 Sep 54		

International Convention for the Suppression of the Traffic in Women of Full Age
Geneva, 11 October 1933
Entry into force: 24 August 1934

State	*Sig.*	*Cons.*	*State*	*Cons.*
Afghanistan		10 Apr 35	Iran	12 Apr 35
China	11 Oct 33			

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
New York, 21 March 1950
Entry into force: 25 July 1951

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		21 May 85	Laos		14 Apr 78
Bangladesh		11 Jan 85	Myanmar	14 Mar 56	
India	9 May 50	9 Jan 53	Pakistan	21 Mar 50	11 Jul 52
Iran	16 Jul 53		Philippines	20 Dec 50	19 Sep 52
Japan		1 May 58	Singapore		26 Oct 66
Korea (Rep.)		13 Feb 62	Sri Lanka		15 Apr 58

Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
New York, 21 March 1950
Entry into force: 25 July 1951

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
India	9 May 50	9 Jan 53	Myanmar	14 Mar 56	
Iran	16 Jul 53		Pakistan	21 Mar 50	
Japan		1 May 58	Philippines	20 Dec 50	19 Sep 52
Korea (Rep.)		13 Feb 62	Sri Lanka		7 Aug 58

TELECOMMUNICATIONS

Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977: *see* Vol. 3 p. 253.

Constitution of the Asia-Pacific Telecommunity, 1976
(Cont'd from Vol. 3 p. 252)

State	*Cons.*
Macau (associate member)	9 Feb 93

Convention on the International Maritime Satellite Organization (INMARSAT), 1976 (as amended)
(Cont'd from Vol. 3 p. 253)

State	*Cons.*	*State*	*Cons.*
Bangladesh	17 Sept 93	Brunei	4 Oct 93

Amendment to Article 11, Paragraph 2 (a), of the Constitution of the Asia-Pacific Telecommunity
Bangkok, 13 November 1981

State	*Cons.*	*State*	*Cons.*
Afghanistan	22 Jul 83	Myanmar	27 Sep 84
Bangladesh	9 Feb 88	Nepal	3 Dec 84
China	26 Jul 82	Pakistan	24 Aug 84
India	15 Jul 83	Singapore	22 Jul 82
Iran	10 Apr 86	Sri Lanka	26 Mar 82
Korea (Rep.)	2 Jul 82	Thailand	1 Nov 82
Malaysia	7 Jan 86	Vietnam	28 Dec 83
Maldives	28 May 82		

Amendments to Articles 3 (5) and 9 (8) of the Constitution of the Asia-Pacific Telecommunity
Colombo, 29 November 1991

State	*Cons.*	*State*	*Cons.*
China	25 May 93	Maldives	3 Feb 93
Korea (Rep.)	18 Feb 93		

TREATIES

Convention on the Law of Treaties, 1969
(Cont'd from Vol. 1 p. 183, Vol. 2 p. 183)

State	*Sig.*	*Cons.*
Korea (Rep.)	27 Nov 69	27 Apr 77

Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations
Vienna, 21 March 1986
Entry into force: -

State	*Sig.*	*State*	*Sig.*
Japan	24 Apr 87	Korea (Rep.)	29 Jun 87

WEAPONS

Protocol for the prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Warfare, 1925: *see* Vol. 3 p. 254.
Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963: *see* Vol. 3 p. 255.
Treaty on the Non-Proliferation of Nuclear Weapons, 1968: *see* Vol. 3 p. 256.
Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 1971: *see* Vol. 3 p. 256.
Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972: *see* Vol. 3 p. 255.
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, and Protocols, 1980: *see* Vol. 2 p. 198.

Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976
(Cont'd from Vol. 2 p. 198)

State	*Cons.*
Uzbekistan	26 May 93

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction

Paris, 13 January 1993

Entry into force: -

State	*Sig.*
Afghanistan	14 Jan 93
Bangladesh	14 Jan 93
Brunei Darussalam	13 Jan 93
Cambodia	15 Jan 93
China	13 Jan 93
India	14 Jan 93
Indonesia	13 Jan 93
Iran	13 Jan 93
Japan	13 Jan 93
Kazakhstan	14 Jan 93
Korea (Rep.)	14 Jan 93
Kyrgyzstan	22 Feb 93
Laos	13 May 93
Malaysia	13 Jan 93
Maldives	4 Oct 93
Mongolia	14 Jan 93
Myanmar	14 Jan 93
Nepal	19 Jan 93
Pakistan	13 Jan 93
Papua New Guinea	14 Jan 93
Philippines	13 Jan 93
Singapore	14 Jan 93
Sri Lanka	14 Jan 93
Tajikistan	14 Jan 93
Thailand	14 Jan 93
Turkmenistan	12 Oct 93
Vietnam	13 Jan 93

ASIA AND INTERNATIONAL ORGANIZATIONS

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE ANNUAL SURVEY OF ACTIVITIES 1993-1994,

including the work of its Thirty-third Session, held in Tokyo, 17-21 January 1994*

M.C.W. Pinto**

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* The account of the main activities of the Committee and the main views expressed during or in connection with the Committee's Thirty-third Session has been adapted from (the unpublished version of) the Secretariat's *Report of the Thirty-third Session ("Report")*. Since 1994 the Secretariat has started publication of "Asian-African Legal Consultative Committee: Report and Selected Documents of the [...] Session".

** General Editor.

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1. MEMBERSHIP AND ORGANIZATION

1. There were forty-three Members of the Committee on 17 January 1994: Bangladesh, China, Cyprus, Egypt, Gambia, Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Kenya, Democratic People's Republic of Korea, Republic of Korea, Kuwait, Libya, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Oman, Pakistan, Palestine, Philippines, Qatar, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates, and Yemen Arab Republic. Botswana is an Associate Member.

2. The Thirty-third Session of the Committee was held in Tokyo from 17-21 January 1994 at the invitation of the Government of Japan. His Excellency Mr. KUNIHIKO SAITO, Vice-Minister for Foreign Affairs of Japan, delivered the inaugural address, and H.E. Mr. AKIRA MIKAZAKI, Minister of Justice, delivered an address of welcome. Mr. CHUSEI YAMADA, Ambassador of Japan to India and currently a Member of the International Law Commission, was elected *President* and Mr. NAJEEB MOHAMMED AL-NAUIMI, Minister Legal Adviser to H.H. The Heir Apparent of Qatar, was elected *Vice-President*. Mr. RAUL I. GOCO (Philippines) was elected chairman of a *Special Meeting on "Developing Institutional and Legal Guidelines for Privatization and Post-privatization Regulatory Framework"* held during the Session, and Mr. RALPH W. OCHAN (Uganda) was elected Rapporteur of the Special Meeting. The Secretary-General of the Committee, Mr. FRANK X. NJENGA, and the members of the AALCC Secretariat were responsible for the organization of the Session.

3. The President declared that, at its Thirty-second Session in Kampala, the Committee had decided to hold its Thirty-fourth Session in Doha, in March 1995. As earlier reported (3 AsYIL, p.260), the Committee at its Kampala Session also decided to accept the offer of the State of Qatar "to host the Headquarters of the AALCC in Doha".

4. Mr. FRANK X. NJENGA (Kenya) having served as Secretary-General for two consecutive terms of three years each as permitted by Rule 20(i) of the Statutory Rules of AALCC, the Committee, at the Sixth Plenary Meeting of the Session on 21 January 1994 unanimously elected Mr. TANG CHENGYUAN, Deputy Director-General, Department of Treaty and Law of the Ministry of Foreign Affairs of China, as Secretary-General for a three-year term

commencing 10 May 1994. *(Report,* pages 151 and 258; Doc. No. AALCC/ XXXIII/TOKYO/94/19).

2. QUESTIONS UNDER CONSIDERATION BY THE INTERNATIONAL LAW COMMISSION

5. The Committee had before it a Secretariat document entitled *Report on the Work of the International Law Commission at its Forty-fifth Session* (Doc. No. AALCC/XXXIII/ TOKYO/94/1) containing surveys of the Commission's work on four topics, *viz.* State responsibility, Draft Code of Crimes against the Peace and Security of Mankind: the establishment of an International Criminal Court, Law of the non-navigational uses of international watercourses, and International liability for injurious consequences arising out of acts not prohibited by international law.

2.1. State responsibility

6. The delegate of *Japan* emphasizing the importance of the topic, urged the Commission to find ways to ensure more rapid progress in the drafting of articles dealing with it. Referring to the complexity of the issues involved, the delegate of *China* said his government would make an in-depth study and submit detailed comments only after the Commission's first reading of the whole topic had been completed. The delegate of *India* said his delegation was opposed to recourse to reprisals as they were iniquitous and only led to abuse of powers. In his view, counter-measures involved unilateral determination, and subjection of such counter-measures to peaceful settlement procedures was not likely to resolve the issues which could arise. The delegate of *Sri Lanka* shared the concern expressed regarding the desirability of formulating a legal regime of unilateral counter-measures, given the inherent dangers of its abuse. He wondered whether dispute settlement procedures would provide an effective remedy in situations where there had been resort to unlawful or disproportionate counter-measures.

2.2. Draft Code of Crimes against the Peace and Security of Mankind: the establishment of an International Criminal Court

7. The delegate of *Japan* said that the international community now felt the need for a new mechanism or instrument that would ensure the rule of law, and recalled the recent establishment by the Security Council of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia as an enforcement measure under Chapter VII of the Charter of the United Nations. Referring to the draft Statute of the International Criminal Court, he said that an approach that would permit optional acceptance of the Court's jurisdiction would be likely to facilitate acceptance of the Statute by a larger number of States, which was the main condition to be satisfied.

8. The delegate of *China* said that, should there be the need to establish an International Criminal Court, the many highly complex and politically sensitive issues involved would have to be resolved with care and caution so as to ensure the feasibility of the Court and its acceptance by all States. A fundamental question was why a State should surrender its criminal jurisdiction over a case if it had the will and judicial capability to exercise such jurisdiction. In his view, the proposals of the Commission were relatively realistic and balanced, although some draft articles would need further consideration and elaboration.

9. The delegate of *India* observed that many issues including those relating to the proposed Court's jurisdiction and the types of offences with which it would deal, were to be considered at the Commission's forthcoming session. Recalling that there was now a trial mechanism for dealing with offences in the former Yugoslavia, and that it did not appear urgent to set up other *ad hoc* courts, he said his delegation would prefer the establishment of an institution of a permanent nature.

10. The delegate of *Turkey,* after an analysis of the draft Statute, observed that the question whether the proposed Court would be a judicial organ of the United Nations, or whether it should be linked to the United Nations in some manner to be prescribed in its Statute, remained unsettled.

11. Commending the Commission's approach as being pragmatic and flexible, the delegate of *Sri Lanka* recalled that there were several aspects of the

proposed Court that would need to be further clarified. Expressing the view that the concept "crimes under general international law" lacked specificity adequate to confer jurisdiction on courts, he suggested that the proposed Court's jurisdiction be confined to offences under the conventions listed in draft Article 22, at least until elaboration and general acceptance of a Code of Crimes against the Peace and Security of Mankind. His delegation was also of the view that the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) should be treated on the same level as other international conventions as constituting international crimes under draft Article 22, rather than as undesirable conduct in terms of Article 26. The Statute's provisions on surrender of persons should be clarified taking into account their relationship to any such existing obligations under bilateral or multilateral treaties.

2.3. Law of the non-navigational uses of international watercourses

12. The delegate of *Syria,* recalling that his delegation had presented its comments on the International Law Commission's draft articles to the Committee at its Islamabad Session in 1992, declared that the volume of a watercourse should under no circumstances be reduced below the sanitary discharge level needed for the river bed concerned. In his opinion, the existence of a general obligation among watercourse States to co-operate, meant that those States should agree upon how the particular watercourse could be shared reasonably and equitably. Provisions on exchange of data and information should be implemented through 'joint committees', and should include information on reservoir operations of the States concerned before and after the conclusion of an agreement on use of the international watercourse concerned.

13. The delegate of *China* observed that it would be difficult to develop a set of norms regulating the non-navigational uses of international watercourses, since the topic touched upon a variety of issues important to each watercourse State, such as those connected with the national economy, the livelihood of its peoples, ecological balance and environmental protection. As international watercourses varied greatly in terms of hydrographic, geological, climatic and geological factors, such issues engaged the fundamental interests of the States concerned, and could reveal contradictions among them.

14. The delegate of *Turkey* said that the diversity of characteristics of international rivers, and of the circumstances associated with them should be

taken into account in formulating the draft articles. He urged that law and policy reflecting national concerns regarding such watercourses should be integrated with global regimes aimed at preservation of the environment and sustainable development.

15. The delegate of *Japan* said that the question of what form should ultimately be given to the draft articles being prepared by the Commission on this topic should be taken up at a later stage of the work.

2.4. International liability for injurious consequences arising out of acts not prohibited by international law

16. The delegate of *China* agreed with the Commission's decision to give priority to consideration of the element of 'prevention', since this approach reflected the current tendency in international environmental legislation. He urged that in formulating preventive measures the Commission should take fully into account the special needs of the developing countries. The delegate of *Japan,* observing that this topic was of particular importance to the development of international environmental law, said his delegation expected that the Commission at its next session would produce draft articles on 'prevention', and take decisions on the next stage of its work on the topic.

17. The delegate of *Turkey* emphasized the importance of establishing a global legal regime which would effectively protect mankind and the environment from the rapidly accelerating negative consequences of economic development.

2.5. New topics

18. Some delegates welcomed the Commission's selection of the "Law and practice relating to reservations to treaties", and "State succession and its impact on the nationality of natural and legal persons" as new topics for its long-term programme of work.

Decision

19. Discussion of this item *(Report,* pages 86-96; see also pages 37-55) was followed by adoption of an essentially procedural decision *(Report,* pages 225-6).

3. LEGAL PROBLEMS REFERRED TO THE COMMITTEE BY PARTICIPATING STATES

3.1. The status and treatment of refugees

20. The Committee had before it the following documents prepared by the Secretariat: "Model legislation on the status and treatment of refugees" (Doc. No. AALCC/ XXXIII/TOKYO/94/3); and "Establishment of 'Safety Zones' for displaced persons in the country of origin" (Doc. No. AALCC/XXXIII/ TOKYO/94/4).

Document TOKYO/94/3 is based on the view that the preparation of a model law for incorporation into national legislation would be more effective in securing protection for refugees than further work on international law standards and principles which may lack enforcement procedures. The Secretariat offers a revised list of main headings of draft model legislation (compare the more detailed list presented to the Committee's Thirty-second Session, 3 AsYIL p.265) and focuses on some issues involved in defining the term 'refugee' or the category of persons entitled to protection under such legislation:

> ". . .
>
> 17. Historically, the term refugee was used in various instruments prior to 1951 to refer to the ethnic or territorial origins of different uprooted groups, and to their loss of national protection. There was in these instruments no reference to persecution in the sense that this term is currently employed. For example, various pre-war instruments or arrangements provided for the issuance of documents to 'Russian refugees' (in 1922) and to 'Armenian refugees' (1924) – in both cases referring to their national origin and to their loss of protection by the Governments of the USSR or of the Turkish Republic respectively. These provisions were, in 1928, extended to 'Turkish, Assyrian and Assyro-Chaldean refugees', followed by a Convention for 'refugees coming from Germany', in 1938, which likewise referred to persons of Germany origin lacking protection of the German Government.
>
> 18. The first formal reference to persecution as part of the refugee definition came in the 1946 Constitution of the International Refugee Organisation (hereinafter called the IRO), a temporary specialized agency of the United Nations and the predecessor of UNHCR. Paragraph 7 (a)(i) of Section C of the Constitution of the IRO referred to a "persecution or fear, based on reasonable grounds owing to race, religion, nationality, or political opinions" as being a valid objection to repatriation. Paragraph 3 of Section A of Part I extended IRO's competence to the 'victims of Nazi persecution' still within

their country of origin. IRO's Constitution also made reference for the first time to 'displaced persons' as well as refugees – a concept which came to be extensively applied to UNHCR's mandate.

19. Thereafter the United Nations Declaration of Human Rights in 1948 alluded to everyone's right to seek asylum from 'persecution', without further defining the term, and the General Assembly employed the term 'well-founded fear of persecution' for specified reasons as the central criterion in dertermining the ambit of UNHCR's Statute.

20. This definition was essentially repeated in the 1951 Convention Relating to the Status of Refugees while its application was limited to victims of persecution as a result of events occurring before January, 1951. The extent and scope of the term 'refugee' was, however expanded in as much as it included 'membership of a social group' as one of the possible causes of persecution. States parties could also, if they desired, restrict the causative events to those occurring in Europe. The 1967 Protocol to the Convention removed both the temporal limitation as well as the optional geographic limitation from this definition.

21. The definitions of the term 'refugee' in the Convention and Protocol have, since 1967, remained unchanged, although it may be recalled that Recommendation E of the Final Act of the Conference of Plenipotentiaries which adopted the Convention in 1951, urged all States parties to extend its benefits as far as possible to persons who did not fall within its strict ambit. While this, of course, is not binding on States it is indicative of the general agreement, at that time, of the need for a liberal interpretation of the term refugee, by States in determining who should receive international protection.

22. This need also became very apparent in regard to UNHCR's activities, and by the 1960s the need for groups outside the original statutory definition to be assisted was clear, particularly in the wake of the General Assembly Resolution the Granting of Independence to Colonial Peoples and independence movements in Africa.

23. Consequently there were a series of General Assembly resolutions, extending over the next two decades, which formally endorsed the High Commissioner's involvement with a much broader category of exiles. Thus in 1959 the General Assembly requested the High Commissioner to use his 'good offices' to transmit contributions to "refugees not within the competence of the United Nations" (without defining this phrase further). Then from 1961 to 1963 a series of General Assembly resolutions endorsed UNHCR activities for regugees within the High Commissioner's mandate "or those for whom he extends his good offices".

24. This liberalizing trend was reinforced in 1969 by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which added to the statutory refugee definition an important expansion of the term in so far as it applied in Africa, *viz.*, that :

> "'Refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

This expanded definition remains the most formal extension of the refugee concept accepted by Governments, and has, following proposals made at the Arusha Conference on Refugees in Africa in 1979, been endorsed by the General Assembly as applying to UNHCR's activities in the African continent.

25. At the same time the General Assembly continued to request UNCHR to undertake programmes generally benefitting persons outside the ambit and scope of the original definition of the term refugee. The High Commissioner was requested, in 1972, to continue to participate, at the invitation of the Secretary-General, in those humanitarian endeavours of the United Nations for which UNHCR had particular expertise and experience. In the following year he was requested, by the General Assembly, to continue his assistance and protection activities for refugees within his mandate as well as for those "for whom he extends his good offices or is called upon to assist".

26. The next reference to 'displaced persons' came in 1975, with a General Assembly resolution requesting the High Commissioner to continue his assistance to Indochinese 'displaced persons', a category which was to appear in every resolution endorsing the Office's activities for the next five years. Particularly important among these was the General Assembly resolution 31\35 which endorsed ECOSOC resolution 2011 of that year, in which UNHCR's assistance to displaced persons, defined as "the victims of man-made disasters requiring urgent humanitarian assistance", in addition to its aid to refugees was approved. The term has remained undefined except for the ECOSOC resolution mentioned above, although it has been suggested that the 'man-made disasters' referred to in this definition might appropriately be described as those outlined in the expanded OAU definition. Nevertheless UNHCR's activities certainly benefit many more 'displaced persons' than strictly defined refugees: the millions of uprooted victims of external wars or civil strife normally falling within this category.

27. The application of the concept of displaced persons led to an acceptance of international responsibility for specified national or ethnic groups, similar to that reflected in the pre-1951 refugee instruments. Concurrently, however,

individual eligibility procedures have continued to be applied, particularly by traditional resettlement or receiving countries, often more strictly than in the past. Ironically this resulted partly from continuing pressure on third countries to provide resettlement opportunities for displaced persons granted temporary asylum, particularly in South East Asia.

28. The liberal use of the displaced persons concept and *prima facie* group determination procedures in countries of first asylum, while essential to enable prompt and proper assistance to be given, has also led to a number of other difficulties in practice. One of these is how to sift out those not entitled to receive help – such as economic migrants – when individual screening is not done, or how to exclude those displaced persons who are not entitled to protection, such as war criminals or armed activists. As regards economic migrants it must be observed that there is no international instruments or authority to deal with such persons, and traditionally, they have been subjected to the juridical process of emigration-cum-immigration rather than the customary principles of non-refoulement and asylum. Experience has shown that the plight of these peoples could be such as to make their lives unbearable in the country of origin and those conditions could be so serious as to amount to persecution or a "well founded fear of persecution". It is for consideration whether the proposed legislation should seek to include and cover economic refugees. In providing international protection for economic migrants, solutions must be found in dimensions other than those of the causative end of the outflow and at the recipient end of the outflow.

29. A new turn was given to the concept of international protection when the ECOSOC referred to persons "who have been forced to flee from their homes suddenly or unexpectedly in large numbers; as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who are within the territory of their own country." It would have been observed that this definitin of internally displaced persons does not conform to the traditional understanding of the term of refugee *i.e.* an asylum seeker who has actually been granted or has received protection outside his own country of origin or habitual residence, to whom asylum has been granted from the authorities of the country of origin and is recognized as a person who is entitled to enjoy certain rights under international law. This is by reason of the fact that in customary international law a refugee is a person who is outside the protection of the State or is unwilling to seek the protection of the State of his nationality or habitual residence. There is thus a need to consider the distinction to be drawn between the terms to be employed and the scope to be given to the Model Legislation. The Committee may wish to consider whether or not the Secretariat should seek to incorporate definitions of some key terms to be employed in the proposed model legislation. The future work

of the Secretariat on model legislation on rights and duties of refugees would now rest on the directives which the Committee's Tokyo Session may give.

30. The Secretariat of the Committee has managed with assistance of the Office of the UNHCR to obtain all the existing national legislations pertaining to refugees. The Secretariat is grateful to the UNHCR for assistance in making copies available to AALCC through the officers of the 'CDR' division, Geneva. The Secretariat of the AALCC is in the process of a thorough examination of these municipal instruments and has been working towards an expanded definition of the term 'Refugee'. The Secretariat, however, is of the view that the question of the expansion of the definition of the term requires to be discussed further. The Committee at its forthcoming Session may wish to give consideration to the extent and scope of the key term around which the proposed model legislation is to be drafted. The guidelines that the Committee may wish to furnish would enable the Secretariat to fulfill its mandate at an early date.

. . ."

21. Document TOKYO/94/4, having recalled the scale of the difficulties involved in dealing with refugees in general and 'internally displaced persons' in particular, re-states "thirteen principles which could furnish a framework for the establishment of Safety Zones in the country of origin" (see 3 AsYIL p.265), and goes on to discuss specific issues to be resolved, including the rôle of the United Nations High Commission for Refugees in such zones:

". . .

II. INTRODUCTION

The Secretary General of the United Nations in his Report on Preventive Diplomacy, Peacemaking and Peacekeeping, entitled 'An Agenda for Peace', *inter alia,* observed that "Poverty, disease, famine, oppression and despair abound to produce 17 million refugees, 20 million displaced persons and massive migrations of peoples within and beyond national, borders". [*footnote:* See Boutros-Ghali, *An Agenda for Peace* Preventive Diplomacy, Peacemaking and Peacekeeping. Report of the Secretary-General pursuant to the Statement adopted by the Summit Meeting of the Secretary Council on 31 January 1992 (United Nations, New York 1992) para 13 at page 17]. It is now estimated that the number of refugees is 19 millions and that internally displaced persons are estimated to be more than 20 millions. The most recent are to be found in Afghanistan, Iraq (the Kurds), Cambodia, former Yugoslavia and some members of the Commonwealth of Independence States (CIS) which have been ravaged by ethnic wars. Somalis have also been uprooted due to civil war. The worst drought of the century in several countries has resulted recently in

numerous displaced persons and drawn active UN interventions. More recently the Office of the United Nations High Commissioner for Refugees has drawn attention to the plight of the internally displaced persons in Burundi and appealed for material and financial assistance for them.

It is extremely difficult for the international community to guarantee the safety and well-being of displaced persons fleeing war, catastrophe, massive violence and the violation of their human rights. Armed attacks on refugee camps, the abduction of politically active exiles and assaults on uprooted people making their way to a country of asylum are growing in frequency and scale. The plight of internally displaced people is often much worse than that of refugees. Generally speaking, internally displaced persons may not be individually persecuted but are fleeing from an unstable and insecure situation. In a large number of cases even where such large number of persons have crossed international borders, they have not been recognised as 'Convention refugees' since they do not face persecution as individual in their State of origin.

Simultaneous with the growing international concern for the plight of victims of man made disasters, massive violence and gross violations of basic human rights, there has been an increasing desire to avoid the overloading of the existing mechanism for the protection of the individually persecuted persons – the refugees. The customary principles of asylum too are under great strains. [*footnote:* Amnesty International Report, 1992]. But with the growing emphasis on respect for human rights, the international community should be more concerned with the fate of massive repression of persons wherever it occurs particularly when such repression is likely to have international repercussions through mass exodus of refugees and the concomitant burden on neighbouring States.

Consequently new legal measures to assist the displaced persons particularly in the wake of the cold war need to be taken urgently. In this context, the programmes designed to resettle displaced people in their own communities could play a vital role in reconciliation and re-establishment of peace in their country of origin. But as governments adopt more restrictive attitudes towards refugees, and as refugee settlements acquire an unanticipated permanence, work with the displaced is becoming more important and the need is increasing for establishing Safety Zones for the displaced.

Violations of human rights cannot be disregarded by the peoples of the United Nations as both the UN Charter and the Universal Declaration of Human Rights have affirmed the legitimacy of the concern of the international community for the protection of fundamental rights and freedoms. This concern is not limited to refugees alone but extends equally to all persons including internally displaced persons within their own country. Efforts to improve the situation of the displaced persons may therefore [have] to be undertaken even if that may lead to some adjustment to the concept of national

sovereignty in the effort to conform to contemporary humanitarian needs and to effectively protect the rights guaranteed to individuals under international humanitarian conventions. One such means might be found in the concept of the establishment of Safety Zones.

. . .

It is imperative in our view that such Safety Zones should be mandated by the Security Council whose decisions are binding on all the member States of the United Nations.

IV. ROLE OF THE UNHCR IN SUCH ZONES

A case can be made for clarifying UNHCR's role in assisting and protecting displaced people. UNHCR has normally assisted displaced people only when requested to do so by the United Nations, and permitted to do so by the authorities concerned. Such requests can be said to have hitherto been made in conformity with primacy of the importance of humanitarian assistance for the victims of natural disasters and other emergencies and the consideration that humanitarian assistance must be provided in accordance with the principle of humanity, neutrality and impartiality. The General Assembly has recognised in this regard that the magnitude and duration of many emergencies are beyond the response capacity of the affected countries. [*footnote:* Paragraph 4 of General Assembly Resolution 46\182 recognised that each States has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected States has the primary role in the initiation, organisation, coordination, and implementation of humanitarian assistance within its territory]. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and solidarity and in conformity with national law. Intergovernmental and non-governmental organisations working impartially and with strictly humanitarian motives should continue to make a significant contribution in supplementing national efforts. The starting point for UNHCR's involvement in the country of origin for the displaced persons has been said to have been affirmed in General Assembly Resolution 46\182 of 19 December 1991 on Strengthening the Coordination of Humanitarian Emergency Assistance of the United Nations System. Paragraph 3 of the annex to that Resolution states:

> "The Sovereignty, territorial integrity and national unity of *states must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the*

affected country and in principle on the basis of an appeal by the affected country". (Emphasis added).

As a UNHCR Working Group on International Protection rightly observed, the above cited provision argues against the UNHCR's involvement without the consent of the affected State in a Safety Zone created through 'humanitarian intervention' by one or more States against another State. The Working Group distinguished "humanitarian intervention in its classical sense from the collective action creating a Safety Zone which may have been sanctioned by the United Nations in line with its responsibilities for the maintenance of international peace and security. It clarified that as a part of the UN system, the UNHCR cannot refuse to provide humanitarian assistance in such situations, if it is requested to do so either by the General Assembly or the Security Council". [*footnote: Report of the UNHCR Working Group on International Protection* (Geneva, July 1992)]. The Working Group while supporting UNHCR's involvement in protecting displaced persons in their own country because of the preventive impact and the humanitarian need, emphasized that the UNHCR should, prior to initiating or accepting a request for involvement ascertain, *inter alia,* that:

(i) The parties concerned acquiesce to UNHCR's involvement;

(ii) The option for seeking asylum abroad remains open at all times, and that the UNHCR's involvement would not lead to or condone *refoulement*;

(iii) The situation calls for UNHCR'S particular expertise in protection and\or assistance and is in line with its humanitarian and non-political character;

(iv) UNHCR is granted full access and security and other conditions exist to allow it to operate; and

(v) the political support of the international community and adequate special funds are available.

The establishment of Safety Zones for the displaced persons in the country of origin should be regarded as a humanitarian measure the application of which would help curtail the creation of 'refugee population'.

The conditions in the so-called 'safe areas' in former Yugoslavia have in recent times demonstrated the difficult conditions under which people live when essential services are cut off and adequate medical

care unavailable. People compelled to live in enclosed or delimited areas are totally dependent upon humanitarian assistance provided by external sources. The resultant camp-like feeling contributes to an overwhelming lack of normalcy in the lives of the residents of such 'protected areas'. It has therefore been suggested that donor States and international organizations should be urged to support governmental programmes of assistance to displaced people only when certain conditions are fulfilled and that such inter-government programmes should conform to the stipulations of the Fourth Geneva Convention of 1949, as this guarantees the presence and security of an international organization, prohibits the use of violence against civilians, and specifies the situations in which relocation programme can be implemented. It is however doubtful whether any conditionality to render assistance would meet the stringent requirements of the cardinal principles of humanitarian assistance *viz.*, neutrality, impartiality and humanity. The realities of a civil strife situation which is typically marked with the absence or breakdown of any Government programme in the recognised and practical sense of the term should also be taken into account.

It has also been suggested that, donors should ensure that relief programmes for the displaced people in Safety Zones are able to function independently of the military factions. There is, however, a danger that the call for the establishment of 'Safety Zones' in such situations might provide justification for interventions by military powers. This should be avoided. Where governmental relief agencies are subject to stringent political controls, assistance should be channelled as far as possible through international organizations and non-governmental agencies acceptable to all the parties to the conflict. In this sense, the word 'humanitarian access' might be more appropriate than the word 'humanitarian intervention' as the concept of the latter term implies or connotes military intervention.

The extent to which assistance programmes for the displaced, like those for refugees, should guarantee choices and participation for the people concerned also requires to be considered at some length. Relief aid imposes its own kind of imprisonment, creating conditions of despondent dependence and hopelessness. Many displaced persons may well become like prisoners within the so called 'Safety Zone' in their own country. This psychological dimension of preventing the up swelling feeling of being in an 'open prison' needs always to be taken into account. This issue is closely related to the question of the length of time or the duration for which the Safety Zones are established.

In December 1992 the International Committee of the Red Cross (ICRC) issued an unusual statement calling for the creation of safe haven zones in Bosnia. The ICRC is understood to have issued the call because it was convinced there was no alternative to the plan. It observed that

> "as no third country seems to be ready even on a provisional basis to grant asylum to one hundred thousand Bosnian refugees (the group under immediate threat in the north of Bosnia-Herzegovina) an original concept must be devised to create protected zones . . . which are equal to the particular requirements and the sheer scale of the problem". [*footnote:* Bill Frelick, 'Preventing Refugee Flows: Protection or Peril?' in: *World Refugee Survey 1993*].

This statement refers to safe havens in the country of origin not as the preferred way to protect would-be refugees, but rather as a last resort to save the individuals concerned since denial of asylum by outside countries had closed the option of asylum. The ICRC faced with the stark reality of prevention of refugee outflow by other governments turned to 'safe haven' idea as an act of desperation to protect the trapped after international refugee regime had failed. The conditions which the ICRC listed and which would have to be met to establish such safe haven zones included *inter alia* the consent of the parties concerned to the concept and location of such zones and duly mandated international troops to assure security of such protected zones. The ICRC's safe haven proposals were based on the *a priori* assumption that asylum outside Bosnia is not an option. However, it should be recalled that in her Note on International Protection, the United Nations High Commissioner for Refugees emphasized that "prevention is not . . . a substitute for asylum." [*footnote:* See *Note on International Protection*, submitted by the High Commissioner, Executive Committee of the High Commissioner's Programme, Forty-third session, August 25, 1992].

Consequently, in our view any proposal for the establishment of a safe haven zone should not preclude the options of seeking asylum outside the country of origin. Thus, admission to or residence in the zone should not affect the right to seek asylum, nor should it restrict the right to freedom of movement of the person in and out of the Safety Zone. 'Operation provide comfort', launched in northern Iraq following upon the adoption of Security Council Resolution 688 of April 5, 1991, was not an effort to address the root causes of the refugee flow so that potential refugees would feel secure enough to choose not to flee. On the contrary they had no choice since asylum in neighbouring countries was denied. While such zones or areas ought to provide sufficient security to convince displaced persons that they can be adequately protected without crossing an international border, they should not be used as a pretext for barring the movement of those who still feel endangered to seek refuge outside their countries.

A major consideration in the creation of a Safety Zone is its effectiveness in actually providing safety to those in need. The UNHCR takes the view that guarantees for safety need to be explicitly and effectively underwritten as clearly as possible. They will depend on the actual circumstances, including the degree and nature of the threat as well as the methods used to establish the Safety Zone. If a Safety Zone is created with the consent of the parties, their assurances may provide a basis for safety. If it results from multilateral action, international supervision by a UN peace keeping force may be an option. The presence of international observers or monitoring by organisations, including UNHCR may also be important additional methods. But experience has shown that such operations are cumbersome and very expensive.

While the humanitarian law stipulations envisage the creation of various types of areas under special protection, they do not provide for the physical protection of such areas. It may be stated in this regard that Article 5 of The Draft Agreement Relating to Hospital and Safety Zones and Localities, attached as Annex I to the Fourth Geneva Convention, stipulates *inter alia* that hospital and safety zones "shall in no case be defended by military means". This restriction is also extended to localities under Article 13 of the Draft Agreement. Yet, where parties do not respect an area under special protection, protection cannot be assured to the persons therein without the use of military means. The safety of the security zone in Iraq as opposed to the lack of security in the protected areas and safe areas in the former Yugoslavia highlight this aspect.

Furthermore, a multitude of questions arise in connection with the necessity to ensure the safety of those in the area under special protection. What type of legal framework would be effective in guaranteeing the security of persons in the area - municipal law and structures, regional or universal regimes? While applicable human rights and humanitarian law obligations would, perhaps, continue to apply, refugee law as such would be inapplicable since such persons remain in their country of origin. Who would be most effective in enforcing the rules governing the area under special protection including those prohibiting violation of the security of the area? Also, how will the safety of those in the area be ensured - by the police or paramilitary forces of the State or by an international peacekeeping force? How will entry and exit to the protected areas be controlled and by whom? How and by whom would the demilitarization of the area be effected and ensured? Would the prospect of creating areas under special protection induce parties to try to annex such areas before their protection is established, thus putting at risk the very people the areas under special protection are supposed to protect?

Indirectly related to ensuring the safety of persons in the area, but essential to the smooth functioning of the area, are questions about who will

administer the area and whether the United Nations agencies will play a monitoring role or an active participatory role in the area by carrying out functions normally performed by the government.

Another factor to be borne in mind is the length of time for which a Safety Zone need be created. How temporary a measure of protection turns out to be would depend on the success of political initiatives to resolve the underlying conflict. The dangers of failure to reach a political settlement are serious. The cost of maintaining a Safety Zone for a long period and the number of persons it might attract could be astronomical and may make it an unworkable proposition. These concerns underscore the importance of political initiatives for a solution in parallel to the establishment of a Zone. In the absence of a political settlement a protracted camp-like situation might result in demands by persons in the zone for transfer abroad. Yet again, the existence of an area under special protection could well strengthen the political initiative and intention to find a comprehensive solution to the conflict. The AALCC may also wish to consider whether the creation of areas under special protection for an indefinite period of time would not also significantly increase the number of persons dependent on international assistance for a protracted period of time.

. . .

The final consideration relates to the presence and participation of other organizations, governmental and non-governmental, in the Safety Zone. The value of inter-agency co-operation would be enhanced in the politically delicate situation of a Safety Zone. From an assistance point of view, the need for inter-agency cooperation to bridge the gap between relief and rehabilitation is well-recognised. The protection, as much as assistance of the displaced should be seen as a cooperative effort between international intergovernmental organisations and states as well as nongovernmental organizations, particularly in filling the gaps between UNHCR's protection responsibilities and the overall needs of the displaced population. It may also be relevant in the context of the mandate entrusted to UNHCR in its operations, since even though UNHCR's protection objectives may have been met, this does not mean that the human rights of the individuals are fully protected. It is important therefore to keep in mind the specific mandate of ICRC for the protection of civilians, as well as the human rights protection and promotion responsibilities of other UN operations. In this respect, the various initiatives which have been launched within and outside the UN to focus greater attention on the plight of the displaced persons - including the internally displaced - should be kept in mind.

> This topic needs further serious study with a more careful evaluation of the situation and practice in recent times in such areas as in northern Iraq, Sri Lanka, Yugoslavia, Somalia among other. The AALCC should give consideration to the directions which the future work of the Secretariat should take. Not only are we dealing with a novel concept but in the absence of a consistent and uniform terminology, the fine distinction between the emerging principles of humanitarian law and the customary principles of human rights and refugee law place the concept in a dark grey area where the two aforementioned branches of law overlap. The usage of a plethora of terms such diverse as 'Safety Zones', 'Open Relief Centres', 'Security Zones', 'Safe Haven Zones', 'Safe Corridor', and 'Safety Corridors', not to mention 'humanitarian access', can scarcely be said to be conducive to the progressive development or codification of law where several customary and codified principles of International Law interact, coincide and at times even appear to be mutually exclusive. This is particularly true of the principles of State Sovereignty and non interference in the domestic affairs of the State. The Committee should give consideration to these and other matters referred to above in determining the future work of the Secretariat in this regard."

22. Introducing the item, the *Deputy Secretary-General* said that the future work of the Secretariat concerning a model law would depend on Member States' views on the meaning and scope of some key terms that would be used in the legislation contemplated as well as the extent of the rights and duties to be conferred upon persons protected under it. On the subject of safety zones, he emphasized the difficulty of dealing with issues which arose within an area of interaction between the emerging principles of humanitarian law on the one hand, and principles of State sovereignty and non-interference in the domestic affairs of States, on the other. He sought the guidance of the Committee on both aspects of the item before it.

23. The delegate of *Iran* noted the importance of refugee problems, particularly in Asia and Africa. He observed that Iran had been host to some 5 million refugees and, as a Party to the 1951 Convention on the Status of Refugees and its 1967 Protocol, had taken steps to provide facilities for refugees within its territory. Although international organizations had expressed appreciation for Iran's efforts, international aid for refugees in Iran had been insignificant when compared with that given to other countries which had taken in smaller numbers of refugees. In his view, measures and policies of a State resulting in displacement of its nationals and their taking refuge in other countries, amounted to a mass expulsion of persons for which the country of origin remained responsible. He emphasized that such displacement could not be used as justification for denying the nationality of the persons

displaced; that a receiving State had the right to facilitate repatriation of such persons whenever it ascertained that the situation in their country of origin had become normal; and that refugees were themselves bound to act in accordance with the laws of the receiving State.

24. The *Representative of the United Nations High Commissioner for Refugees* said that every State needed to adopt legislation that would enable it to manage and regulate humanitarian assistance to be rendered to refugees and displaced persons. He observed that a legal regime could at once protect the interests of asylum seekers, and ensure the protection and preservation of the sovereignty of a State, as well as its national interests. He proposed that the AALCC should second a member of its staff to the Secretariat of the UN High Commissioner for Refugees for a mutually agreed period, to draft model legislation on refugees. The proposed legislation, he said, could be modular, with alternative provisions, and could be submitted to Member States for their observations, additions and amendments. The draft could then be considered and perhaps approved by the Committee at its next session. Thereafter member States which desired to do so, could enact legislation receiving, if necessary, technical assistance from the office of UNHCR.

25. The delegates of *Uganda* and *Kenya* welcomed the offer by UNHCR of technical assistance in the drafting of a model law. The delegate of *Kenya*, recalling that his country had been host to a large number of refugees over a period of some 20 years, observed that the influx of such numbers had an adverse effect on the economy, sometimes (as when refugees brought arms with them) created a climate of insecurity which inhibited foreign investment, and had even led to environmental hazards through the cutting down of trees on a large scale for fuel. He noted that although Kenya had to endure such consequences, it had received only limited assistance from the international community.

26. The delegate of *India* said that the impact of the influx of refugees varied from country to country and from continent to continent. He emphasized that there were many aspects of the problem which needed further careful study and deliberation before the drafting of a model law on the subject could be embarked upon, such as definitions of terms and scope of the proposed legislation. He did not favour introducing into such legislation ideas which had not been accepted voluntarily following detailed discussion, and could not agree to seeking technical assistance in the matter of drafting a law at this stage. He would not, however, be opposed to seeking technical assistance in the drafting of modular legislation at an appropriate time, provided that it was

understood that the existence of the proposed model legislation would not commit or bind any Member State of the Committee, and that adoption of any such legislation would be voluntary. The delegates of *Egypt* and *Turkey* expressed general agreement with the views of the delegate of *India*.

27. The *Representative of UNHCR* pointed out that Member States of the Committee would remain at liberty to consider the substantive and political questions related to the acceptance or enactment of the proposed legislation. The *Secretary-General* agreed that preparation of model legislation by the AALCC Secretariat with the collaboration of UNHCR would not make it mandatory for any Member State of the Committee to enact such legislation. In his view, such model legislation could be of use to many Members in developing their own laws to assist refugees.

Decision

28. In the decision adopted (*Report*, pages 227-8) following discussion of the item (*Report*, pages 136-145 and 155-7) the Committee, *inter alia*:

". . .

1. *Appeals* to Member States to take all measures to eradicate from their countries the causes and conditions resulting in their nationals being forced to leave their countries and becoming refugees;

2. *Urges* the Member States who have not already done so to ratify or accede to the Convention on the Status of Refugees, 1951 and the 1967 Protocol thereto;

3. *Takes* note of the general outline of the programme of work proposed by the Secretariat on the model legislation which is still to be considered by the Committee;

4. *Decides* to continue with the task of the preparation of a model legislation in close co-operation with UNHCR and OAU in light of the codified principles of international law and the practice of States in the region;

5. *Expresses* appreciation to the UNHCR for the offer to assist the AALCC to draft the model legislation;

6. *Decides* in the context of paragraph 4 above to second a professional staff officer of the Secretariat to the UNHCR, for a specified period to be mutually agreed, to draft the detailed modular draft legislation;

7. *Recommends* that such draft legislation be transmitted by the Secretariat to all Member States, prior to the Thirty-fourth Session, for their consideration, amendments, additions on substractions;

8. *Recommends* further that such duly amended draft legislation be considered at the Thrity Fourth Session of the Committee for its possible adoption;

9. *Directs* the Secretariat to include the item 'Status and Treatment of Refugees' on the agenda of the Thirty-fourth Session of the committee; and

10. *Directs* the Secretariat to study further the concept of Safety Zones and to analyse the role played by the United Nations and UNHCR, in particular in the recent past, in that context."

3.2. Law of international rivers

29. The Committee had before it a document entitled "Law of international rivers: normative approaches to the sustainability of freshwater resources" (Doc. No. AALCC/ XXXIII/TOKYO/94/5) prepared by the Secretariat, which examined some legal obstacles to the establishment of a complete international regulatory mechanism for sustaining freshwater resources and their flows. The study was based on principles and draft texts adopted by the International Law Commission in connection with its work on the topic "Non-navigational uses of international watercourses", and drew heavily upon the work of the United Nations Conference on Environment and Development, in particular Chapter 18 of Agenda 21.

30. Referred to the Committee in 1966 by *Iraq* (concerned with defining the term 'international river', and clarifying rules relating to the utilization of the waters of such rivers for purposes not connected with navigation) and by *Pakistan* (concerned with clarifying the rights of lower riparian states), this item serves (1) to focus discussion on areas of importance to Member States that are not likely to be covered by the International Law Commission, as well as (2) to assist Member States to monitor and formulate views concerning progress of the Commission's work. *India* has regularly expressed doubts regarding the usefulness of proceeding with consideration of the item due to the diversity and complexity of the factors involved.

31. The delegate of *Turkey* said that, while he welcomed draft article 5 of the International Law Commission which concerned the "utilization of an international watercourse in an equitable and reasonable manner", he could not

accept such a concept in the utilization of groundwater resources. He recalled that his delegation had pointed out during the Committee's Islamabad Session (2 AsYIL 204) that inclusion of confined groundwater resources could add to the complexity of the subject, but said he had not (as had been erroneously reported) proposed such a course. His delegation believed that since diverse factors characterized river basins in various parts of the world, the item under discussion was not amenable to further examination by the Committee. He said that, in any event, the title of the item should be changed from 'Law of International Rivers', which wrongly implied the existence of an accepted body of law on the subject, to "Study on the non-navigational utilization of international watercourses".

32. The delegate of *India* said that the essentially bilateral dimensions inherent in the topic were such that multilateral efforts to formulate rules merely resulted in work of a high level of generality and abstraction. Accordingly, he suggested that the Committee reach no final conclusion, and that the item be withdrawn from its active agenda.

Decision

33. Discussion of this item *(Report,* pages 96-8) was followed by adoption of an essentially procedural decision *(Report,* p. 229).

3.3. Law of the sea

34. The Committee had before it a Secretariat document entitled *The law of the sea: the work of the Prepcom and the UN Secretary-General's informal consultations (1993)* (Doc. No. AALCC/XXXIII/TOKYO/94/6) which summarized progress made at the Eleventh Session of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea (pages 1-14), as well as progress made at the UN Secretary-General's informal consultations aimed at reaching agreement on practical solutions for the difficulties relating to part XI of the UN Convention on the Law of the Sea (deep sea-bed mining) which the industrialized countries indicated had arisen in changed circumstances following negotiation and signature of the Convention (pages 14-57). The ultimate objective of the consultations was to secure broad agreement concerning implementation of the Convention so that, deposit of the 60th ratification (required to enable the Convention to enter into force) being imminent, the participation of all countries developing and industrialized, those which had

signed, but not ratified the Convention, and those which had not yet signed it – would be facilitated.

35. Reporting on the UN Secretary-General's consultations the Secretariat summarizes and compares the contents of two documents: the 'Boat Paper', which had been the basis of the informal consultations, and of which the AALCC Secretariat observes that it was ". . . an anonymous paper, purported to have been prepared by representatives of several developed and developing States . . . however, it is clear that the majority of the developing countries could not have been parties to it and were neither consulted nor support its content"; and a 'Non-Paper' said to have been prepared by "delegations primarily from the Group of 77". The 'Boat Paper' (so-called because of the sea-bed mining vessel depicted on its cover) discussed proposals for 'implementing' part XI of the Convention while modifying obligations provided for under it, as well as 'procedural approaches' to accomplishing that objective. To the Boat Paper was attached a draft resolution for adoption by the UN General Assembly, together with an "Agreement relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea" which would be subject to signature and ratification (reproduced at pages 63-91 of the document). The 'Non-Paper' entitled "Agreement on the Implementation of Part XI and Annexes III and IV of the United Nations Convention on the Law of the Sea", contemplated (a) extention of the mandate of the Preparatory Commission for an "interim period from the coming into force of the Convention to the time when commercial seabed mining becomes feasible"; (b) authorizing the Preparatory Commission "to exercise all the initial functions of the Authority and the Enterprise in accordance with the Convention, in an evolutionary manner, during this interim period"; (c) the convening of a "review conference at the time when commercial sea-bed mining is about to begin"; and (d) adoption of the text of an Agreement annexed to the draft resolution giving effect to the foregoing, which would be subject to signature and ratification (reproduced at pages 57-62 of the document). In its 'Conclusion' the Secretariat document observes,

> "In the circumstances, as these consultations progress, it is necessary that more attention should be given to the 'Non-Paper' which offers practical solutions for the interim period".

36. The delegate of *Sri Lanka* said that the developing countries should focus on immediately realizable benefits from marine areas under national jurisdiction, since prospects for deep-sea mining operations appeared to be receding. While emphasizing the importance of preserving the universality of

the Convention, he said that it was only through regional co-operation, and with the support of the industrialized countries and international organizations that the developing countries could make practical gains. It was for that reason that Sri Lanka had, in 1981, proposed the establishment of the Organization for Indian Ocean Marine Affairs Co-operation (IOMAC).

37. The delegate of *Indonesia* said that while many provisions of the Convention were the result of the codification of rules of customary law, others like those concerning the exclusive economic zone, the archipelagic state, protection and preservation of the marine environment, transit passage through straits used for international navigation, sea-bed mining and mandatory dispute settlement established new legal regimes. He declared that it was imperative that Member States of AALCC utilize the period before 16 November 1994 (on which date the Convention would enter into force) to secure universal adherence to the Convention, so as to consolidate and further strengthen those provisions, observing, however, that the legal regime of the exclusive economic zone had become part of customary international law as evidenced by state practice.

38. The delegate of *Japan* recalled that his country, as a maritime State, had played an active rôle throughout negotiation of the Convention, as well as at the Secretary-General's consultations. The Convention deserved positive appraisal despite shortcomings related to part XI, and would serve the long-term interests of maritime states through providing an integrated legal basis for use of the seas by the international community, and by putting an end to disorder resulting from unilateral extentions of jurisdiction by coastal states. In his view, the successful conclusion of the Secretary-General's informal consultations was essential in order to safeguard agreed aspects of part XI, to ensure the establishment of a universal legal regime for the oceans, and to prevent erosion of that regime or selective adoption by states of parts of it which they found beneficial to themselves. To achieve that objective, it was necessary to accommodate the views of the developed countries as well as the new political and economic conditions that had emerged after adoption of the Convention. With reference to the work of the Preparatory Commission, he said that since the adoption of the Understanding on the Fulfilment of Obligations by Registered Pioneer Investors, Japan's Deep Ocean Resources Development (DORD) had faithfully implemented their obligations, including establishment of a training programme, which had been approved by the Commission. Under it, three trainees from Thailand, Iran and the Republic of Korea were since 1993 taking 10-month courses in their respective fields *viz.* geology, geophysics and electronic engineering, under the auspices of DORD

and the Geological Survey of Japan, within the framework of the Japan International Cooperation Agency (JICA). These trainees were expected to play a central role in the future Enterprise.

39. The delegate of *Kenya* said that the provisions of the Convention, particularly part XI, represented a compromise between developed and developing countries. While supporting the UN Secretary-General's consultations, he observed that that forum had no mandate to discuss amending the Convention, and that, prior to the entry into force of the Convention, only the Preparatory Commission had such a mandate. He expressed concern regarding the issue of decision-making once the Convention entered into force, noting that it was unclear how the industrialized countries could participate in the work of the International Sea-bed Authority if they did not become parties to the Convention. Recognizing that regional cooperation promoted the interests of the developing countries, he said that training programmes under the auspices of IOMAC had benefitted many countries in the Indian Ocean region.

40. Welcoming deposit of the sixtieth instrument of ratification of the Convention, and its entry into force on 16 November 1994, the delegate of *China* expressed the hope that the largest possible number of countries would become parties to it. He observed that the effectiveness of the Convention would be damaged if the industrialized countries were to stand outside it. Welcoming the informal consultations convened by the UN Secretary-General on deep seabed mining issues, he called upon all States to use the period before the Convention's entry into force to find satisfactory solutions so as to allow the Convention to be accepted as widely as possible. He said that there was clear evidence that the Preparatory Commission had successfully implemented Resolution II of the Third UN Conference on the Law of the Sea, and expressed the hope that the Commission at its forthcoming session would make practical arrangements for the entry into force of the Convention.

41. The delegate of the *Republic of Korea,* while welcoming deposit of the sixtieth instrument of ratification by Guyana and the prospect of the Convention's entry into force in November 1994, observed that the universality of the Convention remained to be secured, and expressed the hope that the UN Secretary-General's consultations would bring about that result. He announced that his Govemment had applied to the Preparatory Commission for registration as a pioneer investor and for the allocation of a pioneer area in accordance with Resolution II of the Third UN Conference on the Law of the Sea.

42. The delegate of *India* expressed the hope that the UN Secretary-General's informal consultations would result in the emergence of a consensus which could be introduced into the Convention on the Law of the Sea through its existing machinery. That, in his opinion, would ensure the due and effective rôle of every State in the establishment of the ocean regime. He expressed the view that states which made substantial investments in the oceans would ensure the protection of the principle of the common heritage of mankind.

Decision

43. In the decision *(Report,* pages 231-233) which followed discussion of the item *(Report,* pages 111-125) the Committee,[1] *inter alia,*

> ". . .
>
> 2. *Notes* with great satisfaction that the United Nations Convention on the Law of the Sea having been ratified by the requisite sixty states shall enter into force on 16 November 1994;
>
> 3. *Urges* the Member States who have not already done so, to consider ratifying the Convention on the Law of the Sea;

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[1] The delegate of *Japan* made the following observation at the adoption of the decision: "Japan believes it essential to ensure the universal application of the Convention. It is encouraging to note that an increasing number of countries recognise the urgent need for arriving at a most widely acceptable agreement through the negotiations at the Secretary General's Informal Consultations prior to the entry into force of the Convention. Japan also hopes that the consultations would lead to a conclusion which would fully reflect the legitimate interests of international community as a whole, including both of the developing and of the developed countries".

The delegate of *Turkey* made the following reservation with respect to the decision: "Turkey supported the international efforts directed to establish a regime of the Law of the Sea which has to be based on the principle of equity and which can be accepted by all States. However, the Convention on the Law of the Sea does not contain the adequate provisions for special geographical zones and situations and, as a consequence, can not succeed to establish a satisfactory balance between the conflicting interests. Furthermore, the Convention contained no provision for reservation on specific clauses. These are the main reasons to prevent Turkey from approving the Convention on the Law of the Sea. Although the Convention is about to enter into force, it is still far from getting universal acceptance. As the distinguished delegate of *Sri Lanka* mentioned in his statement, lack of equity as between the conflicting interests is the source of the informal negotiation conducted with the help of the Secretary-General of the UN.
We do not want to create an obstacle to the decision to be taken by the Committee but, my delegation would like to reserve its position on the issue and express clearly that its silence can not be interpreted as an approval to the resolution which is supposed to be adopted by consensus."

4. *Urges* the full and effective participation of the Member States in the Informal Consultations convened by the Secretary-General of the United Nations so as to ensure and safeguard the legitimate interests of the developing countries;

5. *Reminds* Member States to give timely consideration to the need for adopting a common policy and strategy for the Interim Period before the commercial exploitation of the deep seabed minerals becomes feasible;

6. *Urges* Member States to cooperate in regional initiatives for the securing of practical benefits of the new ocean regime;

7. *Directs* the Secretariat to continue to cooperate with the international organization and with such international organizations competent in the fields of ocean and marine affairs and to consider assisting Member States in the formulation and adoption of municipal legislation for the exploration and exploitation of the natural resources of the Exclusive Economic Zone;

. . ."

4. MATTERS OF COMMON CONCERN HAVING LEGAL IMPLICATIONS

4.1. The United Nations Conference on Environment and Development: follow-up

44. The Committee had before it the following documents prepared by the Secretariat:
"United Nations Conference on Environment and Development: follow-up" (Doc. No. AALCC/XXXIII/TOKYO/94/7); a supplement thereto with the same title (Doc. No. AALCC/XXXIII/TOKYO/94/7a), and "Report on AALCC's Legal Adviser's Meeting, New York, 27 October 1993" (Doc. No. AALCC/XXXIII/TOKYO/94/10).

45. Doc. No. TOKYO/94/7, describing institutional arrangements for giving effect to decisions taken at UNCED, notes that within one year of the Conference, the UN General Assembly, by resolution 47/191 adopted on 22 December 1992, has established the Commission on Sustainable Development, to consist of 53 representatives of States elected by the Economic and Social Council for 3 year terms and to meet once a year; and a High Level Advisory Board to consist of eminent experts on environmental matters, all in

accordance with recommendations contained in chapter 38 of Agenda 21. The document also notes adoption by the Commission of a "thematic multi-year programme of work", the establishment of an Inter-Agency Committee on Sustainable Development to promote co-ordination of the activities of international organizations, the creation of a new Department for Policy Co-ordination and Sustainable Development within the Secretariat (headed by Under-Secretary-General Nitin Desai), and the establishment by some 70 countries of national commissions to implement Agenda 21. While conceding that it might be too early to attempt a comprehensive assessment of overall progress, the document observes (pages 7-8):

> "While the process of establishment of institutional arrangements as envisaged at the Rio Conference has been completed satisfactorily, there appears to be little progress on the two key issues, namely the financial commitments involving new and additional resources and the transfer of environmentally sound technology to the developing countries. It will be recalled that the successful adoption of Agenda 21 at the Rio Summit added a new dimension to the concept of partnership among the developed and the developing countries. The need of the hour is to sustain and strengthen this concept."

46. Doc. No. TOKYO/94/7 then focusses on work done on the drafting of a convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa. Having described the work carried out in 1993 by the Inter-governmental Negotiating Committee on Desertification (INC-D) established pursuant to UN General Assembly resolution 47/188, the AALCC Secretariat offers general comments, as well as its own "tentative draft text of a Convention on Desertification and Mitigation of Drought" (pages 11-59), emphasizing that the views expressed therein "do not necessarily reflect the position of any of the Member States of the AALCC":

> ". . .
>
> III. GENERAL COMMENTS
>
> The Geneva Session of the INC-D was a step forward toward the goal of completion of the elaboration of a convention by June 1994. The compilation prepared by the INC-D Secretariat with the assistance of the International Panel of Experts helped to focus the discussions on a set of proposals on the relevant issues.
>
> It appears that there will be no disagreement on the format of the Convention which will essentially follow the pattern established by the

Convention on Climate Change and Biodiversity. The unanimity reached at the opening of the INC-D Meeting in Geneva on the allocation of work to the two Working Groups was a good omen at the commencement of the negotiating work in Geneva. The two Working Groups during the first week of the Session made a remarkable progress in the first round of discussions on the basis of the compilation made by the Secretariat (Doc. A/AC 241/12). Regrettably, during the later part of the second week, the deliberations got derailed over the semantics.

It is, however, encouraging to note that there is wide consensus on several provisions of the Convention. The divergent views in respect of Preamble, Definitions, Principles, Objectives, Research and Development, Capacity Building, Technology Transfer and Co-operation, Institutional and Procedural Arrangements and Final Clauses will narrow down as the negotiations reach the concluding phase.

There are only three key issues which could keep the INC-D negotiations on tenterhooks. These issues include: the nature and type of commitments, the financial resources and mechanism, and the nature and time table for conclusion of regional instruments. At the conclusion of the Nairobi Session it was hoped that especially the issues concerning regional instruments will not pose problems at the Geneva Session. Regrettably, this was not to be.

It is interesting to note that many of the developed countries purport to advocate that this should be a '*strong*' convention. However, if the views expressed at the Geneva Session on crucial issues such as ccommitments and the financial mechanisms are any indication, the Convention, when it emerges in the final form, would perhaps be among the '*weakest*' on this field of environment and development. The differences of opinion on a single word 'globalization' substantiates this observation. For the climate change issues, the developed countries had vital stakes and therefore they were prepared to cajole and to go to some length to seek support and participation of the developing countries in that process. It may be too harsh to express the opinion that in some quarters, it is felt that 'desertification convention' is a 'charitable convention'. Such a view would be a travesty of the whole international co-operation system currently in vogue. The semantic differences over the character of the issue and whether it is 'global' or not should not be the yardstick to judge the importance of the international convention to combat desertification.

It has been further suggested that the convention should be '*realistic*' and should not deal with issues which are not relevant in the context of the desertification convention. Nobody would dispute that point. However, the word 'realistic' has to be interpreted in the context of overall approach, both by the developed and developing countries. It has been recognised that 'desertification' and 'drought' are two distinct issues and accordingly different types of commitments should be elaborated to deal with them. Drought has been defined as "a sustained period of water deficit in particular areas,

perhaps lasting a few months or many years". Does it mean that one has to wait for many years to identify any particular situation whether it is 'drought' or 'desertification' and provide any assistance accordingly? In the context of desertification, it has been further suggested that the proposed Convention should deal with 'preventing' further desertification and not with the problems of 'reclamation' of degraded land. If the objective is to adopt an 'integrated approach' such different categories of situations, involving different types of comitments does not seem to hold logic. There cannot be a dividing line separating these issues. As and when the Convention comes into force, the Conference of Parties (COP), the highest body designated to oversee the implementation of the Convention, should consider the specific situation in the light of scientific information available and take a decision as to what type of technical and financial assistance would be necessary to deal with that type of situation. If the Convention is to be realistic, it must be *flexible* in its approach on this issue. Instead of arguing for drawing fine distinctions, it should be left to the Conference of Parties to determine the specificity of each situation and act accordingly.

It has been suggested that the Convention should strictly deal with the issues which are relevant in the context of desertification issues. The very mention of 'biodiversity' or climatic issues have not been recognised as relevant, as they are being dealt within other international Conventions. Similarly, since sensitive issues such as mitigation of debt or removing distortions in international trade belong to other international forums, it has been argued that they should not cast their shadows in the negotiations on a desertification convention. No doubt, these issues are not directly related to this exercise, but there is no doubt they are relevant and could be mentioned albeit in a very general manner, perhaps either in the preamble or in the article relating to 'Principles'. Nobody is seeking solution of the debt problem in the context of desertification but the debt burden of developing countries is a reality which is hampering their development process and unless it is seen in a broader perspective no meaningful achievement could be made in any front including combating disertification and drought.

In the context of relevance of issues, a couple of observations may further be made. In some quarters it is felt that the Convention should not fail to refer to 'good governance' and the virtue of a democratic form of government. Some veiled charges were also made in identifying the reasons why past efforts and financial assistance provided to developing countries, could not yield the desired result. It is unfortunate but true that democracy while crucial is not the panacea for all the ills of today's world. There are examples where supposedly democratic governments have systematically exploited their own people and become involved in all types of corruption and other instances when authoritative regimes have done best for the welfare of their people and led to phenomenal development. In the context of desertification, it is not the type of government which matters. Each situation should be judged by

performance and the way that commitments at the national level have been implemented by the Governments. The convention should not attempt to impose a 'charter for good governance' and dictate the national budgetary process and other matters lying in the national domain. Respect for sovereignty and freedom for independent action should be one of the elements in granting international assistance to deal with such problems as desertification which are essentially within the national jurisdiction of States. Such an approach only would make the Convention *realistic*.

Another set of provisions which would be the yardstick to measure the success of the Convention are the financial commitments and the related mechanism to implement the Convention. Perhaps Geneva during the INC-D second session did not provide the right atmosphere to discuss seriously the financial commitments to ameliorate the conditions of millions who are struggling for survival from the menace of desertification far away. The views expressed during consideration of this item in Working Group I do not appear to be encouraging. There is so far little indication from many of the developed countries of their desire to reach the target of 0.7 percent of their GNP in response to the fervent appeal made just a year ago during the Rio Summit. There is little inclination to support the establishment of a separate and special fund within the context of the desertification Convention. On the contrary, there is strong opposition to open a fifth window at the Global Environment Facility (GEF) specifically for desertification issues. It has been suggested that 'desertification' may attract GEF funds in specific situations which may fall under the four programme areas covered under the existing scheme. Although, the discussions on restructuring of GEF are still going on and any clear view on this issue would emerge only after GEF's December 1993 session, there is not much hope of breaking any new ground.

Against this background, it would not be surprising if the fate of discussion on crucial issue of 'new and additional financial resources' will hang in the balance until the last moments of the negotiating process. The negotiating history of the Climate Convention provides a precedent in this regard. The Convention on desertification, however, must address this issue in a pragmatic or innovative manner which will pave the way for any realistic Convention.

Another difficult issue, which remained unresolved at the INC-D first session in Nairobi, and continued to haunt the deliberations in Geneva, is the conclusion of regional instruments. UN General Assembly Resolution 47/188 of 22 December 1992 mandated the INC-D to elaborate an international convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa, with a view to finalising such a Convention by June 1994. The absence of any clear guidelines and the determined time-frame have resulted in a difficult situation and a variety of interpretations.

One view is that the resolution only refers to the conclusion of an international Convention by June 1994. It does not specify elaboration of any regional instrument within this time. The other view, stressed by many delegations, particularly the African States, is that the text of a regional instrument for Africa must be completed within the stipulated time along with the Convention. The third view, advocated by the States from the Asian, Latin American and the Northern Mediteranean regions, seeks simultaneous elaboration of similar regional instruments for their respective regions.

It is our considered view that it may not be feasible to complete the entire work of the elaboration of the Convention together with all the regional instruments by June 1994. The Chairman of the INC-D initially pult forward a proposal which proposed to seek from the Forty-Eighth Session of the General Assembly an extension of the mandate of the INC-D until August 1995. The obvious implications would have been additional financial commitments by the United Nations and the countries which are supporting the INC-D negotiating process by making voluntary contributions to the Special Fund and the Trust Fund established by the General Assembly (Res. 47/188, Paragraph 13, 14 and 15).

Subsequently, the Chairman submitted another draft on 21 September 1993. In this revised paper, the extension time sought is until January 1995. The marked reluctance of some countries who are contributing to these funds and the continuing financial squeeze of the United Nations may pose some difficulties. However, it is presumed that the Chairman through his skill and pursuasive manner will succeed in his mission when the General Assembly takes up the item on report of the INC-D for consideration. At this juncture, one can only speculate whether even with this extension it would be feasible to complete the entire process.

Apart from the time-frame, the nature of regional instruments raise several difficult legal issues. Two kinds of legal instruments could be elaborated, protocols or annexes. It appears that the general view at the Geneva Session is in favour of annexes. Adoption and integration of protocols with the main Convention is a complex process. However, a similar complexity may arise in the context of annexes. The protocol and annex are integral parts of the Convention. Generally, protocols deal with more substantive legal matters and annexes are concerned with the technical, administrative and procedural matters. In the event, the INC-D contemplates elaborating instruments as annexed. Presumably, there will be at least four annexes covering four different regions, *i.e.* Africa, Latin America including Carribean, Asia including the Central Asian region and Northern Mediterranean respectively.

It is hoped that the INC-D will complete the elaboration of the Convention by June 1994 and possibly the text of the annex for Africa. The Convention, together with the African annex should be adopted by the General Assembly at its forty-ninth Session and thereafter be open for signature by Member

States of the United Nations. If other annexes are concluded thereafter, how will they be integrated with the Convention? Would a state which signs the Convention at the first instance, be expected to sign the subsequent annexes? If for any reason, it chooses not to do so, what will be the legal effect of subsequent annexes *vis-a-vis* that State? To stretch this question further, would any State have the option to pick and choose one of the annexes and declare itself not to be bound by other subsequent annexes if it chose not to ratify/accede to them. These are just a few legal issues which would need to be considered in this context.

The AALCC Secretariat is of the view that a convention accommodating the situations in different regions and specifying particular measures to deal with situations in Africa would have been the ideal approach. However, this may not be acceptable to African countries as it would not fully meet their aspirations. The alternative is to elaborate a general convention together with separate regional instruments for different regions. In our view these regional instruments should not seek to establish additional commitments beyond those envisaged in the convention for the parties which do not face any desertification and drought problem. Other Contracting Parties, which do face such problems, may commit themselves to initiate and implement such measures as would be necessary in the context of their respective regions. Since the idea of the regional instrument as an 'annex' is gaining ground, it would be desirable to identify the common elements and elaborate administrative and technical details corresponding to the specificity of each region. As for the time-frame, since all the annexes would be identical in terms of their legal effects, it would not matter which is elaborated first. The IMO has evolved a very practical system of 'tacit acceptance', of annexes. Such a provision could also be considered in the context of this Convention. This would do away with the problem of integration of annexes with the main Convention.

Another interesting example which may be relevant in this context is the 'Implementation Agreement' relating to the implementation of Part XI and related provisions of the United Nations Convention on the Law of the Sea of 1982, currently under discussion in the Informal Negotiations initiated by the UN Secretary General. The initiative of the UN Secretary General to hold consultations on the outstanding issues on the Law of the Sea Convention, is intended to lead to an Implementation Agreement which would facilitate universal participation in the Convention. Article 2(2) of the Implementation Agreement now under discussion envisages that the provisions of Part XI and the Implememention Agreement would be read and interpreted together as one single account. Under Article 3, this Agreement would be ". . . open for accession by those States and other entities referred to in Article 305 of the Convention which have ratified or acceded to the Convention or which are simultaneously ratifying or acceding to the Convontion and this Agreement". Further, Article 4 provides for a simplified procedure. A State or entity which

is a Party to the Law of the Sea Convention prior to the adoption of the Implementation Agreement, "[. . .] would be considered to be a party to this Agreement unless it notifies the Depository within 12 months of the adoption of the Implementation Agreement that it would not have recourse to the simplified procedure as set out in Article 4."

The AALCC Secretariat is of the view that a combination of 'tacit acceptance' and 'simplified procedure' could provide a solution to the difficulties which might arise in the context of the conclusion and implementation of regional annexes to be adopted after the conclusion of the Convention. While 'tacit acceptance' could promote expeditious entry into force of the regional annexes, the simplified procedure might help in sorting out the legal problems raised in relation to the implementation of annexes.

Lastly, the Fourth ACP-EEC Convention, popularly known as Lome IV Convention, signed in Lome on 15 December 1989 will be a very useful precedent. It deals with Environmental Matters (Articles 33-41) and specifically with Drought and Desertification Control (Articles 54-57). The procedure for the Implementation Agreement and promotion of regional cooperation are the two key features which may guide the INC-D in its work.

DRAFT TEXT OF THE UNITED NATIONS CONVENTION ON COMBATING DESERTIFICATION AND MITIGATION OF DROUGHT

(As prepared by the Secretariat of the Asian-African Legal Consultative Committee)

TITLE OF THE CONVENTION

So far, no discussion has been held in the INC-D about the title of the Convention. The AALCC Secretariat is of the view that this is an important matter which deserves due consideration at an early stage. Since this Convention is elaborated in accordance with the mandate given by the General Assembly Resolution 47/188 of 22 December 1992, it would be appropriate if the title reflects that status. The title suggested by the AALCC Secretariat "The United Nations Convention on Combating Desertification and Mitigation of Drought" is based on that consideration.

PREAMBLE

Recalling the United Nations General Assembly resolutions 32/172 of 19 December 1977, 44/172 of 19 December 1989, 44/228 of 22 December 1989 and other relevant resolutions, as well as decisions adopted by the United Nations Conference on Environment and Development held in Rio de Janeiro in June 1992, in particular the recommendation by which the Conference invited the General Assembly to establish, under its auspices, an Inter-governmental Negotiating Comittee for the Elaboration of an International Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa;

Recalling also General Assembly resolution 47/188 of 22 December 1992 by which it established the Intergovernmental Negotiating Committee for the Elaboration of a

Convention to Combat Desertification with a view to finalizing such a Convention by June 1994;

Reaffirming the validity and relevance of the decisions adopted at the United Nations Conference on Environment and Development regarding measures to combat desertification and mitigate drought, and especially Chapter 12 of Agenda 21 "Managing fragile ecosystems: Combating desertification and drought";

Taking into account past experience particularly the efforts to implement the 1977 United Nations Plan of Action to Combat Desertification;

Appreciating the measures already taken or underway by states and organisations such as the United Nations Environment Programme, the United Nations Development Programme, the Food and Agriculture Organization, the United Nations Educational and Scientific Organization, the World Meteorological Organization, the United Nations Sudano-Sahelian Office, the International Fund for Agriculture Development at various levels to understand and address the problems of desertification and drought;

Considering that measures to combat desertification should be planned in the framework of sustainable development, with dynamic interaction between all development activities, and that measures to combat desertification must therefore form an integral part of the overall economic and social development strategies of the countries concerned;

Conscious of the adverse effects, including socio-economic, of land degradation in dryland areas, which affects a significant portion of the earth's surface and population and the need for proper management, utilization and conservation of resources and prevention of mass exodus and migration of populations;

Noting that economic and social developments and eradication of poverty are priority concerns of countries experiencing drought and desertification, particularly in Africa;

Determined to make concerted efforts to combat desertification and mitigate of drought, for the benefit of present and future generation;

Recognising the responsibility of countries affected by desertification to make necessary policy changes in their land tenure systems with a view to promoting sustainable land use practices and encouraging participation of rural communities and indigenous people in the development process;

Recognising also that in view of the widespread nature and complexity of the problems relating to desertification and/or drought and of the particular conditions affecting each region;

Stressing the need for promotion of sub-regional, regional and international co-operation to combat desertification;

Stressing also the need for effective international co-operation in the field of research and development and for applying ecologically sound technologies to combat desertification and mitigate drought;

Recognising the need to make available further and additional financial resources to countries affected by drought and desertification, particularly in Africa;

Recognising also the vital role played by the local people, particularly the women in combating desertification and affirming the need to ensure that they participate fully and effectively in planning and implementation of measures to combat desertification amd mitigate drought;

Decides to conclude an international convention on combating desertification and mitigation of drought as well as appropriate instruments adapted to the specific needs of different regions;

Explanatory Note

Since the discussion concerning the Preamble will continue until a late stage of negotiations, the AALCC draft text on Preamble sets out only a tentative list, which may be further shorthened or elaborated as need be. There are issues such as poverty eradication, mitigation of debt etc., which could find place in the Preamble.

Article 1
Definitions

(a) 'Desertification' is a process of land degradation in arid, semi-arid and dry sub-humid areas resulting from various factors, including climatic variation and human activities.
(b) 'Drought' refers to a sustained period of water deficit in particular areas, perhaps lasting a few months or even many years and can be classified according to a number of criteria involving several variables used either alone or in combination such as meteorological drought, agricultural drought and hydrological drought.
(c) 'Combating desertification' means all activities aimed at halting and reversing the process of desertification as defined in this Convention.
(d) 'Drought mitigation'.
(e) 'Regional economic integration organisation' means an organisation constituted by sovereign states of a given region which has competence in respect of matters governed by this convention, its Protocols or Annexes and has been duly authorised, in accordance with its internal procedures to sign, ratify, accept, approve or accede to the instruments concerned.

Explanatory Note

No attempt has been made to give a complete list of definitions. The AALCC Secretariat is of the view that the definition of desertification as set out in Agenda 21 is appropriate. For the definitions of other terms which may be necessary to be defined in the context of the Convention, advice could be sought from World Meteorological Organization and such other organisations engaged in similar work. Some elements of the OAU and the ECA texts have also been included in the AALCC text. The definition of the term 'Regional Economic Integration Organization' is the standard one as set out in the Climate Change and Biodiversity Conventions.

Article 2
Principles

(a) States have, in accordance with the Charter of the United Nations and Principles of International Law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that

activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.
(b) The Principle of Sovereignty of States shall prevail in all international programmes and measures for combating desertification and mitigate drought.
(c) The Principle of shared, but differentiated responsibility in promoting and implementing the provisions of the Convention.
(d) The right to development must be realized in such a way as to satisfy the development and environmental needs of present and future generations.
(e) States should co-operate in promoting an open international economic system that will facilitate economic growth and sustainable development in all countries, thus enabling particularly those countries which are affected by drought and desertification to take effective action.

Explanatory Note

It appears that the divergent views on the inclusion of an article on Principles could be narrowed down if the list is precise and the principles to be included are generally acceptable. The AALCC Secretariat draft text is a tentative one. There are certain principles in the OAU draft (A/AC. 241/12, paragraph 29) which may be considered in this context.

Article 3
Objective

The overall objective of the Convention is to promote and strengthen international co-operation to combat desertification and mitigate drought more effectively in the regions affected by such problems.

The immediate objectives are: to prevent land degradation and the destruction of ecosystems; to establish a framework of co-operation and partnership based on mutual interest; to strengthen capacity building at the local, national, sub-regional and regional levels; and to establish a system to monitor and review the commitments of the parties to the Convention and its other instruments.

Explanatory Note

Perhaps the AALCC draft may be considered as short and precise. In view of the pending decision on the nature and time-table for the conclusion of regional instruments, it is felt that elaboration of the article on objective could be deferred until a clear view appears on that issue.

Article 4
Commitments

1. The Contracting Parties, taking into account their specific national and regional development priorities, objectives and circumstances, shall:
(a) formulate, implement, publish and periodically update their national and, where appropriate, regional programmes containing measures to mitigate drought and combat desertification;

(b) Develop and strengthen the knowledge base and information for regions prone to desertification and drought, including the economic and social aspects of these ecosystems;
(c) Strengthen regional and global systematic observation networks linked to the development of national system for the observation of land degradation and desertification caused both by climatic fluctuations and by human impact and identify priority areas for action;
(d) Support the integrated data collection and research work of programmes related to desertification and drought;
(e) Support national, regional, sub-regional activities in technology development and dissemination, training and programme implementation to arrest dryland degradation facilitate the mobilization of adequate financial resources for providing technical and financial assistance to developing countries affected by drought and desertification;
(f) Facilitate the mobilization of adequate financial resources for providing technical and financial assistance to developing countries affected by draught and desertification.

2. The Contracting Parties experiencing drought and desertification problems shall:
(a) Develop comprehensive anti-desertification programmes and integrate them into national development plans and national environmental planning;
(b) Develop comprehensive drought preparedness and drought-relief schemes for drought-prone areas and, where necessary, design programmes to cope with environmental refugees;
(c) Develop land use models based on local practices for the improvement of such practices with a view to preventing land degradation;
(d) Promote integrated research programmes on the protection, restoration and conservation of water and land resources and land-use management based on traditional approaches, where feasible;
(e) Develop and adopt, through appropriate national legislation, and introduce institutionally, new and environmentally sound development oriented land use policies;
(f) Strengthen national institutional capabilities to develop and implement appropriate programmes to combat desertification and mitigate of drought;
(g) Co-ordinate and harmonise the implementation of programmes and projects funded by the United Nations Agencies, Inter-governmental and Non-governmental organizations that are directed towards combating desertification and mitigation of drought;
(h) Encourage and promote popular participation and environmental education, focussing on desertification control and the management of the effects of drought;
(i) Establish mechanisms to ensure that land users, particularly women are the main actors in implementing improved land use, including agroforestry systems, in combatting land-degradation.

3. The Contracting Parties, especially those facing serious drought and desertification thall, in addition to the measures mentioned in Paragraph 2, give priority and mobilizes financial, technical, material and human resources to deal with the situation.

Explanatory Note

Since the deliberations on this crucial issue just began at the Geneva Session, it is considered rather premature to draft concrete provisions. Besides the problem

concerning its format, it is also not clear as to what type and categories of commitments would emerge from future deliberations. It is the key issue in the Convention and to arrive at any consensus there has to be give and take approach. The AALCC Secretariat draft merely identifies a few provisions which need to be considered and elaborated in the light of subsequent developments.

Article 5
Regional and Sub-regional Co-operation

The Contracting Parties shall endeavour to promote:
(a) Regional and sub-regional co-operation in the areas concerning combating desertification and mitigation of drought;
(b) Strengthening, and where necessary, establishment of regional and sub-regional centres as well as networks of research monitoring and systematic observation including early warning systems for drought and desertification;
(c) Exchange of information, experiences and know-how relating to policy and programme alternatives in fields such as land-tenure, resource management and use of indigenous technologies;
(d) The establishment of modalities for joint effective management and use of shared resources such as grazing lands, river and lake basins;
(e) Mobilization of technical and financial support and resources necessary for the formulation, implementation, follow-up and evaluation of regional and sub-regional plans of actions.

Article 6
Research and Training

The Contracting Parties, taking into account the special needs of developing countries affected by drought and desertification, shall:
(a) Establish, promote and support research and programmes concerning scientific and technical education and training for monitoring, prevention and control of desertification and mitigation of drought;
(b) The Conference of the Parties at its first meeting shall determine how to establish a clearing house mechanism to promote and facilitate a standardized system for observing and reporting data, as well as other forms of technical and scientific co-operation.

Article 7
Technology Transfer and Co-operation

The Contracting Parties shall facilitate access to and transfer of ecologically friendly anti-desertification technologies on a fair, equitable and preferential basis by encouraging programmes of co-operation and assistance to the developing countries affected by drought and desertification. Such programmes shall take into account the applicability of technology transfer to local communities and encourage active

involvement of the private sector, aiming at the development and transfer of appropriate technologies to combat desertification and mitigate drought.

Article 8
Capacity building

The Contracting Parties shall:
(a) establish and maintain programmes for the development and strengthening of national capabilities by supporting scientific education and training for the specific needs of the developing countries particularly in Africa; and
(b) take all measures to ensure the participation of local populations, particularly women, youth and children.

Article 9
Education and Public Awareness

The Contracting Parties shall:
(a) promote and encourage awareness campaigns for combating desertification and mitigate drought through the electronic and print media;
(b) co-operate in and promote, at the international level, the development and exchange of educational and public awareness material on the causes, effects and measures to deal with drought and desertification.

Explanatory Note

The texts of these four articles dealing respectively with Regional and Sub-regional co-operation, Research and Training, Technology Transfer and Co-operation and Capacity Building reflect the emerging consensus. The AALCC Secretariat draft is by no means an exhaustive one. Depending upon the text of articles on commitments the substance of these four articles would need to be considered again.

Article 10
Financial Mechanism

(a) There shall be a mechanism for the provision of financial resources to developing country parties for the purposes of this Convention on a grant or concessional basis. The mechanism shall function under the authority and guidance and be accountable to the Conference of Parties which shall at its first meeting, decide upon the institutional structure for such a mechanism and determine the policy, strategy, programme priorities and eligibility criteria relating to access to and utilization of such resources. The mechanism so established shall take into account the importance of burden sharing among the parties to the Convention;
(b) The Contracting Parties may seek financial assistance from the Global Environment Facility (GEF) for the implementation of any programme concerning combating desertification and mitigate drought provided such programmes are related to or lie within the areas identified by the GEF for its financial assistance;

(c) The Contracting Parties shall be free to seek or provide any financial resources related to the implementation of the provisions of the Convention through bilateral, regional and other multilateral channels.

Explanatory Note

INC-D Negotiators will find this issue as the toughest nut to crack. The divergence of views between the developed and developing countries in regard to financial resources is too wide. If it becomes possible to involve GEF with this Convention, it will be a real breakthrough. There is no indication whether the developed countries would be prepared to extend generous financial assistance to implement the lofty provisions in the Convention. The AALCC Secretariat, keeping this reality in view, has followed the guidelines established in the Biodiversity Convention (Article 20) in preparing the text of this article.

Article 11
Co-ordination and Co-operation

The Contracting Parties shall take measures to promote efficient co-ordination and co-operation at all levels.

Explanatory Note

The AALCC Secretariat is not sure whether such a provision is necessary. However, this theme is the basic purpose of the Convention. Since the compilation (A/AC.241/12) contained such a provision (paragraph 108) and there was some discussion on this issue during the Geneva Session, the inclusion of such a provision in general terms may be considered useful.

Article 12
Relationship with other Conventions

(a) The Contracting Parties recognise the close link that exists between the realization of the objectives of this Convention and those pursued by other legal instruments particularly the Framework Convention on Climate Change and the Convention on Biodiversity.

(b) In this regard, the provisions of this Convention shall be complementary to and in no manner affect the rights and the obligations of the Parties inherent in any international legal instrument related to objectives of this Convention.

Explanatory Note

The objective of the proposed Convention on Combating desertification is in many ways close to other environmental Conventions, particularly the Climate Change and the Biodiversity Conventions. In order to recognise and strengthen such relationship, it would be useful to stipulate a provision to this effect.

Article 13
Conference of the Parties

(i) A Conference of the Parties is hereby established.

(ii) The Conference of the Parties as the supreme decision-making body within this Convention shall keep under regular review the implementation of the Convention and of any related instruments that the Conference of the Parties may adopt. It shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention. To this end, it shall:

(a) Periodically examine the commitments of the Parties and the institutional arrangements under the Convention, in the light of the objective of the Convention, the experience gained in its implementation and the evolution of scientific and technological knowledge;

(b) Promote and facilitate the exchange of information on measures adopted by the Parties to implement the Convention, taking into account the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under the Convention; and adopt such measures as necessary for the successful implementation of the objectives of the Convention;

(c) Agree upon and adopt, by consensus, rules of procedure and financial rules for itself and for any subsidiary bodies; and

(d) Exercise such other functions as required for the achievement of the objectives of the Convention as well as other functions assigned to it under this Convention.

(iii) The first session of the Conference of the Parties shall be convened by the *Ad Hoc* Secretariat referred to in Article 23 and shall take place not later than one year after the entry into force of the Convention. Thereafter, ordinary sessions of the Conference of the Parties shall be held every year unless otherwise decided by the Conference of the Parties.

(iv) Extraordinary sessions of the Conference of the Parties shall be held at such other times as may be deemed necessary by the Conference, or at written request of any party, supported by one third of the membership of the Conference, within two months of the request being communicated to the Parties by the Secretariat.

(v) The United Nations, its specialized agencies as well as any State member thereof or observers thereto not Party to the Convention, may be admitted by the Conference of the Parties as observers. Any body or agency, whether national or international, governmental or nongovernmental, which is qualified in matters covered by the Convention, and which has informed the Secretariat of its wish to be represented at a session of the Conference of the Parties as an observer may request to be so admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of Procedure adopted by the Conference of the Parties.

Explanatory Note

The AALCC Secretariat draft is based on OAU draft paragraph 116 (A/AC.241/12).

Article 14
Secretariat

(i) A Secretariat is hereby established.

(ii) The functions of the Secretariat shall be:
- (a) To make arrangements for sessions of the Conference of the parties and its subsidiary bodies established under the Convention and to provide them with services as required in accordance;
- (b) To compile and transmit reports submitted to it;
- (c) To facilitate assistance to the Parties, particularly the affected Parties, on request, in the compilation and communication of information required in accordance with the provisions of the Convention;
- (d) To prepare reports on its activities and present them to the Conference of the Parties;
- (e) To ensure the necessary coordination with the secretariats of other relevant international bodies and conventions;
- (f) To enter, under the overall guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its function; and
- (g) To perform other secretariat functions specified in the convention and in any of its protocols and annexes and such other functions as may determined by the Conference of the Parties.

(iii) The Conference of the Parties, at its first sessions, shall designate a permanent secretariat and make arrangements for its functions.

Explanatory Note

The source of the AALCC draft text is the OAU draft (Paragraph 120, A/AC.241/12) which is identical to Article 8 of the Climate Change Convention.

Article 15
Scientific and Technological Council

(a) A Scientific and Technological Council is hereby established as a subsidiary organ of the Conference of the Parties. It shall be made up of 10 Members appointed by the Conference of the Parties for a renewable period of three years;
(b) At the request and under supervision of the Conference of the Parties, it shall provide scientific and technical opinions on all issues that might assist the Conference of the Parties in promoting and pursuing the objectives of the Convention;
(c) It shall cooperate with relevant and competent international organisations and agencies as may be determined by the Conference of Parties;
(d) It shall submit its activity reports to the Conference of the Parties.

Explanatory Note

The AALCC Secretariat text is based on the OAU text in paragraph 124 (a) (A/AC.241/12). During the discussions in Geneva Session it was suggested that the Convention instead of proliferating institutions, should strengthen the existing institutions. However it has been suggested that the regime established by Convention should operate independently. At some stage it would be inevitable that new institutions will have to be established particularly for promoting research and monitoring implementation of the Convention. The Convention should provide for such eventuality. To begin with, as and when the Convention comes into force, a Scientific and Technological Council comprising 10 members nominated by the COP from different regions might be the only additional institution. The UNEP has played a significant catalytic role in this field. It could be entrusted with major responsibilities for promoting research, data collection and public awareness programmes. In this context, inter-agency co-operation and co-ordination among the United Nations Agencies and various international and non-governmental organisation is of equal importance. Besides avoiding duplication, such combined effort could render useful assistance to the Scientific and Technological Council in taking a concerted approach.

Article 16
Adoption of Protocols

(a) The Conference of the Parties may, at any of its regular sessions, adopt protocols to the Convention.
(b) The text of any protocol that is proposed shall be communicated to the parties by the Secretariat at least six months before the session.
(c) The rules governing the entry into force of a protocol shall be laid down in the protocol itself.
(d) Only the parties to the Convention may be parties to a protocol.
(e) Only the parties to a protocol shall take decisions under that protocol.
(f) No state nor any regional economic integration organization may become a party to a protocol without being or simultaneously becoming a party to the Convention.

Explanatory Note

The AALCC Secretariat text is based on the text set out in paragraph 133 (A/AC.241/12).

Article 17
Amendments

(a) Amendments to this Convention may be proposed by any Contracting Party. Amendments to any protocol may be proposed by any Party to that Protocol.
(b) Amendments to this Convention shall be adopted at a meeting of the Conference of the Parties. Amendments to any protocol shall be adopted at a meeting of the Parties to the Protocol in question. The text of any proposed amendment to this Convention or to any protocol, except as may otherwise be provided in such protocol shall be communicated to the Parties to the instrument in question by the Secretariat at least six

months before the meeting at which it is proposed for adoption. The Secretariat shall also communicate proposed amendments to the signatories to this Convention for information.

(c) The Parties shall make every effort to reach agreement on any proposed amendment to the Convention or to any protocol by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall, as a last resort, be adopted by a two-third majority vote of the Parties to the instrument in question present and voting at the meeting, and shall be submitted by the Depositary to all Parties for ratification, acceptance or approval.

(d) Ratification, acceptance or approval of amendments shall be notified to the Depositary in writing. Amendments adopted in accordance with paragraph (3) above shall enter into force among Parties having accepted them on the ninetieth day after the deposit of instruments of ratification, acceptance or approval by at least two thirds of the Contracting Parties to this Convention or of the Parties to the protocol concerned, except as may otherwise be provided in such a protocol. Thereafter the amendments shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, acceptance or approval of the amendments.

(e) For the purposes of this Article, Parties present and voting means Parties present and casting an affirmative or negative vote.

Article 18
Adoption and Amendment of Annexes

(i) The annexes to this Convention or to any protocol shall form an integral part of the Convention or such protocol, as the case may be, and, unless expressly provided otherwise, a reference to this Convention or its protocols constitutes at the same time a reference to any annexes thereto.

(ii) Except as may be otherwise provided in any protocol with respect to its annexes, the following procedure shall apply to the proposal, adoption and entry into force of annexes to this Convention or of annexes to any protocol:

(a) Annexes to this Convention or to any protocol shall be proposed and adopted according to the procedure laid down in Article 17, paragraphs (b), (c) and (d).

(b) Any Party that is unable to approve an additional annex to this Convention or an annex to any protocol to which it is a Party, shall so notify the Depositary in writing, within one year from the date of the communication of the adoption by the Depositary. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time withdraw a previous declaration of objection and the annexes shall thereupon enter into force for that Party.

(c) On the expiry of one year from the date of the communication of the adoption by the Depositary, the annex shall enter into force for all Parties to this Convention or to any protocol concerned which have not submitted a notification it accordance with the provisions of sub paragraph (b) above.

(d) The proposal, adoption and entry into force of amendments to annexes to this Convention or to any protocol shall be subject to the same procedure as for

the proposal, adoption and entry into force of annexes to the Convention or annexes to any protocol.

(e) If an additional annex or an amendment to an annex is related to an amendment to this Convention or to any protocol, the additional annex or amendment shall not enter into force until such time as the amendment to the Convention or to the protocol concerned enters into force.

Explanatory Note

The AALCC Secretariat text is identical to Article 30 of the Bio-diversity Convention and Article 16 of the Climate Change Convention. In the event the INC-D decides to conclude annexes as the regional instruments, the procedure for adoption of such regional annexes may be different and this will necessitate redrafting of this Article accordingly.

Article 19
Settlement of Disputes

In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.

Explanatory Note

The AALCC Secretariat text is identical to OAU drafting proposal set out in paragraph 142 (A/AC.241/12).

Article 20
Right to Vote

1. Each Party to the Convention shall have one vote, except as provided for in paragraph 2 below.

2. Regional economic integration organisations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States that are Parties to the Convention. Such an organisation shall not exercise its right to vote if any of its member States exercises its right and *vice versa*.

Explanatory Note

This is identical to Article 18 of the Climate Change Convention and Article 31 of the Biodiversity Convention.

Article 21

The Secretary-General of the United Nations shall be the Depositary of the Convention, Protocols and Annexes adopted in accordance with Articles 16 and 18 respectively.

Article 22

This Convention shall be open for signature by States that are Members of the United Nations or of any of its specialized agencies or that are parties to the Statute of the International Court Justice and by regional economic integration organisations, at New York, during the forty ninth Session of the General Assembly on . . . . . 1994 and shall remain open for signature until . . . . .

Article 23
Interim Arrangements

The Secretariat functions referred to in Article 14 will be carried out on an interim basis by the Secretariat established by the General Assembly of the United Nations in its Resolution 47/188 of 22 December 1992, until the completion of the first session of the Conference of Parties.

Article 24
Ratification, Acceptance, Approval or Accession

1. The Convention shall be subject to ratification, acceptance, approval or accession by States and by regional economic integration organisations. It shall be open for accession from the day after the date on which the Convention is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

2. Any regional economic integration organization which becomes a Party to the Convention without any of its member States being a Party shall be bound by all the obligations under the Convention. In the case of such organisations, one or more of whose member States is a Party to the Convention, the Organisation and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the Organisation and the member States shall not be entitled to exercise rights under the Convention concurrently.

3. In their instruments of ratification, acceptance, approval or accession, regional economic integration organisations shall declare the extent of their competence with respect to the matters governed by the Convention. These organisations shall also inform the Depositary, who shall in turn inform the Parties, of any substantial modification in the extent of their competence.

Article 25
Entry into force

1. The Convention shall enter into force on the ninetieth day after the date of deposit of the (thirtieth) (fiftieth) instrument of ratification, acceptance approval or accession.

2. For each State or regional economic integration organisation that ratifies, accepts or approves the Convention or accedes there[to] after the deposit of the (thirtieth) (fiftieth) instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or regional economic integration organisation of its instrument of ratification, acceptance, approval or accession.

3. For the purposes of paragraphs 1 and 2 above, any instrument deposited by a regional economic integration organisation shall not be counted as additional to those deposited by member States of the organisation.

Article 26
Reservations

No reservations may be made to the Convention.

Article 27
Withdrawal

1. At any time after three years from the date on which the Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the Depository.

2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of the withdrawal.

3. Any Party that withdraws from the Convention shall be considered as also having withdrawn from any protocol or annex to which it is a Party.

Article 28
Authentic Texts

The original of the Convention, of which the Arabic, Chinese, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

In witness whereof the undersigned, being duly authorised to that effect, have signed this Convention.
Done at New York this . . . . . 1994."

47. Doc. No. TOKYO/94/7a reviews work carried out during 1993 by the Intergovernmental Negotiating Committee (INC) to prepare an effective Framework Convention on Climate Change (originally established by UN General Assembly resolution 45/212 of 21 December 1990, and continued in operation after adoption of the Framework Convention at UNCED, by UN General Assembly resolution 47/195 of 22 December 1992), and by the Intergovernmental Committee on the Convention on Biological Diversity (ICCBD). The Secretariat notes the possibility that the Climate Change Convention would receive during 1994, the 50 ratifications needed to bring it into force, and the invitation of the German Government to act as host to the first session of the Conference of Parties from 28 March 7 April 1995, in Berlin (Doc. No. TOKYO/94/7a, pages 12-13; *Report,* page 49). It also notes that the Convention on Biological Diversity had been signed by 167 countries as of 1 December 1993 and, having been ratified by 37 countries, entered into force on 29 December 1993 (Doc. No. TOKYO/94/7a, page 15). Doc. No. AALCC/XXXIII/TOKYO/94/10 contains on pages 5, 14 and 15, observations concerning efforts to draft a Convention on Desertification.

48. The *Assistant Secretary-General* of AALCC, introducing the item *inter alia* announced that on the basis of resources donated by *Saudi Arabia* and *Myanmar*, and a pledge by *Turkey,* a Special Fund for the Environment had been created within the AALCC Secretariat.

Decision

49. Having considered the documentation before it and the introductory statement of the *Assistant Secretary-General (Report,* pages 147 150), the Committee adopted a decision *(Report,* pages 235-6) which, *inter alia,* underscores the need for Member States of AALCC to participate actively in the relevant meetings on the Environment; expresses appreciation to donors and prospective donors to AALCC's Special Fund for the Environment, and directs the Secretariat to continue to monitor and report upon progress in environmental matters, in particular implementation of Agenda 21.

4.2. United Nations Decade of International Law

50. The Committee had before it a document prepared by the Secretariat entitled *United Nations Decade of International Law* (Doc. No. AALCC/ XXXIII/TOKYO/94/9) outlining the Committee's activities which contributed

to attainment of the objectives of the Decade. Annexed to it is the "Report of the [UN] Secretary-General on a preliminary operational plan for a possible United Nations congress on public international law" (UN Doc. No. A/48/435).

51. The Secretary-General of AALCC introducing the item, noted the Committee's contribution to preparation of the International Conference on International Legal Issues arising under the UN Decade of International Law, to be hosted by the *State of Qatar* in March 1994, as well as Secretariat initiatives in support of the Decade, including a survey of ratifications of key international conventions with a view to assisting Member States to accede to or ratify them; and a study of reservations which Member States may have made to those conventions.

52. Members who spoke, acknowledged the importance of the Decade as a means of promoting the development and dissemination of international law, mentioning peaceful settlement of disputes as a subject which should receive special attention, and welcoming preparations for the United Nations Congress on Public International Law, expected to convene in 1995.

Decision

53. Discussion of this item *(Report,* pages 100-106) was followed by adoption of an essentially procedural decision *(Report,* pages 238-239).

4.3. World Conference on Human Rights: follow up

54. The Committee had before it a document prepared by the Secretariat entitled the *World Conference on Human Rights and its follow up* (Doc. No. AALCC/XXXIII/TOKYO/94/12) and containing a description of the World Conference on Human Rights held at Vienna from 14 to 25 June 1993 in implementation of UN General Assembly resolution 45/155 of 18 December 1990, attended by some 163 States including all 44 Member States of AALCC, as well as the content of the Declaration and Programme of Action adopted by consensus at the Conference. The document lists as controversial the following issues: (1) creation of the position of a United Nations 'High Commissioner for Human Rights' and associated powers and functions (ultimately left for consideration as a matter of priority by the UN General Assembly at its Forty-eighth Session); (2) the universal character of human rights, and the contention

that national and regional particularities/specificities should be taken into account in the implementation and observance of human rights; (3) the right to development as a human right; (4) the linkage between human rights and development assistance - the question whether bilateral or multilateral economic assistance should be conditional on the recipient's fulfilment of conditions related to implementation of civil and political rights; (5) the right to self determination: its definition and implementation; and (6) financing the UN Centre for Human Rights. The document's summary of AALCC's ideas on human rights (based on the Committee's Kampala Declaration, see 3 AsYIL, pages 297-300, reads (in part):

". . .

42. Human rights, development and international peace are interdependent. Peace and security both at the national and international level remain the condition *sine qua non* for the realization and enjoyment of all indivisible and inalienable human rights in full and substantial measure. Members of the international society must therefore reaffirm their desire to save the present and succeeding generations from the scourge of wars and armed conflicts, both international and domestic, as well as to maintain international peace and security in accordance with the purposes and principles of the Charter of the United Nations.

43. In the developing countries poverty is one of major obstacles hindering the enjoyment of human rights. The fact that almost three fourth's of the Planet's population suffer from malnutrition, disease and poverty should be a matter of concern for all of us. The poor socio-economic conditions resulting partly from the transfer of resources to the servicing of external debts and from the disparity in the terms of international trade, hinder both the process of development and the realization of human rights in the developing and least developed countries. We believe that development is not merely a means to economic growth but a process to enlarging people's choices. We also believe that the right to development is an inalienable human right, and the vital importance of economic and social development to the full enjoyment of human rights should be further recognized and underscored. All states therefore must cooperate in the essential task of eradicating poverty for the universal realization of human rights.

44. Development and the environment are intrinsically linked and should not be considered in isolation from each other. Development should not be such a manner as would endanger the environment. In this context, the right of an individual, or human right, to a safe and sound environment as incorporated in the Kampala Declaration needs to be emphasized. This may at first blush appear to be a novel concept. But it is far from being so since the root, and

basis of both concepts *viz.* international environmental law and sustainable development is inter-generation equity. The right to a safe and healthy environment may therefore require to be progressively developed and codified.

45. The indivisibility and inter-dependence of human rights have been recognized and must be given effect in policy formulation and implementation. Civil and political rights cannot be dissociated from economic, social and cultural rights. The satisfaction of economic, social and cultural rights is major factor for this enjoyment of civil and political rights.

46. The primary responsibility for implementing human rights is at the national level. Consequently, the most effective system or method of promoting and protecting these rights has to take into account the nation's history, culture, tradition, norms and values. Whilst the international community should be concerned about the observation of human rights, it should not seek to impose or influence the adoption of the criteria and system that are only suitable to some countries on developing countries. On the other hand, no state should manipulate its sovereignty to deny the inalienable rights of its citizens and expect silence from the international community.

47. International cooperation is vital to the promotion of human rights. It is therefore important that states reaffirm their commitment to the principle of universality, objectivity and non-selectivity of all human rights as a just and balanced approach in this regard. Palletisation of human rights, application of double standards, interference in the internal affairs of others, are a challenge to international cooperation in the field of human rights, and must be avoided.

48. The rule of law in the administration of justice is a prerequisite to full enjoyment of human rights. The international community should reaffirm the significant role that administration of justice should play in the promotion and protection of human rights as well as in the development process, and training, equipment and incentives should be provided to those state agencies [which are] involved in the administration of justice within the developing countries on the basis of their need and request. To this end, governments, regional and international financial institutions and the donor community are urged to provide necessary resources.

49. All states that have not already ratified or acceded to the international human rights conventions should endeavour to do so in the course of the United Nations Decade of International Law. In doing so, such states would be promoting the objectives of acceptance and respect for the principles of international law and also would ensure universal adherence to the international instruments which have set up norms covering a broad spectrum of human rights. This is of vital significance since despite the fact that most

of the international conventions on human rights issues are in force, their status in terms of the number of states parties can scarcely be considered as widespread or universal. Regional human rights instruments should be employed to supplement concepts and norms enumerated in the universal instruments.

50. In every society, there is a class of persons who may require special consideration. The promotion and protection of human rights of vulnerable groups such as women, children, refugees, disabled, migrant workers, minorities and indigenous people should be given special attention and priority.

51. The United Nations system in the field of human rights is urged to use existing mechanisms and resources effectively and efficiently. The improvement of existing institutional mechanisms and the enhancement of their co-operation and coordination should be undertaken. All the members of the international community are called upon to contribute additional financial and other resources for human rights activities both at national and international levels."

55. The Assistant Secretary-General, introducing the item, recalled that the AALCC's Kampala Declaration on Human Rights had been submitted to the Preparatory Committee for the Conference, and that some ideas from the Declaration had been reflected in the final documents of the Conference. He said that two issues should be given urgent attention: the establishment of the office of United Nations High Commissioner for Human Rights, which had been effected by General Assembly resolution without vote on 20 December 1993 although the idea had been strongly opposed by many Asian, African and Latin American countries; and the promotion of universal acceptance of multilateral human rights conventions. As to the first issue, he observed that although the office of High Commissioner for Human Rights had originally been conceived by its proponents as having discretionary powers to send fact-finding missions into countries accused of human rights violations, it had been agreed ultimately that the office would have no such powers. On the second issue, he said that adherence to human rights conventions had been generally very slow, but that adherence by the Member States of AALCC had in many instances been well below the global average. He encouraged all Member States of AALCC to ratify or accede to these conventions in implementation of the Vienna documents urging that fresh efforts be made to identify obstacles to universal acceptance and to seek ways and means of overcoming them.

56. The delegate of *Japan* said that, while human rights may fall within the domestic jurisdiction of a State, and while the latter had primary responsibility

for guaranteeing those rights, it should be recognized that human rights was a universal value common to all mankind and that, as had been stated in the Vienna Declaration and Programme of Action, the promotion and protection of all human rights is a legitimate concern of the international community. Welcoming the creation of the office of UN High Commissioner for Human Rights, he said his Government recognized the necessity of strengthening the capacity of the United Nations to promote and protect human rights, and to increase substantially the resources available to it for the purpose.

57. The delegate of *China* said that the Vienna Declaration represented a consensus on future activities by the international community to promote and protect human rights. The document reflected both shared understandings and some differences of opinion among countries. In his Government's view, the following aspects should be taken into consideration in implementing the Vienna documents:

(i) equal importance should be attached to the various recommendations contained in those documents, so as to ensure their comprehensive implementation;
(ii) efforts should be made to promote co-operation among all States in the field of international human rights on the basis of equality and mutual respect; and
(iii) the international community should continue to be mobilized to address and end large scale violations of human rights resulting from colonialism, racism and foreign aggression and occupation, so as to create conditions for the developing countries to raise their people's living standards and fully realise their right to development at an early date.

58. Continuing, the delegate of *China* said that each country had its own political, economic and historical character, and was at a different stage of economic development, all of which gave rise to special national conditions and traditions. Each country had to deal with its own human rights issues calling for urgent solutions, and in order to do so, had to establish its own approaches and priorities. For China, as for the other developing countries, a citizen's right to subsistence and development was of primary concern. Therefore, there should be respect for the different ways in which the concept of human rights was understood in different countries, taking into account their national conditions, and such an attitude should constitute the cornerstone of exchanges and co-operation in the field of human rights at the international level. Different social systems should be respected, and the application of selectivity and double standards avoided. He said his Government was ready to work with other members of the international community on the basis of

such mutual understanding and respect, to strengthen international co-operation with a view to further promoting and protecting human rights.

59. The delegate of *Sudan,* while agreeing with the delegate of *Japan* that human rights were universal and should be respected by all, observed that violations of human rights were occurring in many countries. Such violations, he said, should be condemned wherever they occurred, and there should be no selectivity, bias and the application of double standards which led to the abuse and victimization of small countries, especially through the mass media. While accepting the universality of the concept of human rights, he could agree that the culture, religion and traditional values of peoples should be taken into account, and recalled the role of *China* at the Vienna Conference in promoting solidarity among the developing countries to combat designs against them.

60. Continuing, the delegate of *Sudan* declared that nongovernmental organizations paid for by Western governments had been allowed to participate in the Vienna Conference to further their design to dominate the world. In his view, it was the solidarity of the developing countries and their regional declaration on human rights issues that had saved the Conference from abuse. As to creation of the office of UN High Commissioner for Human Rights, while his Government did not reject the idea, it would wish to qualify the scope of the High Commissioner's role and powers, to prevent, for example, that office being given the power to impose or enforce sanctions under Chapter VII of the UN Charter, and to prevent misuse of its powers. He observed that while the Security Council was sometimes used to impose sanctions in the name of democracy, it did not itself function along democratic lines.

61. The delegate of *India* reaffirmed his Government's commitment to the promotion and implementation of human rights, and recalled the recent establishment of a national Human Rights Commission. He said that the developing countries were engaged in promoting human rights; however, such action had been voluntary, and could not be imposed.

Decision

62. In the decision *(Report,* pages 241-3) which followed discussion of the item *(Report,* pages 126-136) the Committee[2] *inter alia*

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[2] The Delegate of *Japan* expressed the following reservation to the Decision: "Since paragraph I of the resolution refers to the Kampala Declaration, my delegation reiterates the observations made at the time of its adoption. We recognise that social and economic development often

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1. *Reaffirms* the basic principles incorporated in Kampala Declaration on Human Rights adopted by the Committee on 6th February 1993;
2. *Reaffirms* also the solemn commitment to promote universal respect for and enjoyment by all of human rights and fundamental freedoms;
3. *Welcomes* the successful conclusion of the Second World Conference on Human Rights, and calls for the full and effective implementation of the final document of the Conference;
4. *Reiterates* the vital importance of the universal acceptance of international human rights treaties adopted within the framework of the United Nations system, and other treaties adopted within the framework of other regional organizations;
5. *Urges* Member States to devise effective action plans and concrete measures to speed up the process towards that goal. All States are encouraged to ratify or accede to those treaties with the aim of universal acceptance;
6. *Recommends* that priority be accorded to the following conventions: International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966), International Convention on the Elimination of All Forms of Racial Discrimination (1966), convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (1984), Convention relating to the Status of Refugee (1951) and its Protocol (1967), Convention on the Elimination of All Forms of Discrimination against Women (1979), and Convention on the Right of the Child (1989);
7. *Acknowledges* the creation of the post of High Commissioner for Human Rights and requests Member States to cooperate with the High Commissioner who shall act in accordance with the resolution of the General Assembly;
8. *Stresses* the obligation to respect the sovereignty, territorial integrity and domestic jurisdiction of Member States, while promoting universal respect for and observance of all human rights;
9. *Affirms* that the acknowledgement and promotion of the right to development would greatly enhance respect and observance of human rights in general;

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contributes to ensuring respect for human rights. At the same time, however, fundamental freedoms and human rights should not be sacrificed for the sake of development, but they should be respected by all countries regardless of the degrees of their political and economic development.

As for the problem of human rights and its relationship with the principle of non interference in the internal affairs of other countries my Government is of the view that, since respect for human rights is a widely accepted principle in international society, it is a matter of international concern and could not be regarded as an exclusive internal problem."

10. *Requests* the Secretary General to approach the Technical Support Facility of the Group of Fifteen (G 15) to explore possible areas of co-peration with the Asian African Legal Consultative Committee as far as the legal aspects of the right to development are concerned, and to report to the Thirty Fourth Session on the outcome of this consultation;
11. *Directs* the Secretariat to make further studies on the development of international law in the field of human rights, and render appropriate legal assistance to the member States at their request in connection with national legislation concerning the promotion and protection of human rights".

4.4. 'Agenda for Peace'

63. The Committee had before it a document prepared by the Secretariat entitled *Agenda for peace: preventive diplomacy and related matters* (Doc. No. AALCC/XXXIII/94/8) which contained a summary of the Report of the UN Secretary-General circulated to Member States of the United Nations as document A/47/277 in response to a request by the UN General Assembly in 1992. The document recalls that AALCC at its Kampala Session in 1993 had established an open-ended working group with a core membership of Egypt, China, Ghana, India, Indonesia, Japan, Nigeria, Qatar, Saudi Arabia, Tanzania and Uganda, to examine the Report and assist the Secretariat to prepare a study to be submitted to the United Nations on the occasion of its Fiftieth Anniversary. The Secretariat document suggests work on two topics: (1) legal problems associated with the removal of mines left in former areas of conflict including, most recently, Somalia, Mozambique, Cambodia, Angola, Afghanistan and Yugoslavia, with the aim of developing an international convention on 'de-mining'; and (2) legal problems involved in maintaining the security and safety of international personnel engaged in peace keeping and other humanitarian activities, with the aim of developing an international convention on the subject.

64. The Secretary-General of AALCC, introducing the item, said that while the United Nations could and should play a pivotal role in matters concerning international peace and security, it was important that the delicate balance established by the Charter among its various organs should not be disturbed. The Security Council should not, he said, usurp the powers and functions of the General Assembly, and the role of the International Court of Justice in dispute settlement should be enhanced. Moreover, regional organizations could play an important role in bringing peace to their respective areas. He sought

the Committee's mandate to commence work on the two topics mentioned in the Secretariat document.

Decision

65. After discussion of the item *(Report,* pages 106-110) the Committee adopted a Decision *(Report,* page 237) in which, *inter alia,* it took note of proposals for future work, and directed the Secretariat to consider initiating a joint programme in co-operation with the International Committee of the Red Cross and other organizations engaged in similar work.

4.5. Debt burden of developing countries

66. The Committee had before it a document prepared by the Secretariat entitled *Debt burden of developing countries: an overview of recent developments* (Doc.No. AALCC/XXXIII/ TOKYO/94/14) outlining the impact of some recent debt reduction and debt management strategies.

Decision

67. Having considered the document before it and an introductory statement by the *Assistant Secretary-General (Report,* pages 150-1), the Committee adopted a decision *(Report,* pages 246-7) which, *inter alia,* expresses concern at the growing burden of debt and debt service as major obstacles to the re-vitalization of growth among the developing countries, despite the economic reforms undertaken by many of them; calls upon Member States to take additional measures on an urgent basis to reduce official and commercial debt; and urges commercial banks to extend initiatives to overcome the commercial debt problems of the least developed countries and of low and middle income developing countries.

4.6. Trade Law matters

68. The Committee had before it the following documents prepared by the Secretariat: *Progress report concerning the legislative activities of the UN and other international organizations in the field of international trade law*

(Doc.No. AALCC/XXXIII/TOKYO/94/15); *Legal and institutional framework and guidelines for privatization in Asia and Africa* (Doc.No. AALCC/XXXIII/TOKYO/94/16), which was considered by a Special Meeting during the Tokyo Session; *Report on progress made by the Data Collection Unit* (Doc.No. AALCC/XXXIII/ 94/11); *and Progress report on AALCC's regional centres for arbitration* (Doc.No. AALCC/XXXIII/94/13).

69. Document No. 94/15 reports on the work of the UN Commission on International Trade Law (UNCITRAL) at its Twenty sixth Session (1993) focusing on the Model Law on Procurement of Goods and Construction adopted by it; outlines the work programme for the triennium 1993-5 of the Institute for the Unification of Private Law (UNIDROIT) approved by the General Assembly of UNIDROIT in December 1992; surveys the work of the UN Conference on Trade and Development (UNCTAD) in the field of trade law, covering renegotiation of commodity agreements, and developments concerning promotion of the transfer of technology, control of restrictive business practices, and maritime and multi-modal transport; describes the work of UNIDO in preparing investors' guides (e.g. Hungary, Tanzania), studies dealing with trends in international product standards and the implications for the developing countries, guides on industrial subcontracting, and a manual on technology transfer negotiations; and notes some of the topics to be taken up by the Hague Conference on Private International Law, including conflict of laws problems arising with regard to bank guarantees, civil liability for environmental damage, and recognition and enforcement of foreign judgements.

70. Document No. 94/16 is a 'conference paper' prepared for the Special Meeting on developing legal and institutional guidelines for privatization and post privatization regulatory framework which took place under the auspices of the Committee from 18-20 January 1994. The document outlines the history of public sector enterprises in the developing countries; recalls growing dissatisfaction with their performance; provides an overview of privatization programmes in Egypt, India, Indonesia, Japan, Malaysia, Nigeria, Pakistan, Philippines, Republic of Korea, Sri Lanka, Thailand, Turkey, Tanzania and Uganda including a list of the relevant national legislation; summarizes points of comparison among the different programmes concerning objectives, strategies, scope, social aims, conditions attached to privatization, planning, institutional machinery, and methods and procedures of implementation; and makes observations concerning the legal and institutional framework for

privatization. The Report of the Special Meeting, transmitted to AALCC for its consideration, contains the following 'paper':

"Legal Guidelines for Privatization Programmes

Introduction

1. The objective of this paper is to provide guidance to policy-makers in addressing legal issues likely to arise once a governmental decision has been made to proceed with a programme for the privatization of state assets or enterprises. Such a programme may entail the privatization of substantially all state enterprises in the tradeable sectors of a country, sectoral privatization or the privatization of selected medium or large enterprises. The paper does not, however, discuss small scale privatization of the retail or service sectors or mass privatization programmes involving the distribution to the general public of vouchers or similar instruments.

2. 'A privatization transaction' for the purposes of these guidelines is one in which ownership or control of a public body (state, government, ministry, department, enterprise or corporation) or its major assets or shares held by a public body in a company representing a controlling interest are to be transferred from the government or a government-controlled entity to the private sector.

3. 'Private sector' would exclude an entity which is owned or controlled, directly or indirectly, by a public body. So the sale of an enterprise to a public body, whether of the host state or another state, is not a privatization for the purposes of these guidelines.

4. A privatization law serves a valuable purpose in defining the legal authority for a country's privatization program, the key principles on which it will be based, and the institutional arrangements for policy making and implementation. Other supporting laws provide for the legal steps in preparation for privatization and to consummate the transaction, as well as forming part of the business environment in which the newly privatized enterprises will operate.

Privatization Law

5. The choice of whether or not to enact a privatization law depends upon the legal and individual circumstances of the country concerned. In some cases, a privatization law to authorize the sale of state assets may be a constitutional requirement. Even if a separate privatization law is not mandatory, such a law can serve a variety of purposes, such as to:

- define the government's objectives and establish commitment to the privatization process;
- make amendments to existing laws which otherwise would be an obstacle to privatization, *e.g.* laws preventing private sector participation in what were previously thought of as 'strategic' activities;
- create institutions with the authority to implement privatization: avoid the 'vacuum of authority' which can lead to spontaneous or unauthorized privatization;
- allow for the financial restructuring of enterprises prior to sale and permit liabilities to be cancelled, deferred or swapped for equity;
- define the methods of privatization and any limitations on potential bidders; and provide for the allocation of sale proceeds.

6. A principal function of a privatization law is to define the scope of the program and any exclusions of specific sectors or enterprises. Though the law may list the enterprises to be privatized, the disadvantage of doing so is that the listing becomes inflexible, with the resulting difficulty of either removing or adding enterprises as the program evolves. Other alternatives are to:

(a) adopt a 'negative list' approach, so that all state enterprises are eligible for privatization other than named exceptions, or
(b) require a high level political decision on a case by case or sectoral basis to transfer an enterprise to the privatization agency for disposal.

7. The privatization law can provide for employee preferences to be available on the sale of an enterprise. Preferences should be in the form of a right to acquire a small proportion (normally not more than 10 per cent) of the shares of the enterprise. Payment may be deferred for a limited period, with transfer of ownership of the shares delayed until payment bas been made. Employee consortia should also be eligible to participate in the full bidding process on a basis of parity with other bidders.

Other Supporting Laws

8. The legal framework of the country should support privatization in two respects; first, laws may be required to govern the process of preparing enterprises for privatization and undertaking the transactions, and second, the

overall legal environment must be one in which the newly privatized businesses can obtain access to land and finance, enter into enforceable contracts for their inputs and outputs, and compete on a basis of equality with one another and with the residual state sector.

9. The conversion of enterprises into corporations under a modern corporations law is an effective prelude to privatization. Corporatization enables the assets and liabilities of the business to be identified, allows for the appointment of a transitional board of directors to oversee the management, and provides for the issue of shares to the government, allowing flexibility in the sale of partial interests if required. The corporations law should also include procedures for the liquidation or dissolution of enterprises, thereby releasing the assets of a corporatized state entity for sale to the private sector.

10. Prior to the sale of certain heavy polluting enterprises, it would be advisable to perform an environmental audit of those industries to determine the requirements for any environmental and occupational health cleanup. This audit can be performed in accordance with any existing domestic or international environmental and occupational health standards. Based on that audit, the seller can decide whether to absorb the costs of existing environmental degradation, while requiring the buyer to meet future environment liabilities.

11. Labor restructuring is commonly required before privatization to reflect the change from a government agency to a profit oriented enterprise. Labor laws should define the entitlement of redundant employees to severance or other benefits, while recognizing the right of the employer to reorganize the labor force to meet changing needs.

12. Privatized enterprises are most likely to operate efficiently when they are exposed to competitive forces. A competition law is desirable to:

- allow for the review of the potential cartel effects of purchase of former state enterprises by domestic or foreign entities with market power in the same or related sectors,
- prohibit restrictive or unfair trade practices.

If the enterprise is a public utility, a regulatory regime should be created by law so that the regulator can protect the public interest in output pricing and the quality of services and support future entry by competitors.

13. If foreign investors are expected to participate in the privatization program, the laws of the country should guarantee fair and equitable treatment to those investments according to generally acceptable international standards.

Institutional Arrangements

14. Privatization requires institutional arrangements to manage the program that ensure transparency and consistency in implementation.

15. Yet the conduct of privatization transactions differs from traditional bureaucratic activities, in that:
(a) the process must be as open as possible;
(b) privatization cuts across existing areas of influence and political and bureaucratic control;
(c) the agency controlling privatization must itself operate in a professional manner, as it will be dealing with private domestic and foreign buyers and with investment banks and other professional advisers.

16. These factors suggest the need for a central unit or agency responsible for overall guidance of the privatization program. The agency should have a single mandate, to sell the assets and enterprises in accordance with the policy principles on which the program is based. A clear mandate to privatize, sufficient autonomy, minimal bureaucracy, ready access to top decision-makers, and a small nucleus of quality staff are conditions for success. Responsibility for managing the enterprises prior to sale should rest, if possible, with the governing board of the enterprise.

17. The agency should desirably be given sole authority to:
- recommend to the appropriate political decision-maker the enterprises or classes of enterprise to be included in the privatization program;
- decide upon any necessary financial restructuring of the enterprise prior to sale;
- determine the timing and method of sale;
- control the preparation and issue of bid invitations and the pre-qualification of bidders, if required;
- require government-appointed members of the governing board of each enterprise to resign at or prior to settlement of the sale; and
- recommend the acceptance of the winning bid.

18. Though design, policy-making and supervision of the process is best centralized, transaction management and implementation should be de-centralized to accelerate the process and reduce the workload of the central unit. Responsibility for implementation can be delegated to holding companies or institution-specific groups of experts and stakeholder representatives, assisted by investment banks, lawyers or other professional advisers as required.

Transparency

19. Transparency must be maintained in every privatization transaction. This can be ensured by having a precise, detailed and publicly announced process for carrying out privatization transactions consisting of clearly defined competitive bidding procedures, clear and simple selection criteria for evaluating bids; disclosure of the final purchase price and buyer, well-defined institutional responsibilities; and adequate monitoring and supervision of the program.

20. Lack of transparency can lead to a perception of unfair dealing - even where it does not exist - and to criticism that can threaten not only privatization, but reform in general.

21. Competitive bidding ensures both transparency and fairness and can help maximize sales proceeds if qualified bidders participate and if the process is properly structured and carefully implemented. The dual objective of competitive bidding is to draw all potential buyers into the bidding process, and to avoid the risk of collusive dealing (or the appearance of it) inherent in closed bidding procedures. Competitive bidding also eliminates the need for the seller to devote time and resources to obtaining a market valuation of the assets to be sold.

Methods of Privatization

22. The choice of the method of privatization would be determined, in the case of each transaction, according to the following main criteria:
(a) the objectives pursued by the government;
(b) the enterprise's performance record and economic prospects;
(c) the size of the company to be sold and the ability to mobilize private funds, whether from a core domestic or foreign investor or from the general public.

23. Even within the same transaction, a variety of privatization methods may be used, for example, sale of a tranche of shares to employees, followed by the sale of a core shareholding to a long-term investor, and finally a public offering of the balance of the shares.

24. For the sake of transparency, to minimize the influence of special interests and to protect the integrity of the privatization program, the choice of privatization methods should normally be limited to:
(a) sale of assets or shares through public auction or tender;
(b) public offering of shares on the stock exchange;
(c) employee/management buy out;

(d) concession, lease or management contracts; or
(e) a mix of these four methods.

Subject only to existing legal obligations, such as preemptive rights of existing shareholders, no direct sale or negotiation with a single party should occur, except after the failure of a public bid process, and then only with the approval of a high level government body such as the Cabinet or Council of Ministers.

25. The following paragraphs provide general guidelines for the sale of assets through public auction or tender and through public offering of shares.

Public Auction and Public Tender

26. The public auction technique should be reserved for selling individual assets, such as land, cars, and pieces of equipment and similar assets as well as small or less important businesses. It consists of convening a public forum at a pre-specified date and location at which one or more companies or simple assets are bid upon by interested, and sometimes, prequalified buyers and sold to the highest price bidder. The process of sale mandates that the assets or companies to be sold are described in public announcements and the opportunity to inspect the assets prior to the auction is allowed.

27. In contrast to public auction, public tender is usually in the form of a sealed bid submitted to the managers of the tender process. Preparation of the request for bids requires careful thought and attention to be certain that the concerns which the government may wish bidders to address, are specified. The general principles for a public tendering process are:
(a) the tender notice should be widely publicized and should provide summary information on the assets, should fix the date of bidding and should invite prospective bidders to obtain the tender document;
(b) interested parties should submit letters of interest to receive the tender document and should be invited to visit the enterprise being sold to inspect its operations and finances;
(c) bids should be sought on a cash basis, accompanied by a deposit;
(d) bids should remain valid for a period after the closing date to allow careful evaluation and possible negotiation with the top bidder; and
(e) the privatization agency should have the right to reject any bids which do not conform to the general bidding guidelines, or to reject all bids if none are adequate.

28. The criteria for evaluating the tenders received could differ from one case to another. Desirably, tenders would be evaluated solely on the basis of price, *i.e.* the cash and other financial aspects of the bid (such as the assumption of

liabilities by the bidder) would be assessed on a net present value basis, using a standard and consistent discount rate. The highest value bid would be selected.

The inclusion of non-price criteria can be justified in certain cases, though the bid evaluation process is made more complex. Examples of possible criteria are:

(a) *Consistency with privatization principles and objectives*
- New capital investment proposed in the bidder's offer;
- The bidder's commitment to continue operating the business;
- Extent to which the proposal offers job protection or retrenchment to employees;
- Budgetary impact;
- Bidder's intention to offer expanded or related services; and
- Bidder bringing in foreign exchange for the investment.

(b) *Operational considerations and constraints*
- Feasibility of the bidder's proposed business plan;
- The financial standing of the bidder;
- Aspects related to contract implications, asset transfers, personnel transfers and the transitional implications to the government;
- Costs related to environmental cleanup.

30. Non-price criteria should as far as possible be dealt with in the pre-qualification process to avoid the need to attribute financial 'freights' to these factors. When factors such as investment or employment maintenance promises are included as tender criteria, rather than simply pre-qualification assurances, it will be necessary to include legally binding terms to give effect to these promises in the contract with the successful bidder. The privatization agency would also need to maintain an effective monitoring and enforcement capacity during the post-privatization period.

Public Offering of Shares

31. Approval of an offering prospectus by the relevant capital markets authority according to its normal requirements and criteria, contained in the securities market law, is necessary before any public offering of shares can be made. Steps for public offering of shares typically include:

(a) preparation of the prospectus, which should include relevant information concerning: the price; a detailed description of the securities offered; the use of the proceeds from the issue; the plan of distribution of the securities; the risk factors that the investor should take into account, the business of the company; its legal and financial structure; a description of its main assets and important pending legal proceedings. The prospectus

would also contain audited historical financial statements of the most recent three years and state the name of the auditor. The prospectus should be full, true and clear so the investor has all relevant information necessary before making a decision whether or not to buy the securities being offered;

(b) determination of offering price and timing of sale;

(c) organization of a selling campaign and distribution of the prospectus as widely as possible; and

(d) distribution and collection of applications for buying shares.

Allocation of Proceeds

32. When state assets are sold, the general budget law may determine how the sales proceeds are to be dealt with. If the existing laws do not do so, the privatization law itself should specify that proceeds should be applied:

- first, to meet the costs of sale, which may include a fixed percentage of the proceeds as a contribution to the operating costs of the privatization agency;
- second, towards liabilities of the enterprise retained by the state;
- third, towards outlays which benefit the economy at large or large segments of the population.

33. Since the restructuring of enterprises for privatization can frequently lead to one-time labor costs for the severance and retraining of redundant labor, a fixed proportion of the amounts remaining after payment of sale costs and enterprise liabilities may be applied to a special fund set up for this purpose.

The Privatization Transaction

34. In addition to the broad local issues having application across the entire privatization program, individual privatization transactions will give rise to a variety of legal issues needing to be dealt with on a case by case basis in reliance upon legal advice.

35. Specific transactional legal issues are most readily resolved in the context of a clear and consistent set of publicly announced guidelines for each step of the process, from evaluation through implementation. These guidelines should include the following principles:

(a) Public enterprises should be divested into markets open to competition. For public enterprises operating in commercially oriented sectors, purchasers should not obtain an intact or unregulated monopoly and should not be accorded special protection or privileges such as market protection, concessional or differential input prices, public sector financing, loans or loan guarantees.

(b) All appropriate regulatory issues should be dealt with prior to or simultaneously with privatization. In the tradeable, commercially oriented sectors, regulatory provisions entailing the deregulation/liberalization of imports, prices and market and the removal of other barriers to competition should be introduced. In the non tradeable, utilities sectors which generally require large investment (such as electric power and water supply), the establishment of regulatory mechanisms dealing with entry and pricing policies is essential to ensure the confidence of private investors, and to protect the interests of users.

(c) In cases where the government retains a minority shareholding, it should not be entitled to any special or extraordinary voting rights, except in certain cases in the 'strategic' non tradeable sector, where a golden share could be retained. Such a golden share could permit the government to veto the resale of a controlling interest if that would not be in the interests of the country.

(d) The consideration received by the government in a privatization transaction should be cash or the assumption of public debt (in the case of debt conversion). Where shares are to be transferred to the workforce of the enterprise and are to be paid for over time, the government should receive payment for those shares in full at the time ownership is transferred. The ultimate beneficiaries may finance their share purchase from the financial markets in such manner as they may arrange, or alternatively the shares may be held by a trustee until payment has been made.

(e) There should be no restrictions on participation (local or foreign) either as owner, manager, shareholder or otherwise in the privatization process. The government may however decide, as an exception, to reserve a tranche of shares for domestic investors only."

71. Document No. 94/11, describing progress made by the Committee's Data Collection Unit, financed by the Republic of Korea, notes that the methodology adopted in setting up the Database, classifies information on the Legal Framework for International Trade by subject within the following categories: (a) standard/model contracts for use in international trade; (b) legal guides; guidelines and model laws; (c) legal framework for foreign investment; (d) trade expansion, economic co-operation and integration; (e) intellectual property rights; (f) exchange control arrangements and exchange restrictions; (g) countertrade; (h) arbitration; and (i) international conventions in the field of international trade. Listing documentation thus far received, the Secretariat urges greater co-operation on the part of Member States, referring to difficulties in processing the information transmitted due to its piece-meal character, language differences, and the Committee's lack of the necessary staff.

72. Document No. 94/13 contains a survey of the activities of AALCC's regional arbitration centres at Kuala Lumpur, Cairo and Lagos, and notes plans to establish similar arbitration centres at Tehran and Nairobi. Also before the Committee at its Tokyo Session was a separate detailed description of the activities of the Cairo centre, eventually included as part VIII of the *Report* (pages 185-223) on the Session, to which are annexed sets of "Principles adopted by arbitral tribunals in awards issued under the auspices of the Cairo Regional Centre for International Arbitration" *(Report,* pages 201-6) and 'Rules for Mediation' *(Report,* pages 207-215) as well as a 'Code of Ethics' for arbitrators *(Report,* pages 217-219).

Decisions

73. Having considered the documentation before it, and the *Deputy Secretary-General's* introductory statement *(Report,* pages 99-100), the Committee adopted essentially procedural decisions with respect to the item generally *(Report,* page 249), and to the work of its regional centres for arbitration *(Report,* page 245).

74. In a separate decision on the work of UNCITRAL *(Report,* page 253), the Committee, *inter alia,* welcomes adoption of the Model Law on Procurement of Goods and Construction, urging Member States to take it into consideration when enacting or revising laws on procurement, and

> "4. *Urges* the Member States which have not done so to consider adhering to the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) since wider acceptance of the Hamburg Rules would result in a better protection of shipper's interests, and an early replacement of the Hague and Hague-Visby Rules by the Hamburg Rules would promote uniformity in this vital area, . . ."[3]

75. In a separate decision *(Report,* pages 251-2) on the Report of the Special Meeting on Privatization, the Committee, *inter alia,*

> ". . .
> 4. *Endorses* the contents of the Report which faithfully describes the dis-

[3] The delegate of Japan made the following reservation with respect to this decision: "My delegation has joined the consensus on the Draft Resolution on the work of the UNCITRAL, with the understanding that para. 4 of this resolution in no way affects the freedom of each State in adhering to the Hague-Visby Rules."

4. *Endorses* the contents of the Report which faithfully describes the discussion during the meetings on vital legal issues on privatization;
5. *Commends* the Report which contains the text of the draft legal and institutional guidelines on privatization and post privatization regulatory framework already appended to the Report for consideration of member states;
6. *Requests* the Secretary-General to endeavour to obtain funds from the World Bank to publish and give broad publicity as expeditiously as possible, the proceedings and Report of the Special Meeting including the guidelines annexed thereto to ensure its widest dissemination throughout the Afro-Asian region."

5. OTHER MATTERS

Deportation of Palestinians in violation of international law, particularly the Geneva Convention of 1949 and the massive immigration and settlement of Jews in the occupied territories

76. The Committee, having heard statements by, *inter alia,* delegates of *Palestine (Report,* pages 79, 110) and *Iran (Report,* page 75), adopted a decision[4] whereby it

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[4] The delegates of Iran, Japan and Singapore made reservations with respect to this decision, as follows:

Iran
"My delegation does not recognize the accord between PLO and the other party, and while seeking the full realization of the inalienable rights of the Palestinian People, would like to put on the record its reservation on some paras of this resolution which refer to this accord."

Japan
"Since the Committee met in Kampala last year, a historic event took place in the long history of the Middle East Peace Process. On the 13th September, 1993 "Declaration of Principles" has been signed between PLO and Israel at White House, Washington in the presence of PLO Chairman Yassar Arafat and Israeli Prime Minister Ishaq Rabin. Japan strongly supports this peace process and the agreement reached between PLO and Israel. The Japanese Government maintains the position that deportation in question is not justifiable under the international law. However, the issues taken up in this draft resolution, including the question of deportation of Palestinians are now being negotiated as a part of its peace process between the parties concerned. Since the peace process is at a very crucial and sensitive juncture, we believe that the Committee, as a forum of legal experts, should not take a decision which may prejudge the on-going negotiations. For this reason, the Japanese delegation reserves its position on the resolution as a whole."

Singapore
"Singapore takes the view that this draft resolution does not fall within the purview of the AALCC. The AALCC is a Legal Consultative Committee, constituted to provide an advisory role

". . .

1. *Expresses* its concern at the continuing denial and deprivation of the inalienable legitimate rights of the Palestinian people including, *inter alia,* the right of self determination, return and the establishment of an independent state on their national soil;

2. *Supports* the just cause of the Palestinian people and their struggle for self determination and freedom;

3. *Condemns* Israel's policy in the Arab occupied territories and the deportation of Palestinian people from their indigenous homes and demands the repatriation of all Palestinians deported since 1967 in flagrant violation of Geneva Convention and the Declaration on Human Rights;

4. *Strongly condemns* Israel's policy of immigration and the Settlement of Jews in the Palestinian and other Arab occupied territories in Golan heights and South Lebanon, and consider it an obstacle towards erecting a just and comprehensive peace;

5. *Demands* that Israel respect the principles of International Law and all International Conventions which have a bearing on these matters, including the release of prisoners and detainees in Israel jails and concentration camps;

6. *Condemns* Israel's policy of appropriation and illegal exploitation of the natural resources (particularly water) and the archaeological explorations of the occupied territories in contradiction to the principles of permanent sovereignty over natural resources;

7. *Welcomes* the signing of the Accord of Principles between the Palestine Liberation Organization and the Government of Israel and *considers* it an important breakthrough and a first step towards erecting a just, durable and comprehensive peace in the Middle East.

8. *Calls on* Israel to expedite its withdrawal from the Gaza and Jericho areas to enable the PLO to establish Palestinian National Authority over these territories;

9. *Requests* member States as well as other states and UN organs to extend moral and material support to the Palestinian National Authority in Gaza and Jericho;

10. *Requests* the Secretary-General of the Committee to continue to monitor the events and developments in the occupied territories of Palestine; and

11. *Decides* to include the item in the agenda of its 34th Session."

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to Member Governments on various international legal issues. A political statement such as the Palestinian draft resolution is not appropriate for consideration in this forum; it is more appropriate to be considered in a political forum such as the UN General Assembly.

Furthermore, no notice was given for the tabling of this draft resolution until this evening. It is not possible for Singapore to fully consider the draft and formulate position."

CHRONICLE

CHRONICLE OF EVENTS AND INCIDENTS RELATING TO ASIA WITH RELEVANCE TO INTERNATIONAL LAW
July 1993-June 1994

Ko Swan Sik*
with contributions from WAN ARFAH HAMZAH (Kuala Lumpur) and KOTERA AKIRA (Tokyo)**

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AIR TRAFFIC

Pressure to revise air service agreements with the US

(*see also* AsYIL Vol. 1 p. 268; Vol. 3 p. 343)

Fifteen major Asian and Pacific airlines represented by the Orient Airlines Association announced that they would lobby their governments to scrap or drastically revise a number of decades-old, one-sided air-service agreements with the US.

Under the agreements, concluded in a time when Asian airlines were in their infancy and most international air passengers were Americans, American carriers were given broad freedoms to transport passengers from one point in Asia to another. No similar rights were granted to the Asian carriers in America. (IHT 09-07-93) [The US and Australia reached a three-year agreement on Pacific airline routes via Japan in December 1993 (IHT 21-12-93, 17-03-94).]

Japan-US relations on air services

Japan had opened talks with the US on the future of aviation links by seeking out current rights of US air carriers. Although air travel was not part of the US-Japanese "framework"-agreement reached in July 1993 during the G-7 meeting (*see infra*: International Trade), US officials said Japan's posture in the talks conflicted with principles of open trade referred to in the trade talks between the US president and the Japanese prime minister in July. (IHT 06-08-93)

In March 1994 the US deferred a decision on granting Japan Airlines permission for a new route between Honolulu and Sendai. This reflected, *inter alia*, US dissatisfaction about Japanese denial of approval last year for US airlines to fly without restrictions between the US and Australia via Japan (*see* 3 AsYIL 343). Japan lodged a formal protest against the postponement which was allegedly in violation of a 1984 aviation agreement. (IHT 17 and 25-03-94)

"Fifth freedom" in Malaysia-Philippine air traffic relations

The two countries were to sign a Memorandum of Understanding on 14 February 1994 extending landing rights for airlines of both countries, allowing Malaysia's designated airline to pick up passengers from Manila to Taipei. In return, the Philippines' designated airline would be allowed to pick up passengers from Kuala Lumpur to Bangkok. (STAR 08-02-94)

ALIENS

Detention and expulsion of foreign missionaries

Several foreign Christians were detained in Henan Province, China, in February 1994 and held for five days. The action was based on two new sets of regulations of 5 February 1994 on proselytization and dissemination of religious materials by foreigners. One of the persons was subsequently expelled and the others left themselves at the same time. (IHT 16 and 18-02-94)

Punishment by caning in Singapore

A Singapore court convicted a US teenager of vandalism in early March 1994 and sentenced him, *inter alia*, to be flogged with six strokes of the cane. The sentence was criticized by the acting US ambassador and on 7 March the US president called on the Singapore government to reconsider the punishment, but the latter said it would not intervene in the court decision: "Singapore judicial process cannot apply different standards to persons subjected to the same law." (IHT 04 and 09-03-94)

On 4 May the Singapore government turned down the convict's final plea but reduced the number of lashes from six to four in what it said was a gesture of good will toward the US President who had asked that the sentence be commuted. After the caning had taken place it was again criticized by the US president and the Singaporean ambassador was summoned to the State Department to hear US protests. (IHT 06 and 12-05-94)

Spy suspect in Iran

An American woman was arrested and convicted on charges of drunken behaviour in Tehran in April 1994. The court sentenced her to 80 lashes and a small fine. The woman who arrived in Iran in the early 1980s was also suspected of espionage activities. (IHT 09-05-94)

APEC (ASIA-PACIFIC ECONOMIC COOPERATION)

Origins of APEC

APEC was originally conceived as a forum of officials from Asia-Pacific countries in response to the rise in economic regionalism. Consequently, Australia - the initiator of the plan - excluded the US and Canada when it first proposed the grouping in early 1989. When the US reacted angrily as it feared the emergence of an economic group dominated by Japan, the latter urged Australia to include the US and Canada. The originally twelve APEC ministers, comprising six from ASEAN and another six from ASEAN's Pacific dialogue partners, first met in Canberra in 1989 as an informal consultative forum. Two years later in Seoul, APEC began to spell out the members' commitment to free trade and economic collaboration through "open regionalism". When the US took over the chair in September 1992 it said it wanted the forum to be transformed from a "talking shop" to an achievement-based group. (FEER 18-11-93 p. 16)

Heads of government meeting
(*see also*: East Asian Economic Caucus)

During the G-7 meeting in Tokyo early July 1993 the US president announced that the time had come for the US to "join with Japan and others in this region to create a new Pacific community" and that he was consulting leaders of the 15 APEC members on a proposal to meet in Seattle in November 1993. The main aim of the gathering would be to seek top-level backing for a program to liberalize trade in the region. The US was chairman of the group in 1993 and was to be host of the annual meeting of the APEC foreign and economic ministers at the same time and place.

Singapore, South Korea, the Philippines and Canada supported the American initiative, but Malaysia opposed a summit meeting because it would "institutionalize" the group. Indonesia also appeared wary of the invitation and was reported to want assurances that the Seattle meeting would confine itself to economic matters and not become a venue for discussion of political issues.(IHT 09, 21-07-93) On 25 July 1993 it was reported, however, that except remaining doubts about Malaysia the Asian countries had given up their objections against the proposed summit conference. The Chinese foreign minister stressed that Taiwan and Hong Kong were members of the APEC forum as regional economies and, therefore, should not take part in a summit meeting. On the other hand, US officials said a formula could be devised that would allow China to attend the Seattle meeting at head-of-government level while Taiwan and Hong Kong would send lower-level economic representatives. (IHT 26-07-93)

Prospects of Asia-Pacific integration

At the 25th meeting of ASEAN ministers of economic affairs and trade in early October 1993 concern was expressed about the plans for closer Asia-Pacific integration which had been advanced by a number of developed countries of the region and which

might bring the weaker countries in a position of being dictated the terms of future trade and economic cooperation.

It was said that the US had tried to get the approval of other APEC members for a binding agreement to lower tariff and non-tariff barriers in the Pacific, but was vetoed by ASEAN countries. Instead a preparatory meeting of APEC countries' officials at Honolulu in September 1993 agreed to recommend to the Seattle meeting that a committee be established to "pursue opportunities" to liberalize and expand trade and investment within APEC. The concerns of ASEAN were carefully expressed in the joint press statement issued after the ministers' conference: after noting "the continued evolution of APEC as a constructive framework for sustaining the growth and dynamism of the Asia-Pacific region" and since "this evolution will increasingly involve various economic issues" the meeting concluded that "the ASEAN Economic Ministers should have more meaningful and active roles in providing directions and guidance to promote common ASEAN interests". The Singaporean chairman of the meeting expressed the concerns in the following clearer terms: "APEC should not become a kind of organization that displaces or dilutes the kind of relationship that we have within ASEAN." (IHT 9/10-10-93; ASEAN Documents Series 1992-1994 p. 25)

In November 1993 it was again reported that the ASEAN members had agreed that the APEC forum should remain a loose consultative body and not evolve into a trade negotiating body and that it would be premature to endorse any proposal to create a Pacific free-trade area. No action should be taken that would weaken the global trading system and strengthen trends toward regional economic blocs. ASEAN also wanted to pre-empt moves by the US or Australia to open rapidly growing East Asian markets to their exports at a faster rate than was acceptable to countries in the region. Of the eleven East Asian members of APEC only Singapore and Hong Kong had abolished virtually all barriers to free trade. (IHT 16-11-93)

Seattle meeting

The fifth meeting of APEC foreign and trade ministers was opened on 18 November 1993. They ended their meeting on 19 November after effectively rejecting a long-term vision of an Asian economic "community" constituting a structured free trade group. The Japanese foreign minister said that "[i]t is through consultation, not negotiation, that APEC members should deepen mutual understanding, form common views and pursue common goals." Mexico and Papua-New Guinea were admitted to become members of the forum, but membership of Chile was postponed till next year and a moratorium was imposed on other candidates (such as Peru). A Committee on Trade and Investment was set up which was to recommend on how the APEC countries could lower the cost of doing business in the region.

The heads of state or government met on 19 and 20 November in the absence of the Malaysian Prime Minister. (IHT 12 and 19-11-93)

ARMS SUPPLIES

Russia/US - Malaysia

As a result of competition first Russia and then the US had improved their offers for fighter aircraft, the latter in spite of initial reluctance. Malaysia finally decided on 29 June 1993 to purchase 18 MiG-29M fighters from Russia and 8 McDonnell Douglas F/A-18D strike aircraft from the US (IHT 13-07-93; FEER 08-07-93 p. 13).

It was reported in August 1993 that Russia was finally prepared to make the modifications to its MiG-29 fighter as specified by Malaysia as a condition for the purchase. The modifications were said to include a much improved engine and stronger airframe, and the setting up of a service centre in Malaysia. The final purchase agreement was signed on 7 June 1994. Under the terms of the agreement Malaysia would pay $550 million and under a counter-purchase clause Russia promised to spend $150 million on palm oil and unspecified other products from Malaysia. (IHT 02 and 08-06-94; FEER 12-08-93 p. 9, 05-05-94 p. 13, 16-06-94 p. 20)

Chinese supply of missiles to Pakistan
See: Sanctions

Arms sales to Third World

In 1992 arms sales to the Third World fell to their lowest levels since 1985. Sales from Russia fell from $28.8 billion in 1986 to $5.9 billion in 1991 and $1.3 billion in 1992. Chinese sales dropped from a peak of $4.7 billion in 1987 to $100 million in 1992, slipping from the rank of the world's fifth largest arms seller to the 10th place. US sales fell only slightly, from $14 billion in 1991 to $13.6 billion in 1992, and increased from 49 percent in 1991 to 57 percent in 1992. The US has been the largest seller to the Third World since 1990. (IHT 21-07-93; FEER 26-08-93 p. 11)

Repurchase of weapons

In response to growing fears of terrorist attacks on American civilian aircraft the US government requested the allocation of money by the US Congress to buy back hundreds of Stinger anti-aircraft missiles that the US had given to Afghan rebels in the 1980s. (IHT 24/25-07-93)

Further submarine deliveries from Russia to Iran
(*see:* 3 AsYIL 347)

The Iranian navy commander said in August 1993 that Iran would soon receive its third Russian-made submarine (IHT 17-08-93).

US weapons supply to Taiwan

The US agreed to sell four E-4 Hawkeye early-warning aircraft and 41 Harpoon anti-ship missiles to Taiwan and to lease three frigates on which the missiles would be fitted. (IHT 06-09-93) According to a newspaper report of 25 October 1993 the US also agreed to sell anti-aircraft missiles to Taiwan. (FEER 04-11-93 p.15)

It was reported in late April 1994 that the US was planning to sell hundreds of millions of dollars worth of arms to Taiwan with the tacit approval of China, leaving in effect the 1982 Communique in which the US promised gradual reduction of its arms exports to Taiwan. The compromise was said to be designed to prevent further strains in Sino-US relations. (IHT 28-04-94)

Israeli weapons sales to China

According to the US CIA Israel has been selling advanced military technology to China for more than a decade and appeared to be moving toward formalizing and broadening their military technical cooperation. (IHT 13-10-93) The arms sales were defended by the Israeli prime minister who, however, insisted that they did not violate any restrictions on transferring American weapons technology. (IHT 14-10-93)

Export of "dual use" technology to Iran

According to an investigation completed in September 1993 by the US House Foreign Affairs Subcommittee on International Security, International Organizations and Human Rights, 230 companies had supplied Iran with "dual use" technology and equipment, of which more than 50 were American.

In 1992 German sales of high-technology goods to Iran reached a value of $5 billion, Japanese sales nearly $3 billion, Italy and Britain each $1 billion, France not far behind, and the US ranking sixth at $746.6 million. (IHT 25-10-93)

Indonesian purchase of military aircraft from Britain

After confirmation in June 1993 of an Indonesian order for 24 trainers and ground-attack fighters from British Aerospace, it was reported in December 1993 that the Indonesian air force was authorized to discuss further purchases of Hawk aircraft. Shortly before British Aerospace had announced that it might set up joint ventures with Indonesia on turboprop aircraft and cars.

In June 1993 the Indonesian chief of staff had announced that Indonesia planned to buy about 100 warplanes over 25 years to replace ageing aircraft. (IHT 07-12-93)

Chinese arms supplies to Myanmar

Chinese military equipment has been reported to flow into Myanmar at an increasing pace since August 1990. The total value of the arms delivered and on order was estimated at more than $1.2 billion. One of the main priorities was reported to be the remodelling of the Myanmarese navy. (FEER 16-12-93 p. 26)

North Korean purchase of old submarines

North Korea began purchasing fourty old submarines from the Russian Pacific Fleet for scrap metal, through arrangement of a Japanese trading company. (IHT 20-01-94)

US and Australian arms aid to Cambodia

The US and Australia considered supplying arms to the Cambodian army because of its recent battlefield defeats at the hands of the Khmer Rouge. (*see infra*, Cambodia) The arms supply was requested by King NORODOM SIHANOUK. The Australian foreign minister said that it was "wholly legitimate" for the Cambodian government "to seek assistance ... in order to maintain the country's sovereignty and territorial integrity". A senior US official said that the US was also prepared to consider arms supplies but was unlikely to act on its own because of the multilateral pattern of cooperation established during the UN peace effort. (IHT 16-05-94)

Russian military equipment for India

India was reported to be negotiating the purchase of 30 MiG-29 aircraft, and the manufacturers of the MiGs expected to start a joint venture with the Indian state-owned *Hindustan Aeronautics* to make components for MiG aircraft and service them. (FEER 23-06-94 p. 29)

US fighter planes for Pakistan
See: Sanctions

ASSOCIATION OF SOUTH EAST ASIAN NATIONS (ASEAN)
See also: Asia-Pacific Economic Cooperation, East Asia Economic Caucus, Islam

Cooperation in the field of law

An "ASEAN Ministerial Understanding on the Organizational Arrangement for Cooperation in the Legal Field" was reached at a meeting of ASEAN Ministers of Justice, Ministers of Law and Attorneys-General on 11-12 April 1986. Referring to an observation made at the (seventeenth) ASEAN Ministerial Meeting in 1984 to the effect that stress should be laid on cooperation, including harmonization in the legal field, the Ministers in 1986 agreed, *inter alia*,

1. that legal cooperation shall initially comprise (a) exchange of legal materials, (b) judicial cooperation and (c) legal education and legal research;
2. that these aspects shall be studied further by Senios Legal Officials.

A second meeting of the ministers in the field and attorneys-general was held in April 1993. According to the resulting Joint Communique the ministers and attorneys-general:

(a) called upon the ASEAN legal fraternity to enhance the understanding of each other's legal systems;

(b) noted the need to disseminate reports of studies and research on law undertaken by national training and research institutions; and
(c) called for increased bilateral and regional cooperation in legal training, continuing legal education and exchange of study visits of Senior Law Officials.

The meeting also noted that an ASEAN Legal Information System could facilitate the dissemination of information pertaining to the laws of the ASEAN countries and called upon the member states to consider the feasibility of developing an ASEAN Legal Information System. (Asean Documents Series 1967-1988 p. 377; Id. 1992-1994 (Suppl.Ed.) 64)

Implementation of Common Effective Preferential Tariff scheme

At the 25th Economics Ministers' Conference in October 1993 the ASEAN member states agreed to start implementing the Common Effective Preferential Tariff scheme from 1994, except Brunei which would begin tariff cuts in 1995. The program was designed to cut tariffs on selected product groups to between zero and 5 percent from 1993 (IHT 06-10-93), but only Malaysia had stuck to the schedule while Singapore had already long maintained an almost tariff-free policy.

Agreement was also reached on the enlargement of the list of products due to benefit from accelerated tariff cuts within 10 years (*see* 3 AsYIL 349) by 336 items, an increase of the number of products included in the tariff-reduction process and a reduction of the number of products listed for temporary protection for eight years, particularly for the Philippines, Indonesia and Malaysia. In the absence of concrete details, however, economists remained sceptical of the new version and emphasized that the real issue was the question of non-tariff barriers.

Increasingly AFTA was satisfying few and disappointing many, due, among other things, to lack of proper planning. On the one hand there were those who were most reluctant to accelerate the process. On the other hand there were grievances about the lack of rules governing local content requirements, the absence of effective dispute-settlement procedures, the exclusion of services and non-processed agricultural goods, the limited investment concessions, inadequate regulation of non-tariff barriers, and the inability of governments to adopt adjustment measures for the elimination of protection. (FEER 12-05-94 p. 20; Asean Documents Series 1992-1994 (Suppl. Ed.) 23)

The prime minister of Singapore was reported to have said, *inter alia*, "Where we are competitive, we should export to world markets. Where others are more competitive, we should open our doors to them, giving them a vested interest in our economic well-being and encouraging our own industries to upgrade and become competitive." Otherwise "we cannot criticize others for shutting out our competitive exports." (IHT 08-10-93, FEER 21-10-93 p. 74)

ASIAN DEVELOPMENT BANK

Linkage between bank loans and social and environmental issues

The ADB had reached the ceiling of its lending capacity and prepared to double its authorized capital to $47 billion. The US had decided to give up its opposition against the capital increase but to take a more active role in the bank by calling for a linkage between 40 percent of the bank's loan spending and social and environmental issues, as well as a linkage with "cross-cutting" issues, such as women in development and good governance. This shift of policy to the side of other donor countries took place under the CLINTON administration.

Annoyed over this attempt by Western countries to put conditions on ADB loans, China abstained from voting on the doubling of capital. Several developing countries, among which India and China, argued that the social aspects of development were already well taken care of through the Asian Development Fund, the Bank's concessional-loan branch. According to these countries the Bank's commercial loans were so expensive that they should be kept focused on projects that promote high economic growth, such as infrastructural projects. (IHT 04 and 09-05-94)

ASYLUM

Cambodian prince in Malaysia

Prince NORODOM CHAKRAPONG of Cambodia arrived in Malaysia with his family on 3 July 1994 following an abortive coup. He was granted permission by the Malaysian government to stay temporarily in Malaysia. The permission had been granted on the basis of an old arrangement between the Malaysian prime minister and the prince's father, King NORODOM SIHANOUK, who had requested that the prince be allowed to stay in Malaysia. After getting the impression that the Cambodian government was unhappy about the prince's prolonged stay, Malaysia requested the prince to leave for a third country. The refugee prince was subsequently reported to have been granted permission to leave for France. (NST 14-07-94, 29-07-94; STAR 13-07-94, 18-07-94)

BORDERS, BORDER DISPUTES AND BORDER INCIDENTS

Tajikistan - Afghanistan

Tajik rebel exiles and Afghan fighters launched an attack on a border post on 13 July 1993, resulting in the death of 25 Russian and Tajik soldiers. A second attack, killing eight, was then repulsed by Russian soldiers and border guards firing into Afghanistan. The Tajik government is allied with regional forces against Islamic militants who have their base in Afghanistan. (IHT 16 and 23-07-93)

China - India

During the visit of the Indian prime minister to China in early September 1993 the two countries signed a "peace and tranquillity agreement". The agreement stipulated that, pending a final resolution of the demarcation line, the two countries respect and observe the "line of actual control" and would not resort to force or threats of force. A bilateral team of experts would determine the actual line. The agreement included a commitment to reduce forces along their border, but it had yet to be determined whether that would imply a one-for-one cutback as proposed by China or an adjusted ratio as advocated by India. The two countries also agreed to start confidence-building measures, to give prior notification of military manoeuvres and to prevent airspace intrusions. (IHT 08-09-93, FEER 16-09-93 p. 13)

In December 1993 talks took place between Chinese and Indian Army delegations on measures to lower military tension along the China-India border. (IHT 22-12-93)

Cambodia - Vietnam

See: Inter-state relations

China - Vietnam

China and Vietnam on 19 October 1993 signed an agreement in Hanoi on basic principles to resolve territorial and border issues on land as well as at sea. It was the first agreement since the two parties started border talks 19 years ago. (IHT 20-10-93) In February 1994 it was reported that the two countries had agreed to discuss their territorial disputes (IHT 26/27-02-94) and talks began on 22 March 1994 on the borders in the Gulf of Tonkin. (FEER 31-03-94 p. 13)

Vietnam - Thailand

It was reported that the two states concluded an agreement on principles for settling their territorial disputes on land and in the South China Sea. The agreement was signed on the occasion of a visit by the head of the Vietnamese Communist Party to Thailand in October 1993. (FEER 28-10-93 p. 15) During a visit by the Thai prime minister to Vietnam in March 1994 the two parties agreed to set up a joint body to resolve the disputes over fishing rights and maritime boundaries. (FEER 31-03-94 p. 13)

India - Bangladesh

Indian and Bangladeshi soldiers exchanged fire across the border on 29 November 1993 over a land dispute between farmers. Indian farmers in the northeastern state of Tripura came under fire from Bangladeshi border guards when they tried to till farmland claimed to belong to Bangladeshi farmers. (IHT 30-11-93)

China - Laos

In december 1993 Laos and China signed a treaty intended to maintain peace along their common 500-kilometre border. A border delimitation plan had been adopted in 1992 to resolve disputes along their frontier. (FEER 16-12-93 p. 15)

Indonesia - Vietnam

The presidents of Vietnam and Indonesia agreed to expedite the demarcation of their common border in the South China Sea. (FEER 12-05-94 p. 13)

China - Russia
(*see also*: Inter-state relations: general aspects, p. 461)

The two countries reached agreement on the alignment of the short western section (35 miles) of their 4,000-kilometre border at the conclusion of border talks between China and a joint delegation of four countries of the Commonwealth of Independent States: Russia, Kazakhstan, Kyrgyzstan and Tajikistan. Agreement has yet to be reached on the eastern region around the Amur River which has been a contentious issue between the two countries for a century. (IHT 15-06-94)

Indonesian-Philippine maritime boundaries

According to the Philippine Undersecretary for Foreign Affairs the two countries reached agreement on three principles which would govern the drawing of their maritime boundaries: the UN Convention on the Law of the Sea, the median line principle, and "creative options". (IHT 28-07-94)

BROADCASTING

Star-TV dominated by (Australian) News Corp.

As part of a competition among Western media to develop the television market in Asia where two-thirds of the world's potential viewers live, News Corp. (43 percent owned by RUPERT MURDOCH) on 26 July 1993 bought 63.6 percent of Hutchvision Ltd., parent company of Star-TV, Hong Kong, the dominant sattelite broadcaster in Asia. (IHT 27-07-93)

The acquisition by a non-Asian and the expected resulting friction and instability caused criticism by the prime minister of Malaysia, to which News Corp. responded by a statement reassuring that Star-TV would not become a vehicle for outside interference in Asian affairs.

Malaysia prohibits individuals from owning satellite receiving dishes and in India the government had proposed a law restricting Western television broadcasts. (IHT 04 and 05-08-93)

Because of concerns about an uncontrolled invasion of Western values, several countries in Asia were moving to restrict foreign programming to distribution on land-based cable networks that can be more easily controlled by licensing. (IHT 23-03-94)

Radio Irina
(*see* 3 AsYIL 353)

Vietnam reportedly succeeded to persuade Russia in June 1993 to close Radio Irina. (FEER 25-11-93 p. 11)

China's attitude toward Radio Free Asia

China demanded on 27 January 1994 that the US drop plans to set up a new radio station, envisioned as a conduit of news, information and commentary for the people of Cambodia, China, Laos, Myanmar, North Korea and Vietnam. According to the spokesman of the ministry of foreign affairs the real objective is "to use the news media to interfere in the internal affairs of China and other Asian countries and to create confusion." (IHT 28-01-94)

Taiwanese satellite broadcasting

Po Hsin Entertainment Inc., 45 percent-owned by the Nationalist Party, planned to start broadcasting throughout China, Taiwan and Southeast Asia in October 1994. It signed an agreement with the China-controlled APT Satellite Co. for space on the Apstar-1 satellite which was scheduled to be launched in summer 1994. (IHT 03-02-94)

Chinese re-broadcasting of foreign programs

The Chinese Ministry for Radio, Film and Television and China's main television organization Central China TV signed agreements with the Australian Broadcasting Company, opening the way for transmission of Australian Television programs on Chinese domestic channels. (IHT 10-02-94)

BBC news broadcasts to China

The Chinese government advised STAR TV, the Asian satellite broadcaster controlled by the Australian-owned News Corp., to drop the BBC World Service from its network. The News Corp. chairman responded on 15 February 1994 that the BBC channel would be replaced because of allegations of bias made against the BBC by China and India. Although the BBC program was replaced in broadcasts to China, Hong Kong and Taiwan, it would continue to be broadcast to South Asia by STAR TV under the current contract until 1996. (IHT 17-02-94, 14-06-94)

In late March 1994 it was reported that Warf Cable, another television company in Hong Kong launched in October 1993, had offered the BBC to provide programs on its channel. (IHT 30-03-94)

Censorship on news reports

The Malaysian Television had cut several scenes from a BBC news report about labour riots in Indonesia. As a result the BBC had threatened to stop providing news to the Malaysian state television service. Defending the censorship, the Information Ministry said that the Southeast Asian countries had agreed among themselves to refrain from broadcasting news that might be sensitive to their neighbours. Malaysia decided to cancel the BBC news service. (IHT 29-04, 05-05-94)

CAMBODIA

Establishment of a new government

The 120-member constituent assembly approved a coalition government and voted to maintain the laws of the former Phnom Penh government. The co-prime minister and former prime minister of the Phnom Penh government said that the existing laws had already been approved by the UNTAC while the other co-prime minister, head of the royalist party, agreed to accept the laws on condition that they could be changed by a joint review body. (IHT 02-07-93)

Government-Khmer Rouge relationship

Contrary to their attitude before the elections in May 1993 Khmer Rouge commanders offered to merge their forces (10,000 men) with the army of the newly elected government and said they would open areas under their control to the UN peacekeeping force if their group was given a position of permanent adviser to the newly elected government. (IHT 01 and 15-07-93) Further, Khmer Rouge envoys met the then Prince NORODOM SIHANOUK and the UN commander on 1 July 1993, after a 10-week self-imposed exile, raising hopes of a return by the group to the peace process. Their spokesmen said they had come to discuss opening up the 20 percent of the country they controlled to the newly elected government. (IHT 02-07-93) Meanwhile, however, the group captured the Preah Vihear temple on 7 July 1993. (IHT 13-07-93)

The US vowed to withhold aid if the Khmer Rouge were given a role in the government. One of the co-chairmen of the interim government indicated that the government was prepared to risk losing foreign aid by accepting the Khmer Rouge proposal. "Most important now is that Cambodia should reunite; it should not allow foreign countries to use their economic influence to divide Cambodia." (IHT 15-07-93) Under pressure from France and the US, however, one day later the co-chairmen ruled out any early ministerial role for the Khmer Rouge in a unified government and made it clear that they were only being offered a role as advisers at present. (IHT 16-07-93) This retreat was followed by a statement from the head of state abandoning his planned talks with the Khmer Rouge. Meanwhile the Prince said that "incessant" American warnings were making him (even more) ill and driving him toward "a mental asylum". (IHT 21-07-93)

At their meeting in July 1993 the ASEAN foreign ministers in a joint statement on Cambodia expressed their hope that "all Cambodians set aside factional interests and

work toward national reconciliation". The statement made no direct mention of the Khmer Rouge or of US or French misgivings about the guerrilla group. (IHT 24/25-07-93; ASEAN Documents Series 1992-1994 p. 91) During the ASEAN post-ministerial conference consultations, however, a senior US official said that the US government had not ruled out giving financial assistance to a new Cambodian government including the Khmer Rouge, but would seek ways in which the aid might be reconciled with the strong hostility to the Khmer Rouge in the US. (IHT 26-07-93)

The following weeks were characterized by, on the one hand, increased attacks and acts of sabotage by the Khmer Rouge combined with simultaneous insistance on inclusion in the government, and, on the other hand, offers of peace and cooperation by the government on condition of ceasing of violence, incorporation of the Khmer Rouge forces into the national army, and access to Khmer Rouge-held territory. (IHT 27-07-93, 03-08, 04-08, 05-08, 7/8-08, 23-08-93)

By the middle of August the government ordered the army to retaliate against continued Khmer Rouge attacks, resulting in the biggest government attack, in northwestern Cambodia, since the beginning of the UN peace-keeping mission. (IHT 13-08, 19-08, 20-08-93) On 20 August government forces seized Phum Chat, a major Khmer Rouge arms and logistics centre. (IHT 21/22-08-93; FEER 02-09-93 p. 12)

In November 1993 the King proposed a peace plan with the purpose of drawing the Khmer Rouge into the new government. The peace offer reportedly was withdrawn in late November because the prime minister considered it unconstitutional. The constitution requires senior government officials to be members of parties represented in the National Assembly. Yet on 4 December the prime minister declared to be prepared to invite the Khmer Rouge to integrate their armed forces into the national army provided an immediate cease-fire was implemented. An earlier demand, notably the handing over of Khmer Rouge-controlled territory was dropped by making it the object of later negotiations. (IHT 23-11-93; FEER 16-12-93 p. 18)

On 4 January 1994 the Cambodian armed forces warned the Khmer Rouge of an imminent attack aimed at the capture of the Khmer Rouge headquarters in western Pailin Province. The warning was preceded by a demand from the two co-prime ministers for the guerrillas to join in national reconciliation. (IHT 05-01-94) The Khmer Rouge northern headquarters at Anlong Veng was captured by government forces on 5 February but the base was recaptured by the Khmer Rouge on 24 February. (IHT 02-03-94) In March 1994 government forces captured the Khmer Rouge capital of Pailin. (IHT 23-03-94) In this connection the Cambodian government accused Thailand of having helped POL POT, the Khmer Rouge leader, to flee into Thailand in the face of advancing Cambodian forces. (IHT 07-04-94) Pailin was, however, later recaptured by the Khmer Rouge on 19 April 1994 who then almost captured Battambang, Cambodia's second-largest city. (IHT 20-04-94; FEER 19-05-94 p. 16)

After an appeal from the King, the government and the Khmer Rouge finally agreed to hold peace talks on 27 May 1994 in Pyongyang but neither side appeared ready to negotiate seriously and the talks accordingly ended in failure. (FEER 02-06-94 p. 14, 09-06-94 p. 13)

Ethnic Vietnamese
(*see also:* 3 AsYIL 354, and *infra*: Inter-state relations, Refugees)

The Khmer Rouge rejected an appeal from the head of the UN peacekeeping mission to stop inciting violence against ethnic Vietnamese. It said it had to address the problem of the Vietnamese because the UN mission had failed to do so. The attacks on Vietnamese had stepped up in March and April 1993 causing an exodus of tens of thousands of ethnic Vietnamese across the border into Vietnam. (IHT 14/15-08-93)

The UNTAC had appealed to allow as many as 30,000 ethnic Vietnamese to return from the Cambodian-Vietnamese border where they had fled from the Khmer Rouge, but it was reported that the interim government was dragging its feet. (FEER 26-08-93 p. 13)

Completion of UN mission

The UN Transitional Authority in Cambodia terminated its 18-month mandate on 26 September 1993 as the head of the mission bade farewell to the newly reconstituted Kingdom of Cambodia. (IHT 27-09-93)

Refugees in Thailand

Avoiding the renewed fighting between government and Khmer Rouge forces and resulting from the capture of Pailin by government forces on 19 March a flow of refugees had crossed the northwestern border into Thailand. Thailand had been sending these refugees, around 25,000, back over the border into Khmer Rouge-held territory by way of voluntary repatriation, despite encountering resistance from some of the refugees.

The Cambodian foreign minister protested the "forced repatriation" and asked Thailand to allow access to the ICRC and the UNHCR to determine if the refugees wanted to return to areas controlled by the Cambodian government. The UNHCR also filed a protest, saying that the return "was conducted in a manner contrary to internationally accepted humanitarian principles and practices". (IHT 28 and 29-03-94)

CIVIL WAR

Afghanistan
(*see also:* 3 AsYIL 342)

Fighting erupted on New Year's Day between presidential forces and fighters led by General ABDUL RASHID DOSTAM who joined forces with the prime minister GULBUDDIN HEKMATYAR, another adversary of the president. (IHT 03-01, 06-01, 14-01-94)

According to the Islamabad Accord of March 1993 (*see* 3 AsYIL 342) the president's mandate would expire on 28 June 1994. Under the Accord he should have organized a *loya jirga* (tribal council) and elections. Instead the ethnic Tajik president

wanted to call his own *shoora* (council) to choose a new president. Pakistan tried to broker a second Islamabad Accord but the Afghan president is hostile toward Pakistan and it proved to be difficult to achieve consensus among the foreign backers of the various factions while the neighbouring Central Asian republics complicated the picture further. Turkmenistan backed ISMAEL KHAN, the warlord of western Afghanistan and president RABBANI's ally, but not the president. Uzbekistan backed General DOSTAM who is ethnically Uzbek. Tajikistan supported the president but was hostile to the equally Tajik General MASUD and to the Pashtun prime minister as both of them supported the Islamic rebel movement in Tajikistan. (FEER 30-06-94 p. 24)

Tajikistan

(*see also*: 3 AsYIL 359 and *supra*: Borders)

The opposition to the government of President RAKHMANOV consisted of four separate parties: the Islamic Renaissance Party headed by MOHAMMAD SHARIF HIMMATZADA, the Democrat Party of SHADAN YOUSAF, the National Front led by ABDUL JABBAR TAHIR and the Lale Badakhshan group under AMIR BEG. All four groups demanded the withdrawal of foreign troops and free elections under a neutral caretaker government. On the other side Russian, Uzbek and Kirgyz troops were stationed in Tajikistan under the common defence arrangement of the Commonwealth of Independent States. The Tajik government had signed an agreement with Russia in May 1993 to continue the Russian presence till 1999. (FEER 12-08-93 p. 12)

Iran and Russia reached agreement to cooperate on finding a peaceful settlement to the conflict in Tajikistan. The agreement was reached in talks between the Iranian and Russian deputy foreign ministers. (IHT 08-03-94)

COMMUNICATIONS

Communication among Mekong littoral states

The first bridge to span the Mekong River, the Mitraphab (Friendship) Bridge, was built by Australia and opened on 8 April 1994 to cross the river between Tha Naleng, near Vientiane, Laos, and Nong Kai in Thailand. (IHT 11-11-93, 12-04-94)

Malaysia-Singapore Second Crossing Project

On 22 April 1994 Malaysia and Singapore signed an agreement for the construction of a multi-million ringgit second carriageway linking the two countries. The project would comprise a 2-km bridge over the Straits of Johor. Ninety per cent or a length of 1.6 km to 1.7 km of the bridge would be built by Malaysia and the remainder by Singapore. The project would cost Malaysia about RM 1.6 billion and Singapore RM 680 million. The Malaysian part of the project was privatized while the Singapore government would undertake its part of the project. The bridge should be completed by November 1997. (NST and STAR 23-04-94)

COMPENSATION

See also: Inter-state relations: South Korea-Russia

Shooting down of Korean aircraft over Sakhalin

South Korea said that it would appeal again to Moscow for compensation for the shooting down of the Korean passenger plane on 1 September 1983, despite Russia's claim that the [former] Soviet Union bore no guilt in the incident. According to the Russian side the blame was to be laid on pilot error and a series of fateful coincidences: the Soviet air defence forces firmly believed they were intercepting an enemy spy plane when they shot down the airliner. (IHT 01-09-93)

Yin He incident

As a consequence of the unproven US accusations of the carriage of nerve gas ingredients by a Chinese freighter (*see infra*: High seas) China demanded a formal apology from the US and $13 million in damages. The demands were rejected by the US. (FEER 16-09-93 p. 14)

CULTURAL PROPERTY

Korean ancient books in French possession

During his visit to Seoul in September 1993 the French president suggested the return of a 300-volume collection of ancient Korean books which were plundered from Korean royal archives in 1866. However, France seemed to have reconsidered the return when the French foreign ministry said that the books could only be an item for exhibition in Seoul in exchange of cultural material from Korea of equal value for exhibition in France. (FEER 19-05-94 p. 14)

DEBTS

Rescheduling of Iranian debts

Iran and Germany reached agreement on rescheduling 4.5 billion D-marks in Iranian debt owed to German companies. The agreement gives Iran six years in which to pay overdue commitments. It was said that the agreement had been reached despite fierce US opposition. The US had urged Germany to isolate Iran on grounds that it sponsors terrorism. Iran's foreign debts were estimated to amount to $30 billion. (IHT 28-02-94)

Repayment of Russian debts to South Korea

It was reported that the two countries would renegotiate the repayment terms on $1.5 billion in loans extended to the Soviet Union, and that an extension of the loans with another $1.5 billion as called for under the original loan accord would not take place. South Korea rejected a Russian offer of military equipment in exchange for debt repayment and new loans. (FEER 09-09-93 p. 67)

Rescheduling of Vietnamese debts
See also: Economic cooperation and assistance

The Paris Club of Western creditor states agreed on 13-14 December 1993 to reschedule Vietnam's $4.5 billion hard-currency debt. Eleven countries were prepared to cancel up to half of the debts owed to them. (FEER 30-12-93/06-01-94 p. 87)

DEVELOPMENT AID

US Peace Corps in China

The first 18 American Peace Corps volunteers to serve in China started teaching English in Sichuan Province. A decision on the continuation of the program was to be taken in the summer of 1994. The program originally was to start in 1989 but as a result of the incidents of that year both sides decided to postpone the start indefinitely. The volunteers are called "US-China friendship volunteers". (IHT 19-04-94)

DIPLOMATIC AND CONSULAR INVIOLABILITY

Freeing of hostages in Afghan embassy building

Pakistani commandos stormed the Afghan embassy in Islamabad on 21 February 1994 in order to free schoolchildren and a teacher who had been held hostage in the building by Afghan gunmen. The three Afghans were killed. (IHT 22-02-94)

Attack on Pakistan embassy

On 23 February 1994 a mob of Afghan demonstrators attacked the Pakistan embassy in Kabul, wounding staff members, smashing windows and furniture and burning the Pakistani flag. Security forces were reported to be slow in responding to the demonstration protesting against the killing of Afghan gunmen at the Afghan embassy at Islamabad. (IHT 24-02-94)

DIPLOMATIC AND CONSULAR PROTECTION

Protection of Vietnamese-Americans

See: Diplomatic and consular relations

Thai workers in Libya

The US urged Thailand to withdraw Thai citizens working in chemical and nuclear facilities in Libya. About 25,000 Thais worked in Libya. Earlier in the year the US had warned third countries that it could not guarantee the safety of their workers if the US would take military action against Libya. (IHT 02-09-93) The Thai government accordingly set up a plan for repatriation of Thai citizens in case of an American attack on Libya. (IHT 05-10-93)

DIPLOMATIC AND CONSULAR RELATIONS

See also: Inter-state relations

Vietnam - Israel

On the occasion of a visit of the Vietnamese deputy foreign minister to Israel, the two countries agreed on 12 July 1993 to establish diplomatic relations. (NRC 13-07-93)

Vietnam - US

In 1993, before the lifting of US sanctions, Vietnam and the US agreed in priciple to station three US diplomats in Hanoi "on a temporary basis" to handle consular matters. The US denied that the diplomats would be "preparing the ground for normalization". The diplomats might not enjoy full diplomatic status.

Under an agreement reached a decade ago the US had regularly sent consular officers to process Vietnamese emigrating to the US and in 1991 the US set up an office in Hanoi for the investigation of so-called MIA cases. (IHT 19-07-93; NRC 19-07-93)

After the lifting of the US sanctions in February 1994 the US proposed to set up liaison offices in each other's capital cities. Final arrangements were agreed on 20 May 1994. The offices would be staffed by at least 10 diplomats and would carry out some of the functions of embassies until diplomatic relations were established. (IHT 26-05-94)

Vietnamese-US consular agreement and dual nationality

Problems had arisen in preparing a consular agreement as a basis for the establishment of mutual liaison offices. There was disagreement over the implementation of a provision requiring the Vietnamese to contact US authorities within 72 hours should a US citizen be detained in Vietnam. Under Vietnamese law, Vietnamese nationality can only be relinquished with permission of the government. Since this

practically never occurs, US citizens of Vietnamese origin remain Vietnamese nationals who would be treated as such by the Vietnamese government. (FEER 05-05-94 p. 32) Later agreement was reached on representation and protection of Vietnamese-Americans on Vietnamese territory. (IHT 26-05-94)

Establishment of diplomatic relations with South Africa

India and South Africa restored diplomatic relations on 22 November 1993 after a 39-year freeze. (IHT 23-11-93, FEER 02-12-93 p. 15) In November 1993 Malaysia announced the establishment of diplomatic relations with South Africa (NST 08-11-93), followed some time later by Indonesia. (BLD 1994 No.17)

North Korean-Australian diplomatic relations

After having closed its embassy without explanation in 1975, North Korea asked Australia whether it could re-open the mission. (FEER 27-01-94 p. 9)

Sino-Indian consular relations

India turned down a Chinese request to open a consulate in Calcutta and offered Bombay instead. The state of West Bengal, where Calcutta is located, is the only Indian state ruled by Communists.(FEER 17-02-94 p.12)

Closure of Pakistani consulate in Bombay

Pakistan decided to close its consulate in Bombay, after a leading hotel had refused to have Pakistan Day celebrations on 23 March held on its premises. The Pakistani consul-general said that the consulate had been operating from a rented office and that he had searched for 19 months to find a suitable place for a permanent consulate without success or help from the Indian government. (IHT 22-03-94) The Indian government revoked a promise to let the mission occupy the former residence of MOHAMMAD ALI JINNAH, the founder of Pakistan. (FEER 31-03-94 p. 13)

Expulsion of Iranian diplomat

Norway announced the expulsion of a consul at the Iranian embassy on 25 March 1994 for activities not in keeping with his diplomatic status. The Norwegian ministry did not elaborate on the activities that warranted the expulsion, but emphasized that the expulsion was not related to the attack on the Norwegian publisher of a Norwegian edition of SALMAN RUSHDIE's book. In retaliation Iran expelled the Norwegian consul in Tehran on 27 March for "acts incompatible with diplomatic norms".(IHT 26/27 and 28-03-94)

Malaysia - Tunisia

On the occasion of the signing of an agreement on economic and technical cooperation in May 1994, Tunisia suggested that Malaysia set up a Malaysian External Trade Development Corporation (Matrade) office in Tunisia to promote bilateral trade and to pave the way for the establishment of a Malaysian embassy. Currently, the Malaysian embassy in Rome covers Tunisia while the Tunisian embassy in Jakarta handles dealings with Malaysia. (NST and STAR 27-05-94)

DISARMAMENT AND ARMS CONTROL
See: Weapons

DISPUTE SETTLEMENT

Preventive diplomacy on the South China Sea
(*see:* 3 AsYIL 363)

A fifth workshop on the subject, particularly on resource assessment and development, was held in Jakarta in early July 1993. Officials from 10 Asian countries participated in their personal capacity. Agreement was reached on 4 possible areas of cooperation, among which fishery stock assessment under the coordination of Thailand and study of matters relating to non-hydrocarbon, non-living resources. (AALCCQB Jan-Apr. 93 p. 52)

DIVIDED STATES: CHINA

Invitation for Taiwan official to visit the mainland

China's semi-official Association for Relations Across the Taiwan Strait extended an invitation to the secretary-general of Taiwan's Straits Exchange Foundation, the first such an invitation since the rival governments held official talks in Singapore in April 1993. (IHT 20-07-93)

Increasing trade deficit of the mainland vis-à-vis Taiwan

China was reported to be concerned about the increasing trade deficit with Taiwan. Taiwan exports mainly industrial raw materials and spare parts and imports Chinese medicinal herbs and farm goods. The trade is conducted through Hong Kong on an unofficial basis. (IHT 09-08-93)

Chinese policy paper on Taiwan

On 31 August 1993 China issued a major policy paper ("white paper") on Taiwan (*The Taiwan Question and Reunification of China*), repeating its offer of peaceful reunification but also threatening that military force may be used if necessary to retake the island. The white paper underscored Beijing's opposition to UN membership for Taiwan, for which a campaign was on the way in Taiwan. These efforts were described by the paper as "an attempt to split state sovereignty". (IHT 01-09-93, FEER 16-09-93 p. 10, BR 1993 No.36)

Mainland-Taiwan talks

The first regular talks under the 1993 Joint Agreement (*see* 3 AsYIL 366) took place in late August 1993 and had on the agenda, *inter alia*, the repatriation of illegal Chinese immigrants and the harmonization of the two legal systems.

The talks broke down on 1 September without results. According to the Taiwanese side it pulled out of the talks because the Chinese side refused to negotiate in good faith, wanted to change the agenda and demanded the return of some Chinese hijackers who had recently commandeered civil aircraft to Taiwan. (IHT 02-09-93)

Further talks took place in November 1993 but again ended without formal agreements on how to handle the increasing problems of illegal immigration, fishing disputes and hijackings. With regard to hijacking Taiwan insisted to have the right to refuse repatriation in case of hijacking for political or religious reasons, in deviation of an existing agreement on repatriating criminals. With regard to fishing disputes, no agreement was reached on the setting up of mediation bodies because of Chinese fears that this would amount to recognizing Taiwanese sovereignty. As to repatriation of illegal immigrants from the mainland, the mainland side demanded that its officials be allowed to visit the emigrants before their repatriation, which the Taiwanese considered unnecessary. (IHT 08-11 and 20-12-93)

A new round of talks took place from 18 till 22 December 1993. The two sides agreed that hijackers be repatriated under the principles of humanitarianism, safety and convenience, but they remained divided on who should put hijackers on trial. The mainland side insisted that hijackers be returned within 15 days except in certain "special cases". (IHT 23-12-93) As to investment protection political obstacles appeared insurmountable since the Chinese government was unwilling to acknowledge the separate status of the government at Taiwan. But meanwhile China had unilaterally prepared new "special domestic investment rules" including specific guarantee and protection provisions for Taiwanese investments. (FEER 30-12-93/06-01-94 p. 14, 17-03-94 p. 15)

A new set of five days of high-level talks began on 31 January 1994. The agenda included renewed discussions on the hijacking issue as well as Taiwan's worries over an influx of undocumented immigrants seeking construction and household work on the island, and also the issue of a stronger legal framework for Taiwanese investments on the mainland. (IHT 01-02-94) As to the issue of putting hijackers on trial, the problem seemed to be the Chinese refusal to endorse any formal acknowledgement of the Taiwanese exercising criminal jurisdiction apart from Chinese jurisdiction.

Another round of talks took place in March 1994 without results. (FEER 14-04-94 p.18)

German refusal to sell arms to Taiwan

China thanked Germany on 11 November 1993 for curbing arms sales to Taiwan and virtually assured a reward in the form of contracts. (IHT 12-11-93)

Deportation of hijackers
(*see also*: Hijacking of aircraft)

The Taiwan authorities decided on 18 November 1993 that henceforth Chinese airline hijackers would be deported after they were convicted or after they had finished their jail terms. So far hijackers could stay in Taiwan after they had served their prison terms.(IHT 19-11-93)

Diplomatic/consular relations with Latvia

Latvia first established diplomatic relations with China in September 1991. Some months later it established consular relations with Taiwan. In a departure from its usual practice China continued to maintain its diplomatic relations. It appeared that from the Latvian side some disillusionment with Taiwan developed because of unfulfilled economic promises, while on the other hand China had become Latvia's leading trading partner in Asia. (FEER 13-01-94 p. 27)

Diplomatic relations with Burkina Faso

China suspended diplomatic relations with Burkina Faso in retaliation for the latter's resumption of ties with Taiwan after a 20-year break. Taiwan subsequently promised economic and technical assistance. (FEER 17-02-94 p. 13)

Taiwanese "vacation diplomacy"

Under the guise of a golfing holiday the Taiwanese president visited the Philippines, Indonesia and Thailand in February 1994. He met and held talks with the presidents of the Philippines and Indonesia in their "private capacity" and with one of the Thai deputy prime ministers. The talks concerned mostly economic and investment matters.

Both the Philippine president and the Thai prime minister reaffirmed adherence to a "one China" policy. China officially protested with the three countries against the visits, charging that the Taiwanese were trying to create "two Chinas" by establishing "substantive relations" under the guise of taking a holiday. (FEER 24-02-94 p. 18)

The death of 24 Taiwanese tourists

A tourist boat taking Taiwanese tourists in Zhejiang Province burst into flames on 31 March 1994. The disaster killed 24 tourists. In response Taiwan would not hold further talks with the Chinese side before it received full details of the event, demanded compensation from China for relatives of the victims (IHT 12-04-94) and said it would suspend cultural and educational exchanges and also China tours.

After some denials China acknowledged that the fire could have been caused by criminal acts and later three men were arrested, suspected of robbing and killing the 24 Taiwanese tourists and eight Chinese crewmen. As a result Taiwan decided to gradually resume the economic links with the mainland. (IHT 13,14,18 and 27-04-94) China explicitly ruled out army involvement in the murder of the tourists, contrary to suspicions from the Taiwan side. (IHT 11-05-94) The three men were convicted to the death sentence. (IHT 13-06-94)

DIVIDED STATES: KOREA

North-South talks
(*see also*: Nuclear capacity)

On 1 September 1993 North Korea proposed urgent talks with the South. It called for an exchange of special envoys to solve the nuclear issue. Previous negotiations had broken down in January 1993 over a dispute about nuclear inspections and the joint US-South Korea military exercises. In talks between North Korea and the US there had been tentative agreement on US assistance in the conversion of North Korean nuclear reactors for exclusively civilian use, but this, as well as further talks, was made conditional upon a resumption of North-South dialogue. (IHT 02-09-93)

The North Korean proposal was accepted by South Korea on 2 September 1993 (IHT 03-09-93) but the talks did not take place as the two sides could not agree on the date of meeting. (IHT 07-09-93) A breakthrough was achieved on 2 October when North Korea dropped several conditions, including a promise by the South to halt its joint military exercises with the US and a demand that South Korea pledge not to seek an alliance with the US and other countries to put pressure over the nuclear dispute. South Korea said it would propose to halt the war manoeuvres with the US if the nuclear dispute with North Korea could be solved and to exchange special presidential envoys. (IHT 04-10-93) The talks started on 5 October but ended inconclusively. It was then agreed to resume talking on 15 October. (FEER 14-10-93 p. 15)

Asylum for North Korean loggers from Siberia

North Korea threatened to retaliate against South Korea for offering political asylum to North Korean loggers who escaped from their work camps in Siberia. (FEER 26-05-94 p. 13)

EAST ASIA ECONOMIC CAUCUS (EAEC)

Status of EAEC in view of APEC

The invitation by the US president for a summit meeting of APEC government leaders in Seattle in November 1993 and Malaysia's reluctance to accept the invitation brought about a compromise within ASEAN, brokered by Singapore, to proceed with the East Asian Economic Caucus within the structure of APEC. It was subsequently reported that American concern about the EAEC had been "greatly eased" by the decision. Nevertheless, Japan and South Korea had declined an invitation to join the caucus and preferred to wait further clarification about its objectives and operating procedures.

The ASEAN foreign ministers in their joint communique following their meeting in July 1993 considered that the Caucus should get "support and direction" from the ASEAN economic ministers, "taking into account that the prospective members of EAEC are also members of APEC". Consequently "the Foreign Ministers agreed that the EAEC is a caucus within APEC". (IHT 28-07-93; ASEAN Documents Series 1992-1994 p. 12)

ECONOMIC COOPERATION AND ASSISTANCE

Development aid to India

Leading industrial countries associated in the India Consortium pledged $7.4 billion in aid to India which was $200 million more than last year. The increase came about as Japan unexpectedly raised its aid commitment. The decision showed the strong support given to India's moves towards a liberal economy. (IHT 3/4-07-93)

Japanese aid to Vietnam

Japan announced it would grant significant financial aid to Vietnam for public works before the end of 1993. (IHT 23-07-93)

Japan - Singapore

The two countries issued a joint statement announcing the establishment of a "Japan-Singapore Partnership Programme" (JSSP) starting in April 1994. Under the Programme the two states agreed to jointly provide resources and expertise to assist developing countries by increasing the number of joint training programmes to be conducted in Singapore and by other forms of collaboration. (A/49/71)

Clearing of Vietnam's arrears with the IMF
(*see also*: Debts)

France, Japan and 13 other states, calling themselves the "Friends of Vietnam", announced a financial package on 27 September 1993 to clear Vietnam's arrears with the IMF. This would pave the way for the Fund's executive board to consider loans to Vietnam. (IHT 29-09-93)

Japanese economic aid to Vietnam

After the US gave its approval to the World Bank and the ADB in July 1993 to extend credits to Vietnam, Japan pledged 60 billion yen in aid, consisting of 52 billion yen in loans, 6 billion in grants and 2 billion in technical assistance. (IHT 03-02-94)

Economic aid to Cambodia

The International Committee on the Reconstruction of Cambodia (ICORC) held a meeting in Tokyo on 10-11 March 1994. On the basis of an economic blueprint presented by the Cambodian government the 25 donor states and 10 international organizations pledged $490 million for 1994 and a further $271 million for 1995. (FEER 24-03-94 p. 47)

G-15 meeting

Seven out of the 15 heads of state and government of the so-called G-15 group of developing states, formed in 1989 on the initiative of the late Indian prime minister RAJIV GANDHI, met in New Delhi in late March 1994. The group includes India, Indonesia, Malaysia, Zimbabwe, Nigeria, Senegal, Argentina, Algeria, Brazil, Egypt, Jamaica, Mexico, Peru, Venezuela and Yugoslavia. A closing communique demanded the restructuring of the UN Security Council, the World Bank and the IMF in order to give an increased voice to developing states, and denounced efforts by Western states to use "environmental and social concerns" such as human rights pressures and condemnation of child labour to limit trading opportunities for poorer nations. (IHT 29-03-94, 01-04-94)

EMBARGO
See also: Sanctions

US export restrictions of advanced telecommunications gear to China

The US declined to lift COCOM restrictions in respect of the sale of high-speed telephone transmission switches by AT&T to China. The high-speed switch is able to handle four times as many conversations through a single fibre-optic cable than the older ones that can handle 2000 conversations simultaneously. Some industry officials speculated that the reason of the restrictions was that the new model would make it

more difficult for US intelligence to monitor Chinese military communications. (IHT 07/08-08-93, FEER 02-09-93 p. 9)

Dissolution of COCOM

The 17 COCOM (Coordinating Committee for Multilateral Export Controls, comprising all NATO member states except Iceland, Australia and Japan) participant states met on 16 November 1993 in the Netherlands to agree on the dissolution of the organization which was established during the Cold War to prevent the export of high technology to the Communist bloc. But the member states agreed to consult each other and restrict technology exports to areas of potential conflict. It was expected that the system would be replaced with a new one aiming at preventing the transfer of militarily useful technology to "countries of concern". The successor body was expected to include Austria, Finland, Ireland, New Zealand and Switzerland as well as a number of countries once on COCOM's list of target states. The Committee was actually abolished on 1 April 1994.(IHT 13/14-11-93, 5/6-03-94, 01-04-94)

With the disbanding of COCOM most US export controls on telecom and computer equipment were eliminated. Export would still be prohibited to countries classified as supporting terrorism. (FEER 14-04-94 p. 15)

Japanese enforcement of COCOM embargo against North Korea

The Japanese police raided companies searching for evidence of shipments of high-technology (electronic) instruments to North Korea. The equipment being investigated was considered "dual use" but one of the items, spectrum analyzers, which could be used to guide ballistic missiles, was alleged to be on the COCOM list of restricted technology. (IHT 15/16-01-94) North Korea, however, denied the purchase. (IHT 20-01-94)

In March 1994 it was reported that Japanese police had arrested two executives on suspicion of violating the Foreign Exchange and Foreign Trade Control Law (and COCOM rules) by exporting image-intensifier tubes containing strategic technology to China. The image-enhancers reportedly might be re-exported to North Korea. (IHT 29-03-94)

US embargo on Jordanian sale of F-5 fighter planes to Indonesia

The US refused to allow Jordan to transfer several US-made F-5 fighter aircraft to Indonesia."The combination of a number of sensitive issues in this case made approval impossible." These included human rights in Indonesia, particularly in East Timor as well as certain Jordanian practices. (IHT 09-08-93; FEER 26-08-93 p. 24)

US embargo on Indonesian sale of helicopters and warships to Iran

It was reported that the Indonesian Minister for Research and Technology had offered Indonesian-made helicopters under French licence for sale to Iran although he was allegedly bound by an agreement not to show some of the equipment involved. The

US president raised concerns about these reports when he met the Indonesian president on 7 July 1993 in Tokyo. (FEER 26-08-94 p. 24)

ENVIRONMENTAL POLLUTION AND PROTECTION

Fund for compensation of compliance with measures concerning the depletion of the ozone layer

At a conference held at Kuala Lumpur in July 1993 it was observed that the developed states had only contributed half of the targeted $240 million to an international fund set up in 1990 under the 1987 Montreal Protocol [on Substances that Deplete the Ozone Layer] to help developing states phase out the use of ozone depleting substances. (IHT 21-07-93)

Protected forest area in Malaysia for ITTO study

The Malaysian state of Pahang decided to declare a 437,000 hectare forest area in Rompin a protected area for the next 50 years in order to enable the International Tropical Timber Organisation (ITTO) to carry out a study on better forest management system for timber-producing countries. The study would be jointly undertaken by ITTO and the Malaysian government. (NST 09-09-93)

Trade in endangered species

The US had decided that China and Taiwan were violating the international ban on trade in rhinoceros horn and tiger bones. Under the so-called Pelly Amendment the government had 60 days to notify the US Congress whether trade sanctions would be applied. The Pelly Amendment is a wildlife-protection provision in US law targeting states which are violating international conservation programs. China denied accusations about its violations of the ban, but, responding to international pressures, both China and Taiwan announced new measures against illicit wildlife dealers.

The Standing Committee of the UN Convention on International Trade in Endangered Species of Wild Flora and Fauna called on states to consider stricter measures in the case of violation by China and Taiwan, including "trade sanctions in world wildlife products" and was scheduled to meet again in March 1994 to take a final decision. (FEER 30-09-93 p. 28) In March 1994 the Standing Committee commended China for progress demonstrated in meeting minimum requirements for controlling the illicit trade in tiger products, contrary to the US initiative to impose trade sanctions on China for allowing such trade. (IHT 26/27-03-94)

Dumping of radioactive waste in the Sea of Japan

In the joint declaration issued on the occasion of the visit by the Russian prime minister to Japan in October 1993, the Russian president and the Japanese prime

minister agreed that "the ocean-dumping of radioactive wastes raises a grave concern on a global scale."

A week later it was reported that a Russian navy ship had been dumping nearly 2,000 tons (other reports mentioned 900 tons, 31,000 cubic feet, 900 cubic meters, 1,200 cubic yards) of low-level radioactive waste in the Sea of Japan in October 1993.

According to Russian officials the liquid residue from cleaning and deactivating nuclear submarines contained radiation measured at only 2 curies. They added that international authorities were informed about the dumping two weeks previously. (IHT 18-10-93) According to later reports one (IAEA) of three international nuclear monitoring organizations (including the 1972 London Dumping Convention and the IMO) was informed; Japan denied having had advance notice and filed an official protest with the Russian ambassador, as did South Korea. On the other hand, Russia said it would keep dumping and announced that an additional 28,000 cubic feet would be dumped by 15 November. (IHT 19-10-93)

Yielding to protests from various sides Russia announced on 21 October 1993 that it had suspended plans to dump a second cargo. The announcement was, however, coupled with an appeal for financial help to speed construction of a nuclear waste-processing plant. If it took more than 18 months to build one, the navy might be forced to resume disposal of the waste at sea. (IHT 22-10-93) Russian officials said they had to store about 20,000 cubic meters of nuclear waste aboard aging ships for a year because the building of onshore storage sites was suspended in the 1960s. (IHT 20-10-93)

While it was disclosed by Russian officials that the former Soviet Navy had dumped 18 decommissioned nuclear reactors and more than 13,000 containers of radio-active waste between 1978 and mid-1993, Japanese officials admitted that Tokyo Electric Power Company was dumping ten times more radio-active waste each year into the Sea of Japan than the amount that the Russians got rid of in October 1993. (IHT 31-12/1-2-01-94)

Meanwhile a ban on the dumping of radioactive waste at sea under the London Convention came into force on 21 February 1994. (IHT 22-02-94)

Pollution by nuclear tests

Kazakhstan had appealed to China for joint efforts to clean up the area of Kazakhstan adjacent to the Lop Nor nuclear testing site in Western China. However, China disclaimed any responsibility on the grounds that Lop Nor was downwind of Kazakhstan. (FEER 16-09-93 p. 14)

Prosecution of tanker owner for sludge-dumping

Malaysia would prosecute Global Maritime Services Ltd. of London, the owner of the Liberia-registered tanker *Arabian Sea*, and the Singaporean cleaning contractor under its Environment Quality Act on charges of sludge-dumping, and under the Merchant Shipping Act and the Light Dues Act for not having obtained clearance to enter Malaysian ports and for not having paid light dues.

The tanker had been detained off Tanjung Piai, Johor, since 17 January 1994, for allegedly dumping between 600 to 800 tonnes of sludge into the Straits of Malacca en route to Singapore. The next day the Malaysian officials found 300,000 bags containing some 900,000 tonnes of sludge on board. Subsequently, nine navy divers discovered plastic bags of sludge scattered on the sea-bed around the detained tanker and traces of sludge were also found along the Johor coast. The tanker was released in late February after the tanker owner put up a RM500,000 bond and Singapore's Ministry of Environment consented to undertake the proper disposal of the sludge found on board in accordance with the provisions of the Basel Convention on the Transboundary Movement of Hazardous Waste to which both Malaysia and Singapore are parties. (NST 19 and 26-01-94, 05-02-94; STAR 19-01, 20-01, 26-01, 10-02 and 26-02-94)

ASEAN memorandum on oil spills

A Memorandum of Understanding on the ASEAN Oil Spill Response Action Plan (AOSRAP) to strengthen efforts to combat oil spills in the region was agreed and signed by most ASEAN member countries in May 1993 and in January 1994 by Malaysia. The Plan was made under the Japanese Oil Spills Preparedness and Response Project (OSPAR) and was in line with efforts of IMO to draw up an international convention on oil pollution preparedness, response and cooperation. (NST and STAR 06-01-94)

Danish eco-fund for Malaysia and Thailand

Denmark, the fifth largest investor in Malaysia amongst European Community states, set up a $25 million fund for pilot environment projects in Malaysia and Thailand. (STAR 20-01-94)

Asia as toxic waste dump

According to a report by Greenpeace, "The Waste Invasion of Asia", Australia, Canada, Germany, Britain and the US had shipped more than 5.4 million tons of toxic waste to Asia from 1990 to 1993, under the guise of recycling. The report said that waste traders had proposed to ship more than five million more tons to Bangladesh, Cambodia, China, India and Vietnam. (IHT 02-02-94)

Ecological wonder of the world

Bhutan, that largely lacked roads, electricity, hospitals, schools and a postal system until 1962, was labeled by the World Wildlife Fund as "one of the ecological wonders of the world", with 5,000 species of plants, 160 species of mammals and more than 770 types of birds, but the people of Bhutan suffered some of the highest poverty, infant mortality and illiteracy rates in the world. (IHT 06-04-94)

Class action on grounds of mining waste disposal

6,000 Papua New Guinean villagers filed a class action suit against Broken Hill Pty. (Australia) at the Supreme Court of the State of Victoria in Melbourne. The claim was 4 billion Australian dollars ($2.85 billion) based on the destruction of the villagers' way of life by the dumping of up to 100,000 tons of waste every day from the Ok Tedi gold and copper mine into the Ok Tedi River which resulted in an environmental catastrophe. (IHT 04-05-94)

Foreign waste disposal in Indonesia

After Indonesia had imposed an import ban on virtually all forms of hazardous and toxic waste the government was stuck with 260 unclaimed containers of waste in various ports in the country, with the countries where the containers originated from showing little inclination to take them back.

The Netherlands were the only country thus far to respond to an Indonesian request to consider taking the containers back by sending a mission to carry out an inspection. From the great number of containers that arrived from Rotterdam, only four were said to originate from Dutch companies, while the other containers were transshipments. (JP 14-05-94)

Japan's attitude toward a whale sanctuary

The International Whaling Commission decided on 27 May 1994 to create a whale sanctuary in Antarctica, permanently barring commercial hunting irrespective of an eventual lifting of the existing moratorium on whaling. Japan was the only country that voted against the measure. The sanctuary would not eliminate the exemption allowing Japan to catch a limited number of minke whales for scientific purposes. (IHT 28/29-05-94)

FINANCIAL CLAIMS
See also: Compensation

Compensation of Bhopal victims

It was reported that special claims courts, established as late as 1992 to distribute the $470 million damage settlement of 1989 (*see* 3 AsYIL 377), have so far only paid out $3.1 million. (IHT 14-09-93)

Settlement of Vietnam-US war claims

Vietnam and the US agreed to hold talks aimed at settling financial claims stemming from the Vietnam War. It was estimated that US claims against Vietnam would amount to about $250 million, mostly related to US investments in South Vietnam which were seized when the Saigon regime was defeated in 1975. Occidental

Petroleum Corp. was believed to be one of the largest claimants. The negotiations would also deal with the status of US government buildings seized after the war, including the American embassy, and Vietnamese assets frozen in the US currently valued at $290 million. (IHT 21-01-94, 03-03-94; FEER 03-02-94 p. 15)

Philippines-Westinghouse settlement
(*see* 3 AsYIL 377)

The Philippine president approved "in principle" an out-of-court settlement with Westinghouse Electric, under which Westinghouse would provide two 100-megawatt turbine generators worth a total of $49.5 million. (FEER 14-10-93 p. 75)

FISHERIES

Taiwanese driftnet-fishing

Despite a UN moratorium on driftnet fishing on the high seas Taiwanese fishermen were reported to be continuing to operate in the North Pacific and Indian oceans. Since Taiwan had banned driftnet fishing they frequently flew Chinese flags and operated from Chinese ports. (FEER 08-07-93 p. 22)

Sino-US driftnet agreement

China and the US signed an accord on joint inspection of boats suspected of using banned drift nets to fish in international waters. The agreement was intended to enforce the UN ban on certain types of driftnet fishing. (IHT 20-01-94)

Fishing by Vietnamese in Malaysian EEZ

The Malaysian Fisheries Department detained ten Vietnamese fishermen and seized their boat which was 20 nautical miles from Bachok in Kelantan on 4 April 1994 for intruding in the country's exclusive economic zone. The fishermen were remanded before being produced before the court. (NST 06-04-94)

FOREIGN INVESTMENT AND TRANSNATIONAL CONTRACTS

See also: Joint development and joint ventures, Territorial claims and disputes

Investment by Brunei in Vietnam

An agreement was signed in Brunei by a Brunei company and officials from the Vietnam State Committee for Cooperation and Investment on investment of $9 billion in Vietnam.(IHT 04-08-93)

Bidding for exploration of Indian oil and gas fields

In 1992 India decided to invite private-sector bids to develop 43 oil and gas fields. The US Enron power company was one of the applicants in a partnership with the Reliance Group of India. As regards the offshore fields, a consortium of Hyundai of Korea and the Indian steel and shipping group Essar Gujarat was considered to rank first with regard to two neighbouring oil fields: Mukta and Panna. For the Mid-Tapti and South-Tapti gas fields in the Gulf of Cambay (north of Bombay) the top bidder was believed to be BHP Petroleum (Australia). As to the Ravva oil field on the Bay of Bengal coast a subsidiary of Malaysia's state oil company Petronas, Carigali, was top bidder. (FEER 09-12-93 p. 66)

Singapore investments

The prime minister said that under a new strategy Singapore would probably invest 30 to 35 percent of its reserves, currently worth about $46 billion, in the emerging economies of the Asia-Pacific region over the next 10 to 15 years. Until recently, Singapore policy was to invest its national reserves in relatively safe investments and bonds in developed countries. (IHT 31-01-94)

Exploration of Chinese inland oil fields

In early 1993 five blocs in the Tarim basin in Xinjiang Province, Northwestern China, covering 72,000 square kilometres, were offered for foreign exploration. On 20 December 1993 Exxon Corp. of the US, Sumitomo Corp. of Japan and Indonesia Petroleum Ltd. (a Japanese company) signed a contract covering 14,475 square kilometres, 1,600 kilometres west of Beijing. Exploration was to begin in 1994, but oil production was not expected until the turn of the century. The basin had been excluded for foreign oil companies until 1993. (IHT 22-12-93, FEER 30-12-93/06-01-94 p. 87)

On 8 February 1994 another contract was signed with a consortium led by Agip SpA of Italy and consisting of Agip, Elf Hydrocarbures Chine, Japan Petroleum Exploration Co., Japan Energy Co. and Texaco China. On discovery of a commercial field the China National Petroleum Co. would be entitled to participate in developing the bloc up to 51 percent. (IHT 09-02-94) In March 1994 it was reported that a third bloc, measuring 15,000 square kilometres, would be awarded to an exploration joint venture led by British Petroleum. (IHT 16-03-94)

Exploration of East China Sea deposits

Esso China Ltd., a subsidiary of Exxon, entered into a contract with China National Offshore Oil Corp. to explore a 2,120 square-kilometre area east of Zhejiang province. (FEER 16-12-93 p. 59)

Malaysian-German joint venture in aircraft manufacturing

Dornier of Germany entered into a joint venture with Malaysian investors under the name of Dornier Seastar, for the manufacturing of seaplanes, holding 25% of the venture. (FEER 16-12-93 p. 59)

Exploration of Vietnamese offshore oil fields

A consortium of Mobil Corp. of the US, Nissho Iwai Corp. of Japan, Japan Exploration Co. and Indonesia Petroleum Ltd. were granted a 72.5 percent interest in exploring a block containing the Thanh Long structure that, according to some industry specialists, may contain more than 700 million barrels of oil. The Thanh Long field is near a disputed area in the South China Sea that China awarded last year to the Crestone Energy Corp. (IHT 22-12-93, FEER 02-09-93 p. 67)

Two weeks after the US lifted its trade embargo Kerr-McGee of the US obtained exploration rights off the coast by buying 35% of a block previously awarded to Cairn Energy of the UK and Secab of Sweden. (FEER 03-03-94 p. 57)

South Korean investment in Chinese refinery

It was reported that Ssangyong Oil Refining from South Korea and Saudi Aramco (which was owner of 35% of Ssangyong) were finalising an agreement with the Chinese government to build an oil refinery in the town of Qingdao. The project would involve $2 billion and be the largest South Korean investment in China so far. (FEER 27-01-94 p. 9)

Foreign investment in Vietnam

In the six years between 1987 and 1993 the State Committee for Cooperation and Investment licensed 863 foreign investment projects with a total approved capital of nearly $7.46 billion. (IHT 24-01-94)

Chinese participation in mining in Bangladesh

Bangladesh and China agreed to jointly mine coal in northwestern Bangladesh. (FEER 24-02-94 p. 83)

Railway contract in Korea

The Franco-British engineering joint venture GEC Alsthom and the Korean High-Speed Rail Construction Authority signed a letter of intent for a contract of $2.05 billion on the equipment of a line of 270 miles between Seoul and Pusan. South Korean companies would receive orders accounting for at least half of the contract. (IHT 19-04-94)

General Electric investment in China

It was reported that General Electric intended to invest $500 million in China over the next three to five years, including the establishment of up to 7 major new enterprises. (IHT 10-05-94)

Transfer of technology

Although still keen to attract foreign investment, China is clearly beginning to demand greater technology transfer from industrialized countries. (IHT 14/15-05-94)

GENERAL AGREEMENT ON TARIFFS AND TRADE

Chinese participation

In March 1994 China announced that it would remove all quota and licensing barriers on imports by 1997. Earlier it had promised to cut by two-thirds its list of more than 50 import items subject to quotas and licenses. (IHT 31-03-94)

A senior US official said on 12 April 1994 that China would be unlikely to meet the conditions set by the US for it to join the GATT in 1994 although the US was not seeking to hold up China's application because of human rights considerations (but this was questioned by others). Although formally, for China to join GATT, it would have to satisfy requirements set by a working party of GATT members, in practice it would be up to the US to decide on China's application.

The American conditions were: (1) more complete disclosure of quotas, procedures and other trade regulations; (2) reform of the foreign exchange system to make the Chinese currency freely convertible; (3) guarantees that China would be able to enforce GATT regulations throughout China, not just at the central government level; (4) assurances that foreign companies operating in China will receive the same treatment as domestic businesses.

Besides, Europe and the US demanded special safeguards against a surge in imports from China after its entry into GATT. This would in fact restrict Chinese exports to Europe and the US, meaning a negation of GATT's perceived benefits. Another objection was concerned with Chinese retaliation against companies from particular countries.

China took the view that it is a developing country and that it should not be required to undertake more obligations than those commensurate with the status of a developing country. The GATT allows for such distinctions but it was said that Chinese practices did not even match those of the average developing states. Besides China's rising importance in world trade made it more difficult to plead for special exemptions. (IHT 13-04-94, 14/15-05-94; FEER 17-09-94 p. 43)

Compromise on linkage of trade with labour issues

A compromise was reached between the US and developing countries on the former's and French demand to link labour rights with trade issues, thus enabling the signature of the Final Act of the Uruguay Round of GATT to proceed in April 1994. France and the US see the advantages for countries that export cheap goods thanks to poor working conditions as unfair advantages. According to countries with developing export economies the issue was an excuse for protectionism. The US Trade Representative said: "Enforcement of international labour standards helps to maintain support for trade liberalization in developed countries by assuring them that they do not have to compete with exploited workers and by assuring them of expanding markets abroad." (IHT 08-04-94)

HIGH SEAS
See also: Immigration and Emigration, Piracy

The "Yin He" incident

US warships and military aircraft obstructed the Chinese cargo ship *Yin He* which had departed from a Chinese port on 15 July 1993 and was bound for the Middle East, on suspicion that it was transporting chemicals which were ingredients of mustard gas and nerve gas, to Iran. According to US officials the ship dropped anchor in international waters near Iran "under nearly continuous US air and naval surveillance". The US had been trying for two weeks to verify the cargo. Since 23 July the US, on the basis of intelligence reports, made several representations with China, accusing the ship of carrying two chemicals as chemical weapon precursors bound for Iran and demanding that the ship be recalled to its port of departure. China denied the export of the chemicals in question and said that the ship had only paper goods, hardware and machine parts on board. Most of the 2,500 containers on the ship were not bound for Iran. About 560 were destined for unloading in Dubai and some of these were for transshipment to Iran. China filed a strong protest with the US embassy on 7 August 1993 and on 11 August accused the US of shadowing and hampering the ship which was compelled to stay adrift on the high seas for more than 20 days and allegedly got into distress. The US, however, denied that it had detained or threatened the ship. It asked China to prevent the ship from reaching Iran and to order it to submit to inspection in a port with US participation, but was unable to persuade any of several Arab countries to allow the ship to dock for inspection. The Chinese proposed that the *Yin He* be allowed to dock at its first port of call and that officials from China and that country jointly inspect the cargo to see if there are chemicals. (IHT 09, 11, 12, 17 and 18-08-93, FEER 26-08-93 p. 10; UN doc. A/48/477) Although the US initially insisted that the vessel be searched by the US navy, an agreement was finally reached under which the ship on 24 August headed for the port of Dammam in Saudi Arabia (IHT 25-08-93) to be inspected by a Chinese-Saudi team, with US officials as advisers to the Saudi side. The inspection of the cargo took place from 26 August till 4 September 1993, but the two suspected chemicals thiodiglycol and thionyl chloride were not found.

The inspection report of 4 September which was signed by the representatives of the three states, *inter alia*, read:
"2. The complete inspection of all the containers aboard the 'Yin He' showed conclusively that the two chemicals thiodiglycol and thionyl chloride were not among the ship's cargo.
3. The Government of the United States undertakes to inform the Governments of the countries on which the Chinese ship 'Yin He' had been scheduled to call of the results of this inspection and to seek to ensure the smooth entry of the ship into the ports concerned to unload its cargo." (UN doc. A/48/477; IHT 03 and 07-09-93)

Interference with shipping in the South China Sea

The International Maritime Bureau, a division of the International Chamber of Commerce, reported about the seizure of vessels and confiscation of their cargoes because of alleged smuggling by uniformed Chinese on what apparently were Chinese naval vessels. From May to December 1993 42 attacks had been reported and in 1994, until early March, already about twenty such attacks had occurred.

There were suspicions that the moves against ships in international waters were government-inspired and linked with the territorial dispute over the Spratly Islands or that it was a matter of the Chinese government being powerless to stop an upsurge of lawlessness in the coastal regions, but many questions remained. Chinese customs authorities were not involved and no judicial action had been taken against the owners or captains of any of the captured ships. While captains had reported having to pay fines for the release of their vessels, the IMB ascertained that receipts for the fines were not official Chinese documents.

According to the chairman of the IMO Safety Committee, China had denied the reports about involvement of official Chinese agencies. On 14 April 1994, however, China announced that its off-shore patrols would open fire on any ship suspected of smuggling which refused to let its cargo be examined or tried to escape. This right to inspect ships was said to be claimed not only in the Chinese national waters, but also in undefined "adjacent zones". (IHT 11-01-94, 10-03, 17-3, 18-03-94, 15-04-94; FEER 16-06-94 p. 22)

HIJACKING OF AIRCRAFT

Chinese aircraft hijacked to Taiwan

In the period from April 1993 till March 1994 there had been eleven cases of hijacking of Chinese aircraft to Taiwan. In all these cases the plane with passengers resumed its flight while the hijackers were arrested and brought to trial. On 6 April 1994 one of the hijackers was sentenced in Taiwan to ten years in prison, in an attempt to end the spate of hijackings. Yet the court showed leniency because the man had surrendered to the Taiwan authorities. (IHT 11-08-93, 6/7-11-93, 09-11-93, 13/14-11-93, 13-12-93, 07-04-94)

HONG KONG

The Preparatory Work Committee of the Hong Kong Special Administrative Region

Chinese officials promised on 1 July 1993 that the Committee which was formed by the Chinese government has the sole task of preparing a smooth transfer of power in 1997 and would not interfere with British administration of the colony before that time. The Committee is made up of 57 Chinese and Hongkong public figures under the chairmanship of the Chinese Foreign Minister and held a session in Hongkong for the first time in May 1994. (IHT 02-07, 10-12-93, 06-05-94)

Preparation of Chinese forces for Hong Kong

For the first time the Chinese government disclosed its military plans for Hong Kong in 1997. It was reported by a senior Chinese military official that specially trained units would be deployed. (IHT 17/18-07-93)

Sino-British talks on democratic reform

After many rounds of talks without progress the Chinese side said that "if an agreement can not be reached there will be no 'through train'", referring to the continuation of existing political institutions beyond 1997. (IHT 27-09-93) Despite Chinese warnings that unilateral changes were unacceptable, the Hong Kong government decided to end the eight-month deadlock in negotiations and to introduce the bill in the legislature later in December. (IHT 01 and 03-12-93) The bill was expected to comprise a limited package of reforms, leaving the door open for negotiations on more sensitive aspects. (IHT 02-12-93) China responded by stating that any election reform enacted by Hong Kong's legislature without its approval would be overturned after the colony's reversion to Chinese sovereignty in 1997. (IHT 4/5-12-93)

The "Democratic Reform Bill", a stripped-down version of the original proposals, included the lowering of the voting age to 18, abolition of government-appointed local council members, establishment of a system of one legislator per constituency for the 20 seats to be chosen by direct election, and allowing local members of China's parliament to run in Hongkong elections. It was approved by the Legislative Council on 24 February 1994.

A second bill, much more controversial, was introduced on 25 February and went to the legislature on 9 March 1994. It dealt with the size of nine new functional constituencies, electorates organized along professional and trade group lines that cover most workers, and the composition of an electoral committee that would select ten legislators in the 1995 elections. The bill was endorsed by the Legislative Council on 29 June 1994.

On 24 February 1994 a British government report was released, containing the British version of the dispute with China and the breakdown of the negotiations in November 1993, but the Chinese side accused Britain of concealing details of the talks.

(IHT 11/12-12, 16-12-93, 21-02, 23-02, 24-02, 25-02, 26/27-02, 28-02, 10-03, and 30-06-94)

The airport issue
(*see* AsYIL Vol. 1 p. 303, Vol. 2 p. 321, Vol. 3 p. 383)

Under a pact of September 1991 Britain had agreed to seek approval from China for financing the projected complex of a new airport, seaport and commuter railway. As discussions had since derailed the Hongkong government asked the Legislative Council for the disbursement of an amount of more than 200 million US$ to keep construction going for another few months.

China responded strongly, saying that all the [government] contracts associated with the new airport project and approved by the Hong Kong British authorities without the consent of the Chinese side will not be valid after 1 July 1997. The statement said that the current financial plan would leave the post-1997 government with a debt of more than $5.8 billion, which was nine times the total debt limit China and Britain had set in 1991. The Chinese side took the reference to "government debt" in the September 1991 agreement to include debt to be raised by two independent - but government-owned - Hongkong corporations. (IHT 14, 26 and 29/30-01-94)

In March 1994 China said that the cost increases on the project violated the Sino-British Memorandum of Understanding of 1991 on the matter, but the British side announced on 2 March that it would leave behind fiscal reserves of $15.5 billion, nearly five times the amount promised in the 1991 memorandum. (IHT 18-03-94) Both parties announced on 24 June 1994 that they had begun drafting an agreement that would end their dispute over the funding of the airport. (IHT 25/26-06-94)

Emigration flow

The flow of emigration to Canada was declining as indicated by a reduction in the rate of new visa applications. This rate fell ten percent in 1993. Since 1987, about half of all Hongkong emigrants have gone to Canada. (IHT 23-02-94)

Issue of banknotes

On 2 May 1994 the Bank of China in Hong Kong started to issue Hong Kong dollar banknotes. Until then banknotes had only been issued by the (British) Hongkong and Shanghai Banking Corp. and the Standard Chartered Bank. The Bank of China would initially issue 3 billion Hongkong dollars ($385 million) in 1994, or 4 percent of the banknotes in circulation. (IHT 03-05-94)

HUMAN RIGHTS
See also: Aliens, Labour, Sanctions

China's view on regional arrangements for the promotion and protection of human rights

In its reply of 23 July 1993 on a request by the UN Centre for Human Rights, the Chinese government observed, *inter alia*:
"(a) There is no fixed model for each regional human rights machinery. In proceeding [with] international human rights cooperation and making regional arrangements for the respect and protection of human rights, the reality of the region should be considered and practices of other regions should not be followed blindly. The Asian and Pacific region has huge populations and vast territories. The historical and cultural background, the social system, values and levels of economic development in each of the countries have their own characteristics. Only by taking proper measures based on the regional situations and demands of all peoples can it be truly conducive to the enhancement of the level of human rights enjoyment in the region.
(b) The establishment of the regional human rights machinery should fully respect the wills of all the countries in the region and be decided by all the Governments through consultation. In this process, the practice of imposing outside pressures or forcing one's own will on others can only produce negative impacts.
(c) The establishment of the regional human rights machinery should have a long-term and full preparation and be accomplished progressively without any unnecessary haste. In the Asian and Pacific region, all the countries may continue to strengthen the exchange and cooperation among them on the basis of mutual respect and full equality, and create conditions for regional human rights protection through contacts with countries both outside the region and related United Nations organs as well." (UN doc. E/CN.4/1994/40)

ASEAN stand on human rights

In the joint communique following the 26th Ministerial Meeting in July 1993 the ASEAN foreign ministers stressed that human rights are interrelated and indivisible, comprising civil, political, economic, social and cultural rights, that they are of equal importance, and that they should be addressed in a balanced and integrated manner. The communique emphasized that human rights should be "protected and promoted with due regard for specific cultural, social, economic and political circumstances" and that the promotion and protection should not be politicized.

Further, the foreign ministers noted in the communique that the UN Charter had placed the question of universal observance and promotion of human rights within the context of international cooperation, and stressed that the use of human rights as a conditionality for economic cooperation and development assistance is detrimental to international cooperation and could undermine an international consensus on human rights. It was emphasized that the protection and promotion of human rights in the international community should take cognizance of the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states.

The ministers gave expression of their conviction that freedom, progress and national stability are promoted by a balance between the rights of the individual and those of the community, through which many individual rights are realized.

While the considerable and continuing progress of ASEAN in freeing its peoples from fear and want, thus enabling them to live in dignity, was reviewed with satisfaction, the ministers stressed that the violation of basic human rights must be redressed and should not be tolerated under any pretext. (ASEAN Documents Series 1992-1994 p. 12)

Singapore rejects US standards of human rights

During his visit to Singapore for the ASEAN Post-Ministerial Meeting in July 1993, the US Secretary of State said, *inter alia*: "Some have argued that democracy is somehow unsuited for Asia and that our emphasis on human rights is a mask for Western cultural imperialism. They could not be more wrong. The yearnings for freedom are not a Western export; they are a human instinct." In a memo directed to the US charge d'affaires which was not considered a formal protest Singapore rejected the US call and said that the US stance on human rights was deluded. (IHT 06-08-93)

UN resolutions on human rights in Iran and Myanmar

By initiative of the UN Commission on Human Rights the UN General Assembly expressed itself about the human rights situation in Iran (res. 48/145) and Myanmar (res. 48/150). In the first case the General Assembly, *inter alia*, expressed deep concern at continuing reports of violations of human rights and the continued excessive use of the death penalty. It urged the Iranian government to refrain from activities against members of the Iranian opposition living abroad. In the case of Myanmar the General Assembly, *inter alia*, deplored the continued violations of human rights, urged the Myanmar government to "take all necessary steps towards the restoration of democracy in accordance with the will of the people as expressed in the democratis elections held in 1990", and strongly urged that government to release unconditionally and immediately AUNG SAN SUU KYI. (UN doc. A/RES/48/145 and A/RES/48/150)

Red Cross access to Chinese prisoners

China announced on 9 November 1993 that it was ready to discuss allowing the International Committee of the Red Cross access to the more than 3,000 political prisoners. On 15 October 1993 the Chinese minister of justice had stated that of the 1.2 million inmates in Chinese prisons, 0.3 percent, or about 3,600, had been convicted of "counterrevolutionary" offences. (IHT 10-11-93) The Red Cross responded by saying that it planned to contact China on its offer. (IHT 12-11-93) In January 1994 a first round of talks took place. (IHT 17 and 21-01-94)

Vietnam - US dialogue

Vietnam agreed to begin a dialogue with the US over allegations of human rights abuses in Vietnam. (IHT 11-01-94)

IMMIGRATION AND EMIGRATION

Illegal Chinese immigrants to the US

Three ships off the Mexican coast with 659 Chinese nationals trying to enter the US were detained by the US Coast Guard in international waters in July 1993 to prevent them from reaching US territory where they could seek political asylum. On request of the US Mexico later accepted the US-bound ships in its port, out of humanitarian concern. The Chinese foreign ministry said that it was arranging their repatriation in consultation with Mexico. According to news reports the US would pay the costs. (IHT 16 and 19-07-93) Meanwhile officers of the US Immigration and Naturalization Service interviewed the migrants and were to take to the US those who would seem to have legitimate claims as political refugees. (IHT 17/18-07-93)

It was reported in November 1993 that illegal Chinese immigration had all but dried up, despite tougher immigration measures in the US and cooperation of the Chinese government by way of intercepting ships, imprisonment of smuggling ring leaders, the publicizing of the problems facing the immigrants upon arrival in the US and putting up government posters warning of the dangers of the voyage. China agreed to broadcast television programs, made by the US Information Agency, showing recent Chinese arrivals being jailed. China had also agreed to take back those who were deported. It was said by an American official that China's attitude on immigration may be "the one bright spot" in the relations between the two countries. (IHT 02-11-93)

In March 1994 there were again reports of a freighter that had unloaded more than 100 illegal immigrants from China off the coast of Virginia. (IHT 08-04-94) In April 1994 the US Coast Guard intercepted a fishing trawler headed for California with more than 100 illegal Chinese immigrants aboard. This time too the ship was taken in custody while on the high seas. The Coast Guard boarded the ship, investigated allegations that the ship was operated by a Chinese smuggling ring and were prepared to arrest crew members and remove them from the ship before it would enter the territorial waters of Guatemala, which had agreed to let the ship land in order to have most of the passengers sent home. (IHT 30-04-94)

Migrants from Myanmar and Indochina in Thailand

It was reported that by the end of 1993 there were some 400,000 foreign settlers from Myanmar and Indochina in Thailand, constituting a dilemma for the government.

According to a report by the Internal Security Operations Command the first flood consisted of 48,000 Vietnamese who arrived around 1945-46 from North Vietnam (followed by another inflow in 1954) and who settled in northeastern Thailand. They

play a substantial part in the agricultural economy and some 4,000 have already been given Thai nationality.

Since the end of the Vietnam War until September 1993 a total of 757,531 displaced persons arrived from the three Indochinese countries. Most were resettled in third countries, but others were returned to their countries of origin. A separate group were the 370,000 Cambodians who crossed the border in the years following the Vietnamese invasion of Cambodia, most of whom were repatriated in 1992-1993. Currently remaining in Thailand were some 32,000 immigrants from Laos among whom were 28,000 hill tribe people, some 11,600 Vietnamese and 115 Cambodians.

At Thailand's western border there were over 340,000 illegal Myanmarese immigrants: some 47,000 who crossed the border for political reasons before 1976, 33,000 who came for economic reasons after 1976, 60,000 who fled border fighting between government forces and ethnic minority rebel groups since 1984, 200,000 illegal workers and 2,500 students seeking political sanctuary. (FEER 16-12-93 p. 27)

Illegal immigrants in Malaysia

The Malaysian Marine Police announced on 11 January 1994 that henceforth boats bringing in illegal immigrants would be stopped at sea and ordered to return to their port of origin. (NST 12-01-94)

INSURGENTS

See also: Civil war, Specific territories within a state

Muslim separatists in Southern Thailand

It was reported that Thai Muslim guerillas had been active again in August 1993 in Narathiwat Province in Southern Thailand, bordering on Kelantan State, Malaysia. A separatist movement, the Pattani United Liberation Organization, has been in existence for the past two decades. Its goal is independence for Thailand's four Muslim-majority southern provinces. Although the Malaysian government has never condoned Muslim activism in southern Thailand, the opposition Islamic Party, which controls Kelantan, has long been suspected by the Thais of supporting the radical Thai Muslims. (FEER 02-09-93 p. 20, 16-09-93 p. 12)

Thai-Malaysian arrangement for Malaysian insurgents

Under an accord of December 1989 between Communist Party of Malaysia insurgents and the Malaysian and Thai authorities the insurgents agreed to lay down their arms and to become Thai citizens. They were provided several living compounds in the southern Yala province of Thailand. (FEER 30-09-93 p. 30)

Talks between Philippine government and insurgents

The Philippine government and the Moro National Liberation Front (MNLF) which strives for autonomy in the southern island of Mindanao, held their first formal talks since the 1970s in Jakarta from 25 October till 7 November 1993 and reached agreement on some issues. Among them was an interim cease-fire agreement. (IHT 08-11-93, FEER 04-11-93 p. 15) A second round of talks took place in the town of Patikul in the Muslim-dominated Sulu island on 20 December 1993. On 26 January 1994 a cease-fire agreement was signed in Manila. (IHT 27-01-94; FEER 30-12-93/06-01-94 p. 15, 10-02-94 p. 13)

Later talks in the spring of 1994 failed to produce any concrete results. The MNLF stuck to the so-called Tripoli agreement, which was entered into by the government of the late president MARCOS and the MNLF in 1976 and under which the government had committed itself to undertake steps that would give autonomy to 13 predominantly Muslim provinces in Mindanao. (FEER 26-05-94 p. 12)

Vietnam agreed to host peace talks in Ho Chi Minh City between the Philippine government and the National Democratic Front, whose armed wing had been waging war for more than two decades. (FEER 23-09-93 p. 14)

End of civil war between Myanmar government and rebels

Peace talks had begun in late 1991 between the government and the Kachin rebels and were suspended in the summer of 1993 to persuade other groups (Karen and Mon) in the ethnic umbrella organization, the Democratic Alliance of Burma, to join the talks. (FEER 26-08-93 p. 9) As the other groups set conditions for talks that were unacceptable to the government, however, an agreement was finally reached between the government and the Kachin rebels (Kachin Independence Army), the strongest insurgent force, in October 1993. A final peace agreement was signed on 24 February 1994. (IHT 08-04-94; FEER 19-05-94 p. 28)

Apart from the Karen rebels and a few scattered bands of dissident students and other opponents of the government, only the Karennis and the Mon rebels in the south would be the remaining challengers of the government. (FEER 21-10-93 p. 32) Preliminary peace talks between the government and the Karen rebels started in the Karen state capital Pa-an. The Karens claimed to act on behalf of the Democratic Alliance of Burma, but the government insisted to make separate deals with individual ethnic rebel groups. (FEER 20-01-94 p. 15)

Under Thai pressure the Mons were the first group along the Thai border to strike a deal with the government in December 1993, followed by government negotiations with the Karenni Nationalities People's Liberation Front on 9 February 1994 near the Karenni state capital of Loikaw.

Various components of the defunct Communist Party, mainly Wa and Kokang Chinese, had made peace with the government in 1989, and later rebel groups from the Shan, Palaung and Pa-O national minorities also concluded cease-fire agreements. (FEER 17-03-94 p. 14)

The Democratic Alliance of Burma basically advocates a modified version of the federal system that existed before the first military coup in 1962. The government, on

the other hand, wants a system similar to the Chinese one: let the minorities do what they like within their respective areas as long as they do not interfere with national politics. (FEER 27-01-94 p. 20)

It was reported in January 1994 that the Myanmar army had launched a major offensive against the Mong Tai Army (MTA) of KHUN SA, who controls the drug production and trade in the so-called Golden Triangle area. The MTA is based in the Shan state in Myanmar along the Thai border. (FEER 20-01-94 p. 22)

Indonesian-East Timorese talks

The Indonesian government held its first reconciliation talks with East Timorese who are opposed to Indonesian rule in mid-December 1993. The talks took place near London. (FEER 30-12-93/06-01-94 p. 15)

Bangladesh

The government of Bangladesh and the Shanti Bahini tribal guerilla movement which demands autonomy for the Chittagong Hill Tracts held a seventh round of peace talks on 5 May 1994. (FEER 12-05-94 p. 13)

INTELLECTUAL PROPERTY

New Thai legislation

In an effort to convince the US of Thai sincerity about protection of intellectual property the Thai government approved amendments to the country's copyright law to cover computer software, rental rights and performers' rights. The US had long been considering Thailand as one of the biggest violators of intellectual property rights. (IHT 15-07-93)

Pierre Cardin and Levi Strauss sued by counterfeiters

An Indonesian company which had been making copies of Cardin and Strauss products and had registered these and other trade marks was able under a new law to claim that after registering the trademark first it was entitled to sole use. Pierre Cardin and Levi Strauss & Co. were sued in two Indonesian court cases in September 1993. (IHT 01-10-93)

Violation of US intellectual property rights in China

It was estimated that US entertainment companies were losing about $800 million each year as a result of Chinese pirating of recordings and computer software. The US was considering to designate China as a "priority" violator of intellectual property rights which would lead to sanctions under the so-called Super 301 provision (*see* 2 AsYIL 334) in the form of restrictions on selected Chinese exports to the US. (IHT 29-

04-94) Finally, however, the US decided to delay action till 1 July, well after the decision on China's MFN-status. (IHT 02-05-94) In view of this deadline China published a white paper on 16 June 1994 defending its intellectual property safeguards. (IHT 17-06-94; FEER 30-06-94 p. 13) Although China implemented a copyright law in 1991 the law was not enforced effectively. (IHT 27-06-94)

INTER-STATE RELATIONS: GENERAL ASPECTS

North Korea - US

On 12 July 1993 North Korea handed over to US officials the remains of 17 American soldiers killed in the Korean War. It was the largest such return since the end of the 1950-53 war and was seen as a goodwill gesture to the US on the eve of the scheduled resumption of US-North Korean talks on the nuclear weapons question. (IHT 13-07-93) The gesture was repeated on 26 November 1993 when it was announced that the remains of 33 American soldiers would be handed over. (IHT 27/28-11-93)

Calls for economic sanctions against North Korea in case of its defiance to demands concerning its nuclear program had led to North Korean threats to suspend the Korean armistice. In view of the North Korean military capabilities the senior American commander in Korea, with the support of the US Defense Department, had requested the dispatch of Patriot anti-missile batteries to South Korea.

Besides there were reports of new US approaches in the event of a North Korean attack on the South. Rather than simply driving the North's troops from South Korea, the new plan provides for a fierce counteroffensive intended to seize the capital Pyongyang in the hope of toppling the government. (IHT 26-01, 07-02-94, 03-03-94)

Japan - United States/Russia

In a speech on the occasion of the anniversary of the founding of the Japanese ministry of foreign affairs the Japanese foreign minister expressed his feeling that the US and Russia had started to gang up on Japan after the end of the Cold War. He emphasized the necessity of Japan establishing independent diplomacy. (IHT 13-07-93)

Pakistan - US

The US decided not to place Pakistan on the American list of countries sponsoring international terrorism. The decision was based on Pakistan's response to US concerns about reported Pakistani support for Kashmiri militants. (IHT 16-07-93) The two countries held talks in November 1993 but little progress was made on the subject of nuclear non-proliferation. Pakistan refuses to sign the NPT unless India also does so. Another subject of discussion was the Indo-Pakistani dispute over Kashmir. (IHT 09-11-93)

North Korea - Israel

Contacts with Israel began in early 1993 and up to August there had been three meetings between officials of the two countries. Israel said it had agreed to the talks in the hope of persuading North Korea not to sell Rodong-I ballistic missiles to Iran. North Korea had proposed Israeli investment in a gold mine project and later expressed interest in more general economic cooperation.

The US had urged Israel not to establish diplomatic relations with North Korea. In August it was reported that the US had conveyed fresh reservations to Israel about Israeli talks with North Korea, warning that such contacts could help ease the international pressure on North Korea to stop building a nuclear weapon. In light of the US complaint Israel decided to suspend the contacts and leave it to the US to press North Korea to halt missile sales.(IHT 16 and 17-08-93)

China - Vatican

The Chinese News Agency quoted a Foreign Ministry spokesman who said that China was willing to improve links with the Vatican provided the latter cut its diplomatic ties with Taiwan and refrain from interfering in China's internal affairs. Formal relations were broken off in 1950 when the Vatican maintained ties with the Taipei government.

The existence of indirect contacts was confirmed by the Vatican. (IHT 21/22-08-93) In September 1993 a cardinal *cum* senior diplomat of 70 years was delegated to China at the invitation of the organizers of the Chinese National Athletic Games, but there would also be meetings with "government personalities". (IHT 03 and 4/5-09-93, FEER 16-09-93 p. 15)

China - India

The Indian prime minister paid an official visit to China in September 1993. During the visit four agreements were signed: on an interim border arrangement, increased cooperation on the environment (trade in endangered species), exchange of radio and television programs, and on border trade, including the opening of a second border crossing point.

In the "peace and tranquility" agreement on the Sino-Indian border the two countries agreed to respect the line that divided their forces along their disputed frontier. A newly formed bilateral team of experts would delineate that line. The agreement represented a milestone on the way to an eventual boundary settlement. China claims nearly 90,000 square kilometres on the eastern sector of the border and claims and controls some 33,000 square kilometres of the western sector in the Indian state of Jammu and Kashmir, and had long proposed a straightforward swap. The two parties also agreed to reduce their forces along the border but it remained to be determined whether the reduction would be a one-for-one cutback or an adjusted ratio.

The Indian prime minister reiterated that India regards Tibet as an integral part of China and that sanctuary was granted to the Dalai Lama on humanitarian, not political grounds. He raised the topic of Chinese arms flowing into Myanmar and the build-up

of naval facilities there. He also voiced concerns about Chinese sales of missiles and nuclear technology to Pakistan.

"Points of convergence" discussed included environmental concerns, human rights, non-discriminatory access to technology and a new world order responsive to the needs of developing countries. (IHT 08-09-93, FEER 16-09-93 p. 13)

Cambodia - Vietnam

The co-prime ministers of the provisional Cambodian government visited Vietnam in late August 1993 and the talks were concluded by a joint communique on 25 August 1993. The two sides decided not to dicuss divisive issues. One such issue was the fate of some 30,000 ethnic Vietnamese who had fled to Vietnam earlier in the year after the massacre of a number of them. (3 AsYIL 354) The Cambodian side said that a technical committee would be set up to study the problem, and that security inside Cambodia had to be provided before the return of the Vietnamese could be considered.

Another contentious issue was that of the land and sea borders. Here again the two sides would establish technical committees. Cambodia believed that Vietnam had moved border markers in their favour during the 10-year occupation of Cambodia, and wished to restore the border as it existed as a result of the Cambodian-Vietnamese agreement of 1967 which pledged to use a French map of 1954. During the Vietnamese occupation the government at Phnom Penh concluded two further agreements with Vietnam in 1982/83 and 1985, but according to Vietnamese experts the 1983 agreement was also based on the 1954 map. (FEER 09-09-93 p. 13, 03-03-94 p. 13)

Thailand - Myanmar

It was announced that three border trading passes along the Thai-Myanmar border would be opened soon. (FEER 30-09-93 p. 14)

South Korea - Russia

The economic and political cooperation which was hoped for when diplomatic relations were restored in 1989 failed to materialize. The two main issues impeding progress were the suspension of Korean aid as a response to Russian tardiness in its payment of interest on previous loans and Russia's refusal to pay compensation for the victims of the Korean Air Lines plane shot down by the Soviet Union in 1983.

As an incentive for the opening of diplomatic relations South Korea had arranged $1 billion in bank loans. Of about $52.5 million in interest payment outstanding, only $12.5 million was settled by a delivery of aluminium ingots, causing South Korea to have to service the debt on behalf of Russia at a relatively high interest of 1.375 percentage points above the London interbank official rate (LIBOR). Russia had neither been forthcoming in interest payment on trade credits, being $15 million in arrears.

As to the Korean Air Lines incident, Russia had refused to say officially whether any bodies were recovered and stuck to its official position that it bore no responsibility as the KAL aircraft failed to respond to warning signals.

Another sticking point was the Russian demand that South Korea would pay compensation for the former Imperial Russian consulate land taken over in 1970. The Korean government agreed to pay the equivalent price of the old consulate site. The cost of providing a new Russian embassy site was estimated to be around $370 million. (FEER 07-10-93 p. 30)

Japan - Russia

The visit by the Russian president to Japan from 11 till 13 October 1993 brought the worsening of relations between the two countries to a halt. As regards the islands dispute, the President admitted that the "the issue exists and must be resolved some day." He apologized for the Soviet Union's "inhumane" treatment of 600,000 Japanese prisoners of war who were kept in Siberian labour camps after the end of World War II. On the other side any linkage between territorial questions and the extension of aid was rejected and instead a "parallel development" of political and economic relations was pursued. The two sides also agreed to have a regular six-monthly meeting of foreign ministers and to put new emphasis on a working party which had been discussing a peace treaty. No mention was made in the "Tokyo Declaration" of the implementation of a 1956 agreement in which the Soviet Union promised the eventual return of two smaller islands in the four island group. (FEER 21-10-93 p. 13)

Iran - India - China

In September 1993, the Iranian president launched the idea of an India-Iran-China alignment, mainly based on the assumed negative relationships with the West. The India-Iran equation harks back to the days of the Shah, when then prime minister INDIRA GANDHI persuaded the Shah of the virtues of political cooperation between two countries rich in potential which occupied strategic locations. (IHT 27-09-93, 21-10-93)

China - US
(*see also*: Immigration)

In order to halt the deterioration of the relations between the two countries, the US in September 1993 adopted a new and less confrontational policy towards China. The new strategy was set out in a classified presidential "action memorandum" and included the end of a freeze on high-level exchanges with China. As part of the diplomatic campaign the US Assistant Secretary of State for human rights and humanitarian affairs conducted talks in China in October 1993 on such issues as the release of political prisoners, Chinese policy in Tibet, the use of prison labour in goods for export, forced abortions and mandatory sterilization. In the same month the Secretary of Agriculture held talks in China, largely focusing on US demands that China lower tariffs and remove remaining trade barriers, including a ban on wheat imports from seven US states because of a fungus, commonly known as TCK. There were also visits by the Treasury Secretary and the Assistant Secretary of Defense. (IHT 13-10-93, 21-10-93) In late October 1993 the US announced a visit by the Assistant Secretary of Defense and the topics to be discussed. These included regional security problems, international

peacekeeping, US concerns about Chinese weapons exports, and the conversion of military factories to civilian production. (IHT 30/31-10-93, 01-11-93)

On 11 March the US Secretary of State came to China for his first visit, to prepare his assessment of whether China had fulfilled American conditions for the extension of MFN status. The visit took place in a frosty atmosphere because of recent arrests of dissidents. (IHT 12/13-03-94) Trying to avoid an open conflict the Secretary of State offered China routine extension of MFN status if China were forthcoming at all. He said that future conditions on the trading status could be set in general, rather than specific terms. Before 1989 MFN-status was granted without debate, although China's repressive practices were, if anything, tougher than now. The Secretary alluded to the importance of the 1989 crackdown which "put the Congress and the American people in quite a different frame of mind about China". (IHT 12/13-03-94)

The US demand for improvement of China's human rights performance was, however, dismissed as meddling in China's internal affairs. (IHT 14-03-94) Yet on the accounting for political prisoners the American side received much information on 235 specific cases presented by the US in 1993 and China pledged to provide detailed information about 106 Tibetan prisoners. The two sides also reaffirmed their agreement reached in January on allowing US customs officers into Chinese prisons to ensure that their factories were not making products for export to the US. China also promised to investigate reports about jamming of the Voice of America and to start technical talks soon with the ICRC on inspections of Chinese prisons. (IHT 15-03-94)

On 28 April 1994 the US Congress passed the Foreign Relations Appropriations Act which ended the 1982 commitment vis-a-vis China to reduce arms sales to Taiwan, provided for a US Information Agency in Tibet, called on the State Department to list Tibet as a separate state, and created a Radio Free Asia to broadcast US programs to China, Tibet, North Korea and Indochina. China filed an official protest. (IHT 06-05-94)

Indonesia - Israel

The Indonesian president and the Israeli prime minister met for the first time on 15 October 1993 during a stop-over by the latter in Jakarta on his way home from China. Formally the Indonesian president received his Israeli guest in his capacity of chairman of the Non-Aligned Movement. (FEER 28-10-93 p. 28)

India - US

India accused the US of abandoning its evenhanded policy on South Asia to favour Pakistan in the dispute over Kashmir. This accusation was caused by remarks by a senior official in Washington which were quoted as follows: "We view Kashmir as a disputed territory and that means that we do not recognize that Instrument of Accession as meaning that Kashmir is forever more an integral part of India." The last time that India accused the US of favouring Pakistan was before the last of the three Indian-Pakistani wars, which led to Bangladeshi independence in 1971. (IHT 01-11-93)

Early April 1994 the US Deputy Secretary of State visited India to eliminate existing tensions and to boost economic ties. It was widely known that US concerns

about nuclear developments at the subcontinent would be taken up in the discussions with India and with Pakistan (*see infra*: Nuclear capacity) which was also on the itinerary. (IHT 04 and 07-04-94)

Laos - Thailand

Relations between the two countries improved lately due to a combination of much-needed Thai investment, a Thai foreign aid scheme and the genuine hand of friendship offered by the Thai King and Royal Family. The relations had been soured by centuries of distrust, the closure of borders a decade ago and bloody border clashes in 1988.

A concrete Thai move to dispel Lao distrust had been the periodic arrest and deportation over the past two years of US-based, anti-government Lao groups organizing armed incursions into Laos from Thailand. The groups operated with assistance of some of the 35,000 Lao refugees still in Thailand, and, prior to 1991, with Thai military support. (FEER 04-11-93 p. 33)

Iran - US

The US criticized the European Community in late 1993 for allowing some of its members to break ranks and reopen trade and diplomatic ties with Iran. In the view of the US, Iran must remain quarantined until it changed its policies. In May 1994 the US Assistant Secretary of State for Near Eastern Affairs said that the US was using economic pressure to persuade Iran to change its policies, mentioning the blocking of Iran's debt-rescheduling efforts and its attempts to get new credits.

On the other hand Iran celebrated the 14th anniversary of the seizure of the US embassy in 1979. On that occasion the highest religious leader ruled out any chance of improving relations with the US and the parliamentary speaker said negotiations with Washington were "out of the question". (IHT 05-11-93, 09-05-94)

The president of Iran accused the US of reneging on secret assurances that Iranian assets frozen by the US in 1979 would be freed in exchange for Iranian mediation to gain the release of American hostages in Lebanon in 1991. According to the Iranian president the deal was reached by the intermediary of the UN Secretary General. Iran claims that more than $11 billion of its assets had been frozen by the US. The facts were that militant Lebanese groups released 10 Western hostages in late 1991, while in November 1991 the US and Iran reached agreement under which the US returned $278 million for military claims by Iran. (*see* AsYIL Vol. 1 p. 297, Vol. 2 p. 313) Moreover, the US government at that time issued a statement clearing Iran of involvement in the destruction of the Pan American aircraft over Scotland in 1989. (IHT 09-06-94)

Vietnam - China

The president of Vietnam made an official visit to China in November 1993, the first by a Vietnamese head of state since the one by HO CHI MINH in 1959. The Chinese prime minister said that the two countries should be friends, even though they had fought a border war and still had territorial disputes. These disputes concern the

land border, the boundary demarcation in the Gulf of Tonkin and conflicting claims over the Spratly Islands. (IHT 11-11-93)

China - Germany

It was expected that as a consequence of Chinese appreciation for the German refusal to sell arms to Taiwan, the German delegation that visited China with the German Chancellor in November 1993 would be rewarded with contracts estimated at a total value of 6 billion D-marks. In accordance with these expectations several large contracts, such as the building of an underground rail system in Guangzhou and the purchase of six Airbus aircraft, were indeed signed during the visit. (IHT 12-11, 17-11-93)

India - Pakistan
(*see also*: Specific territories within a state: Kashmir)

The foreign ministries of the two countries held a new round of talks in early January 1994, spurred on by US State Department officials and the first since August 1992 when an 18-month period of six meetings was ended. (IHT 25-11-93, 12-01-94, FEER 09-12-93 p. 30)

It was reported that India offered a series of six proposals on confidence-building measures, including a pledge of non-first use of nuclear weapons. (IHT 26-01-94)

In February 1994 Pakistan submitted a draft resolution to the UN Commission on Human Rights condemning India for human rights abuses in Kashmir, but dropped it on 9 March 1994 after a joint appeal by China and Iran which was later supported by other Islamic, Asian and other developing states. (IHT 10-03-94, FEER 17-03-94 p. 15)

China - Russia

On the occasion of a visit by the Russian Defence Minister in November 1993 China, after earlier refusals of Russian overtures, committed itself to sign an agreement with Russia aimed at preventing inadvertent or dangerous military confrontations between their forces. Until such signature the two countries agreed to establish a communications channel between the commander of the Russian Far Eastern district and the Chinese northeastern military commander in Liaoning Province. The two sides also agreed to inform each other of plans for military maneuvres in border districts and to exchange information on military doctrine and experience. The five-year, renewable agreement was reported to provide for detailed annual military cooperation plans to be drawn up bilaterally each December. (IHT 06-12-93; FEER 26-05-94 p. 24)

When the Russian prime minister visited China in May 1994 agreements were signed on 27 May on cooperation in managing the mutual borders and in trade, agriculture and environmental protection. (IHT 28/29-05-94)

Iran - Germany

The German government on 5 January 1994 warned Iran of further isolation from the West if a death sentence against a German national convicted of spying for Iraq would be carried out. A Foreign Ministry spokesman said that "Germany is the only Western industrialized nation that hasn't isolated Iran, and they are perfectly aware that it would not be in their interests to carry out this sentence."

In another case five men - an Iranian and four pro-Iranian Lebanese Shiite Muslims - had gone on trial in December 1993 in Berlin, charged with the assassination of a Kurdish leader and three others. According to the German authorities the Iranian defendant was an Iranian intelligence agent. (IHT 06-01-94)

Iran - France

Switzerland demanded the extradition from France of two Iranians, suspected of being involved in the assassination of an Iranian dissident leader near Geneva in 1990 and apprehended in France. Yet France decided to send the two persons back to Iran, as the French prime minister said, in the interests of France. (IHT 06-01-94)

China - France

After a year-long dispute over French sales of jet fighter planes to Taiwan, France and China announced in a joint statement on 12 January 1994 that they would restore friendly relations on the basis of a commitment from France to ban any further arms sales to Taiwan. The statement read, *inter alia*: "[The] Chinese side reaffirms that the sale of any type of arms will bring harm to China's sovereignty, security and reunification and the Chinese government firmly opposes it. To take account of the Chinese side's concern the French government pledges not to authorize French enterprises to participate in the arming of Taiwan in the future." It added that France "recognizes the government of the People's Republic of China as the sole legal government of China and Taiwan as an integral part of the Chinese territory." (IHT 13-01-94) It was estimated that France lost more than $1 billion of business with China in 1993 because of the rift with China. (IHT 17-01-94; FEER 27-01-94 p. 13)

The French prime minister came to China on an official visit in early April 1994. According to Chinese sources he gave an assurance on that occasion that France would not interfere in China's internal affairs, including the human rights issue. He said that France's goal was to raise its profile in Asia, and that increased trade with China is a central element. He argued that the issue of human rights "should not be played down, but it should not define our entire foreign policy .... We are not going to give lessons to the whole world while others who invoke moral values are doing business behind our back." (IHT 08, 9/10 and 12-04-94)

South Korea - Japan

South Korea decided to maintain a decades-old ban on Japanese shows and films. It reaffirmed that South Korea needed to block an influx of Japanese culture, which had

been barred as unsavory and alien as a result of the 1910-1945 colonial occupation. South Korea allows Japanese cartoons and stage productions, but still bans musicals, movies, videotapes, discs and Japanese-language television broadcasts. Japanese singers and musicians are also barred. South Korea wants Japan to transfer sophisticated technology, but in return Japan demands the lift of the cultural ban. (IHT 03-02-94)

Malaysia - Philippines

The first official visit by a Malaysian prime minister to the Philippines since the two countries established diplomatic ties in 1964 took place in early February 1994. The visit reciprocated the official visit by the Philippine president to Malaysia a year ago and was to give further impetus to the new phase in relations between the two countries which had been strained due to the Filipino claim on Sabah. (NST 03-02-94, 04-02-94, 07-02-94)

Central Asia

In spite of the fact that Uzbekistan is a major supporter of factions in Afghanistan (General DOSTAM, *see supra*: Civil War) and the current government in Tajikistan, and although Turkmenistan is also supporting factions in Afghanistan (ISMAEL KHAN of Western Afghanistan, supporting President RABBANI), both agreed on a peace initiative for the whole region. Uzbekistan called for a regional peace conference on Tajikistan under UN auspices and including Russia, Pakistan, Iran, Afghanistan and the five Central Asian states. Both Uzbekistan and Turkmenistan insisted on negotiations between the Tajik government and opposition. (*see* 3 AsYIL 359) Uzbekistan's turnaround was prompted by growing tensions with Russia while Turkmenistan had already agreed to various Russian demands. (*see infra*) (FEER 03-02-94 p. 17)

Central Asia - Russia

Despite bids by neighbouring Muslim countries to influence the Central Asian republics, the policies of these countries remained very much determined by Russian power and leverage based on, *inter alia*, demographic, economic and military factors.

In Tajikistan Russian forces supported the Uzbek-endorsed government in its fight against the Islamic opposition. Turkmenistan had succumbed to Russian pressure and rejoined the CIS.

Russia had been insisting on the grant of local nationality to the huge Russian populations in the Central Asian republics in addition to retention of Russian nationality, resulting in dual nationality. In Kazakhstan Russians constitute 39 percent of the population, in Turkmenistan 12.6 percent, in Kirgyzstan 20 percent, in Uzbekistan 10 percent. Since the republice achieved independence there had been Russian complaints about discrimination in favour of those of indigenous ethnic origin. Rejection of the Russian demands could result in a massive emigration with disastrous consequences for the economy and the administration of the country. So far Uzbekistan and Kazakhstan had rejected the demand, but Turkmenistan concluded an agreement

on 23 December 1993 meeting the Russian wishes, allowing migrating Russians to transfer all their possessions to Russia.

Other Russian pressures concerned the introduction of local currencies which would alleviate the monetary burden for Russia. In November 1993 it forced Uzbekistan to adopt its own currency by blocking the supply of roubles.

Economically, Russia remained the largest market and the main supplier of essential goods. It also insists that the countries concerned consult Russia before entering deals to build pipelines through other countries like Iran and Turkey (*see infra*: Oil). Militarily, Russia adopted a new doctrine in October 1993, asserting that its strategic domain included Central Asia. The December 1993 agreement with Turkmenistan legitimized the presence of Russian forces at the Iran-Turkmenistan and Afghanistan-Turkmenistan borders and allows Russia to intervene militarily in CIS states when its interests, including those of Russian minorities, are threatened. Similar agreements with other Central Asian republics were said to be not unlikely in view of the fact that only 6% of the army officers in Kazakhstan and 10% of those in Uzbekistan are of local stock, while the air forces of all the republics are manned almost exclusively by Russians. (FEER 03-02-94 p.17, 24-02-94 p. 22)

Malaysia - United Kingdom

Relations between Malaysia and the UK suffered a setback when the Malaysian government announced on 25 February 1994 a ban on the award of new contracts by the Malaysian government and government agencies to British firms following a series of unsubstantiated reports in the British media alleging pay-offs to Malaysian political leaders by British firms to gain contracts in Malaysia. The straw that broke the camel's back was a report in *The Sunday Times* of London of 20 February 1994 alleging that a British construction firm had approved a $500,000 (RM 1.35 million) pay-off to the Malaysian prime minister to secure a contract to build a billion ringgit aluminium smelter (an allegation denied by the British firm and the Malaysian government which pointed out that at no time was there a proposal to build an aluminium smelter in Malaysia). (NST 26-02-94, 02-03-94, 06-03-94)

China - Central Asia

The Chinese prime minister visited the Central-Asian republics of Turkmenistan, Uzbekistan, Kazakhstan and Kirgyzstan in April 1994. These republics wanted to make economic deals with China and in return they promised to help turn the tide of Islamic fundamentalism. A border accord was concluded with Kazakhstan. Of the 1,700 kilometre frontier, about 70 kilometres had been in dispute between China and the Soviet Union. Kazakhstan scrapped all its restrictions on cross-border transport. In Turkmenistan an agreement was reached on feasibility studies for a new railway across Central Asia and a pipeline across China. In Uzbekistan the Chinese guest promised that border disputes with the region would be settled exclusively by negotiations. The Chinese prime minister called for a "new Silk Road" establishing closer trade links between China and Central Asia and pledged fresh economic assistance. On the occasion the two countries concluded economic and trade agreements. There exists a

Chinese claim to a large tract of land in Gorno Badaskhsan in Tajikistan. (IHT 20 and 27-04-94; FEER 12-05-94 p. 30)

Myanmar - India

India was reported to have been changing its policy toward Myanmar. Previously India emphasized the release of *Aung San Suu Kyi* and the handing over of power to her party which had won the 1990 elections, and supported moves to isolate the Myanmarese government, *inter alia*, by vetoing the latter's bid to join the Non-Aligned Movement at the Jakarta Summit in August 1992. The switch in India's position was considered to have started late 1992 after a visit by a Myanmarese foreign ministry official, followed, in March 1993, by a visit by the Indian foreign minister to Yangon. At the end of January 1994 the Deputy Foreign Minister of Myanmar visited India and signed several agreements which clearly showed a change in the relationship.

One of the agreements regularized and intended to promote the informal trade across the land border into India's northeastern states. The most significant agreement, however, provided for cooperation between civilian authorities to crack down on "illegal and negative cross-border activities", possibly paving the way for cross-border pursuit of rebels and criminals in the future. India would want to deny rebels from Assam, Nagaland and Manipur sanctuary on the Myanmar side of the 1,643-kilometre border, while the Myanmarese government would want India to keep the several hundred Myanmarese students and civilian politicians who took refuge in India after 1989 under control. (FEER 03-02-94 p. 14)

Vietnam - US

The US Assistant Secretary of State told the Congress that Vietnam's human rights performance would affect its relationship with the US. On the other side, Vietnam announced that preconditions to normalization of relations and interference in its internal affairs were not acceptable. (FEER 24-02-94 p. 15)

European attitude toward China

The European Parliament passed a unanimous resolution calling for a multiparty system in China and protection of the human rights of Tibetans. The resolution urged the European Union not to upgrade trade links with China unless China abolishes its labour camps and frees political prisoners. (FEER 24-02-94 p. 15)

Myanmar - ASEAN

Rejecting pressure from the US and Europe for measures to isolate the Myanmar military government, ASEAN stepped up a policy of "constructive engagement" and quiet diplomacy by expanding political and economic ties with Myanmar. It agreed to allow Myanmar to attend the annual conference of ASEAN foreign ministers in Bangkok in July 1994 as a guest of the host state. (IHT 11-03-94)

The prime minister of Singapore arrived in Myanmar on 28 March 1994 for an official visit. He was the second head of government to visit Myanmar since 1988, after the Laotian prime minister. (FEER 07-04-94 p. 13)

Japan - China

In anticipation of the visit by the Japanese prime minister to China in March 1994 Japanese officials said that the prime minister would only make passing and vague references to China's treatment of dissidents, in sharp contrast with the tense confrontation entered into by the US Secretary of State a week before. (*see supra*: China - US) Japanese two-way trade with China nearly doubled in five years, making Japan China's biggest trading partner in 1993. Japan is by far the largest provider of foreign aid to China, and Japanese direct investment was vastly increasing after years of hesitation.

On the North Korean nuclear issue China was not prepared to promise any substantial help; it considered itself to have no more than "a small role to play" in North Korea. China also refused to make any promise regarding the Japanese request for "transparency" in China's military build-up. China asserted that the steep rise in defence appropriations in the latest budget amounted to no real increase in light of inflation and currency depreciation. In dollar terms China's total defence outlays were said to stand at no more than one eighth of those of Japan. (IHT 19/20 and 21-03-94; FEER 31-03-94 p. 21)

Myanmar - US

A new, tougher, US policy towards Myanmar emerged at a high-level meeting of a US inter-agency committee, giving top priority to human rights and democracy. The committee agreed that closer consultations with Asian governments on Myanmar were needed, especially concerning arms sales and Myanmar's participation in regional forums. There was disappointment regarding ASEAN's "constructive engagement" policy.

The new policy was being greeted with concern in Southeast Asian circles and could create a serious policy rift between ASEAN and the US. (FEER 31-03-94 p. 31)

Singapore - US

On 9 May 1994 the US trade representative opposed the idea of holding the first ministerial meeting of the new World Trade Organization in Singapore, linking this stance to the caning of a US citizen for vandalism. (*see supra*: Aliens) However, two days later the US State Department disavowed the statement, clarifying that the US had not yet taken a position on the Singapore proposal. (IHT 11 and 12-05-94)

South East Asia - China

In a speech closing an international conference on relations between Southeast Asia and China the Senior Minister of Singapore on 18 May 1994 cautioned China not to

misread the mood of the region. He referred to the Chinese comment on recent anti-Chinese riots in Indonesia which had "revived old fears that China has not abandoned its claim to the loyalties of all ethnic Chinese." He also said China should take steps to "reduce anxieties over its intentions in the South China Sea". Speaking at the same conference the Chinese deputy prime minister gave an assurance that "China doesn't seek hegemony, nor will it seek hegemony and expansion when its economy is well developed in the future." (IHT 20-05-94)

Indonesia - Malaysia

The Malaysia-Indonesia Joint Commission was set up to discuss and review all aspects of bilateral cooperation. It held its first meeting in 1991. At its third meeting in May 1994 it discussed, *inter alia*, the influx of illegal Indonesian immigrants in Malaysia, exchange of information on nationals arrested and convicted, land border demarcation, co-operation in the fields of trade, investment, tourism, agriculture, education, science and technology, the need for another joint hydrographic survey of the Straits of Malacca to improve navigational safety, and for the delimitation of the exclusive economic zone in the straits. (NST and STAR 27-05-94)

Vietnam - Russia

Vietnam and Russia signed a new friendship treaty on 16 June 1994. The signing was being held up by a dispute over the financial terms for the continued use of the Cam Ranh Bay naval base by Russia. According to earlier reports the terms for the repayment of a $9 billion Vietnamese debt to Russia were also delaying the agreement. (IHT 17-06-94)

(NON-)INTERFERENCE
(*see also*: Aliens, Broadcasting, Inter-state relations)

Thai involvement in Libyan construction work

The US warned Thailand that Thai companies were the principal foreign contractors for the construction of what US intelligence agencies had concluded to be chemical weapons plants in Libya. According to US officials Thai companies had taken over the projects from German and Japanese contractors who were forced to withdraw in the 1980s under pressure of their governments to end ties with the government of Colonel GADHAFI. It was said that involvement of Thai companies in building a chemical weapons plant would be a violation of an existing UN arms embargo against Lybia and of the Chemical Weapons Treaty. However, Thailand has signed the treaty but has yet to ratify it, and Lybia is no signatory at all.

Prompted by the US the Thai government moved against the contractor, arresting its owner and charging him with sending Thai workers abroad without government permission. The man was, however, almost immediately released again. It was reported that Thailand had long resisted American pressure to prevent Thai companies from

operating in Libya, the reasons being mostly economic: nearly 25,000 Thais work in Libya, sending tens of millions of dollars back home annually. (IHT 05-10-93, 26-10-93. *See also:* IHT 04-11-93, 10-11-93, 24-11-93; FEER 16-09-93 p. 27, 04-11-93 p. 15)

Dalai Lama's meeting with French and US presidents

China denounced the meeting of the French president with the Dalai Lama on 16 November 1993 during the latter's visit to France, calling it an interference in Chinese internal affairs. The French foreign ministry responded by emphasizing the "pastoral and private nature" of the visit, saying that the French "have reminded [the Chinese authorities] of the conditions under which the Dalai Lama came to France and under which he had meetings with French officials." (IHT 26-11-93)

China also sharply criticized the meeting of the US president with the Dalai Lama on 29 April 1994. A statement of the Chinese foreign ministry read, *inter alia*: "We demand that the US side live up to its commitments on recognizing Tibet as part of China's territory, abide by the basic norms governing international relations, set store by the overall interests of Sino-US relations and refrain from taking actions interfering in China's internal affairs and hurting the feelings of the Chinese people." (IHT 30-04-94)

US attitude toward handling of Myanmar dissident

The US expressed dismay about pronouncements by Myanmar ruling out early talks with DAW AUNG SAN SUU KYI, the imprisoned leader of the National League of Democracy. It was suggested that the US might step up sanctions against Myanmar because of the government's failure to open a dialogue. The US had already suspended all economic and military aid, imposed an arms embargo, abolished low tariffs, and blocked the IMF and World Bank from making loans to the country. (IHT 09-03-94)

Manila Conference on East Timor

When the scheduled date of 31 May 1994 approached for a privately organized "Asia-Pacific Conference on East Timor" in Manila, which had been in preparation since January 1993, Indonesia forcefully expressed its opposition. It was reported that initially it was the Indonesian foreign minister who informed the Philippine government in October 1993 of the plans for the conference. Indonesia opposed the alleged use of Philippine territory to threaten its territorial integrity. The Indonesian foreign minister expressed hope for cancellation of the conference planned under the auspices of the University of the Philippines in Manila and warned the Philippines not to underestimate the Indonesian depth of feeling on the issue. (IHT 17-05-94; FEER 02-06-94 p. 17, 16-06-94 p. 18)

The Indonesian dissatisfaction was also expressed by the withdrawal from participation in an East Asean Growth Area (EAGA) business conference in the Philippines including the cancellation of 12 joint ventures worth $300 million (*see infra*: Joint development), and by statements by Indonesian officials that they were considering the

withdrawal of Indonesia's support as a host and intermediary for long-running peace talks between the Philippine government and Islamic insurgents in the southern part of the Philippines (*see supra*: Insurgents). Besides the permissive attitude of Indonesian authorities towards Filipino fishermen in Indonesian waters changed drastically; about 25 small boats were impounded by the Indonesians in the space of a week. (IHT 31-05-94, 01-06-94; FEER 16-06-94 p. 18)

In response to these pressures the Philippine president declared that the Philippine government would not prohibit the conference because that would violate the freedom of speech guaranteed by the Philippine Constitution. But in the national interest and in order to prevent non-Filipinos from making use of Philippine soil to seek to undermine the territorial integrity of a friendly neighbouring state he issued an order barring a number of East Timorese participants from the country and instructing the Bureau of Immigration to deny entry to other foreign participants in the conference. A special envoy was sent to Jakarta to explain that it was constitutionally impossible to forbid the conference from proceeding. The Indonesian foreign minister expressed Indonesian disappointment and claimed that the Philippine government had pledged to ban the seminar when it was first announced in 1993 but withdrew its promise in March 1994: "Although we can fully understand their constitutional constraints, there is also something else in the relations between countries, and that is called national interest." Filipino officials said that the Indonesian government was told in 1993 that it was not possible to ban the meeting but that the Philippine government would mobilize the democratic forces to ensure that the Philippines would not be used to embarrass Indonesia.

On 27 May the Quezon City Regional Trial Court issued a temporary restraining order at the request of the Philippines-Indonesia Friendship Society (PHILINDO) *et al.*, four days before the conference was to begin. (IHT 28/29-05 and 31-05-94, 01-06-94; JP 17-05-94; FEER 02-06-94 p. 17, 16-06-94 p. 18) The order was in its turn restrained on 31 May by the Supreme Court which, however, upheld the Philippine government's exclusion of foreigners from entering the country to take part. (FEER 09-06-94 p. 13)

Chinese statement on Indonesian riots
(*see also infra*: Minorities)

When labour unrest in and around the city of Medan degenerated into ethnic riots the Chinese foreign ministry issued a statement calling on Indonesia to act speedily to overcome the riots. The Indonesian Justice Minister responded by saying that the statement created the impression of interfering in the internal affairs of Indonesia and that "China had better mind its own internal affairs". The deputy chairman of the Chinese parliament, visiting Indonesia at the time, denied any interfering nature of the Chinese statement, quoting the saying "Do not force onto others what you do not want others to force on you". (JP 27-04-94; IHT 20-05-94)

Malaysian NGO forum on East Timor

The Malaysian government rejected the plans of the Malaysian Action Front, a group comprising 30 NGOs, to hold a forum to discuss alleged human rights violations by Indonesian authorities in East Timor. The foreign minister said on 26 June 1994 that the holding of such forums would strain Indonesian-Malaysian relations. (IHT 27-06-94)

INTERNATIONAL TRADE
See also: Air traffic, Asia-Pacific Economic Cooperation

Japanese - US trade negotiations

The negotiations about the American wish to narrow the US-Japanese trade imbalance continued during the G-7 meeting in Tokyo in July 1993. The aim was to reach agreement on a framework approach to reducing the trade surplus, particularly referring to increase of Japanese imports of American-made automobiles and auto parts, telecommunications, deregulation in insurance services and government procurement of medical technology, as well as to settle conflicts over intellectual property. Agreement was finally reached on 10 July 1993 with the US dropping its insistence on numerical targets on threat of US retaliation for lack of progress, and instead accepting a compromise proposal offered by the Japanese prime minister on 2 July 1993. According to this proposal the two sides would agree on indicators ("objective criteria") to be applied as measurements of progress on trade matters but would not set specific targets to meet (*see* for text, Joint Statement on the Framework for a New Economic Partnership, 10 July 1993, 32 ILM (1993) 1414). The objective criteria as part of the compromise had yet to be agreed on. The criteria referred to were likely to include changes in market share, the number of foreign companies bidding for government contracts and the number of cases in which Japanese officials intervene to stop exclusionary business practices. The accord also called for negotiations on a variety of sectors of trade.

The agreement, such as Japan's pledge to "significantly reduce" its trade surplus, was susceptible to different interpretations. Moreover, both parties expressed their intention to prepare side letters which could undermine the agreement. Japan would affirm its right to opt out of sectoral talks if the US takes unilateral retaliatory action, and the US would emphasize its right to apply the "Super 301" clause of its 1988 Trade Act to sectors covered in the framework agreement. (IHT 07, 08, 09, 10/11 and 12-07-93, 15/16-01-94) A few days after the agreement was reached conflicts were already rising about the scope and meaning of various provisions, particularly about the question whether the agreement contained a numerical target for the reduction of the Japanese trade surplus and on 12 July 1993 the two sides already exchanged letters that underscored these differences of interpretation. (IHT 14-07-93)

In late September 1993 the new Japanese prime minister met the US president and reiterated Japan's opposition to the setting of numerical targets to cut Japan's surplus in its current account (IHT 27-09-93) while the US accused the Japanese of foot-dragging in failing to follow through on the agreement of summer 1993 to establish a

new "results-oriented" framework for trade negotiations. (IHT 01-10-93) Subsequent talks did not achieve agreement and it was reported in January 1994 that the US government had begun to talk directly to Japanese companies, urging them to buy more foreign products. (IHT 19-01-94)

During a summit meeting on 11 February 1994 Japan and the US also failed to settle their trade differences in any of the four key areas. (IHT 12/13-02-94) Expressing the idea that the two countries should deal with each other as equals, the Japanese prime minister said that the US-Japanese relationship had become "a mature relationship, a relationship between adults". (IHT 14-02-94)

As to possible US trade retaliation (*see infra*) the Japanese deputy foreign minister for economic affairs said that such action by the US would be unjustified because "there is no breach of agreement, no violation of international rules" by Japan. (IHT 15-02-94) For its part the US announced in early March the re-activation of the so-called Super 301 provision in the US Omnibus Trade Act. (*see* note *infra*) It was said that in 1989 the threat of Super 301 had proved effective to extract promises from Japan to buy more from the US.(IHT 04-03-94)

On 10 March 1994 the US Secretary of State said in a meeting with Japanese leaders in Tokyo that Japan had failed to live up to its promises to the US president in July 1993 on market openings and told them that "great nations keep their commitments". (IHT 11-03-94) On 29 March 1994 Japan announced a package of market-opening measures aimed at placating the US and averting a trade war. Reference may be made to the "Outline of External Economic Reform Measures" and the 1994 "Government Actions for Import Promotion". The package included a continuation of an income-tax cut for a few more years and the raising of the projected level of spending on public works in the current decade. (IHT 29-03-94, 21-04-94)

On 24 May 1994 the two countries reached agreement on how to measure access to Japanese markets and thus on a clearer definition of the phrase "objective criteria". It appeared that the two sides had agreed to keep a range of statistics on Japanese markets as a basis for assessment whether market access had improved, instead of any single criterion. Having reached this agreement, the two parties resumed the framework trade negotiations which were broken off in February. (IHT 25-05-94; FEER 02-06-94 p. 61)

According to the US annual review of world trade barriers (National Trade Estimate) which was made public on 31 March 1994 the US deficit with Japan totaled $60.4 billion in 1993, $10 billion more than in 1992. The review singled out Japan for trade barriers exceeding those of any other major industrialized country, placing "an unacceptable burden on the global trading system". For its part, the Japanese "Annual Report on Unfair Trade Policies by Major Trading Partners" charged the US with violations in 9 of 13 categories, and the European Union with violations of 4 categories. (IHT 01 and 2/3-04-94)

Note: The "Super 301" provision in the US Omnibus Trade Act (*see* 2 AsYIL 334) was adopted by the US (Democrats-controlled) Congress in 1988 and accepted by President REAGAN on condition that its validity be limited to two years. It allows the government to identify countries considered to have erected trade barriers which are considered most damaging to the US, and sets a timetable for negotiations for the dismantling of

the barriers. Failure of such negotiations could constitute grounds for the imposition of substantially higher tariffs (under other laws) by way of retaliation.

Japanese car imports to the EC
(*see* 3 AsYIL 408)

While Japan tacitly agreed on a further reduction of imports in 1993 because of the depressed EC market, the Japanese stressed the need to agree on ground rules for revising import targets in general before agreeing to any specific figures in order to prevent repeated talks on import levels. While acknowledging that the drop in overall European car sales in 1993 would be more than the 6.5 percent forecast which was used as the basis for the previous agreement of April 1993, Japan disagreed with the EC prediction of a decline of up to 16 percent for the full year. (IHT 15-07-93) Finally an agreement was reached on 4 September 1993 on a limitation to 980,000 units, 18.5 per cent lower than the 1992 level and sharply below the 9.4 percent cut that had been agreed in April. While the result might prove irrelevant in a market with a plummeting demand the lower agreed figure could make it more difficult for Japan to raise the ceiling next year should the demand increase. (IHT 4/5-09-93, 06-09-93)

US MFN-status for China

The US House of Representatives on 21 July 1993 rejected a resolution denying China MFN-status, thereby endorsing the president's policy. (IHT 22-07-93)

It was reported in March 1994 that the US government was studying ways to avoid an "all or nothing" decision if it were to decide to curtail China's MFN-status over human rights issues, such as the possibility of withdrawing MFN-status from certain goods or industries only (although the concept of limited withdrawal of MFN-status from state-owned enterprises had already been incorporated in a bill passed in 1992 but vetoed by the former President). The goal would be to maximize the economic impact on the Chinese government, while sparing sectors of the economy not deemed responsible for human rights abuses. Voices advocating this approach in the US became increasingly stronger so as to have a broader foundation for US-Chinese relations than that of the granting of MFN-status on purely human rights grounds. (IHT 19/20 and 30-03-94) China exported goods to the US in 1993 worth around $30 billion or about 30 percent of its exports, while some 2 percent of the US exports went to China. (IHT 13-05-94)

As the moment for the US decision was approaching, both sides tried to reach some common ground. China told the US that it was willing to take further steps to improve its human rights record in order to build more constructive relations between the two countries, but asked for understanding on the need to clamp down on dissent and preserve social stability. The fundamental appeal was: the stable growth of China would contribute to world peace in the next century and an unstable China could be a disaster for Asian security, the international economy and the global environment. The US for its part was dispatching several envoys prompting an extensive high-level dialogue. The US president reminded that the MFN decision was "of great moment": not only economic interests were involved, but also human right interests, national

security interests and "international security considerations for a long time to come". (IHT 20-05-94)

In preparing his official report the US Secretary of State told the president on 24 May that China had complied with the two mandatory requirements (under the so-called Jackson-Vanik amendment dating from the 1970s, on freedom of emigration and prevention of export to the US of prison-made goods) for extension of its MFN-status but had not reached "overall, significant progress" in the 5 other areas.(*see* 3 AsYIL 407) although it formally adhered to the UDHR and produced lists of political prisoners, held talks with the ICRC on prison inspections, and had discussed the jamming of the Voice of America. He suggested that these failures could be addressed with measures short of revoking the MFN-status, such as targeted sanctions. The advice was designed to break the link between trade status and human rights. (IHT 25-05-94)

Finally, the US president announced his decision to extend MFN-status to China on 26 May 1994, without attaching conditions as to future human rights performance by China. The executive order coupled the extension to a ban on the importation of Chinese guns and ammunition. (IHT 27 and 28/29-05-94) The decision did not imply the granting of permanent MFN status. This would require modification of the so-called Jackson-Vanik amendment to US trade law, stipulating that "non-market economies" must undergo an annual test in order to be granted the status. (FEER 03-02-94 p. 52)

Easing of South Korean trade restrictions against Japan

South Korea decided to phase out discriminatory trade restrictions in a reversal of economic policy that had been mixed with politics. The number of banned Japanese goods would be cut in half over the next five years. Japanese intellectual property rights would be protected in line with the progress of Japan's transfer of technology to South Korea. (IHT 11-08-93)

Japanese and Korean rice import

In view of its worst harvest in decades Japan would exceptionally allow "emergency imports" of rice. It was announced that in 1993 200,000 metric tons would be imported. The government stressed that it did not signify a change in its general policy of self-sufficiency and of not allowing commercial rice imports. (IHT 30-09, 01-10-93)

Later the US and Japan reached basic agreement to convert Japan's virtual ban on rice imports to a system of tariffs after 6 years, and to raise the minimum access to the Japanese rice market from an initial 4 percent to 8 percent during these six years from 1995. The Japanese decision was officially announced on 14 December 1993. (IHT 15-11-93, 22-11-93, 29-11-93, 08-12-93; FEER 23-12-93 p. 14)

South Korea accepted a similar arrangement, as announced in a statement made by Japan and the South Korean government 9 December 1993. (IHT 10-12-93)

EC-Japanese trade imbalance

The European Community was prepared to launch talks with Japan on its growing trade imbalance. The talks would be parallel to the US-Japanese "trade framework"

negotiations and would be called "trade-assessment-mechanism" talks. These would include groups of Japanese and Europeans who review the flow of trade in about 30 product areas to see where problems may lie. In an attempt to keep the talks out of publicity the parties agreed to a virtual information stop as regards their contents. The European Union would have preferred to cooperate with the US but it was said that the US had failed to share information about its contacts with Japan.

Japan accounts for 10 percent of the European Union's total trade, a significantly lower percentage than the 15 percent of US trade. The cumulative deficit of Europe with Japan had reached $142 billion, compared with the combined European-US deficit of $384.5 billion over the past five years. Japanese direct investment in the twelve EU states was 15 times the level of European investment in Japan. (IHT 08-10-93, 07-04-94)

Public construction contracts

The US Trade Representative threatened to impose trade sanctions on Japan beginning 1 November 1993 if Japan would still refuse to allow foreign companies to bid on government construction contracts. Its implementation was, however, postponed in view of a broad pledge by Japan on 26 October 1993 to introduce open, competitive bidding. On 18 January 1994 Japan adopted an action plan to open its market. In the new plan Japan would award contracts based on open bidding for projects worth a certain minimum amount, with different minimum values for different kinds of projects or services. Under the plan, any company that meets certain, open and objective, qualifications will be able to bid, and experience outside Japan would be considered in evaluating foreign companies. (IHT 21-10-93, 18-01, 19-01-94)

Japanese-US semiconductor trade agreement
(*see* AsYIL Vol.1 p.321, Vol.2 p.339, Vol.3 p.411)

The market share of US-made computer chips in Japan fell to 18.1 percent during the third quarter of 1993 after having reached the desired level of above 20 percent at the end of 1992. Since the foreign chip sales had risen 26 percent compared with the year before, the US Trade Representative announced the need of "emergency" talks on the matter. (IHT 29-12-93)

US textile imports from China

Textile negotiations between the two countries broke off in December 1993, after four sessions in the preceding nine months, when China turned down American demands for tougher controls and penalties on transshipments in which goods move to a third nation, receive new labels and thus escape the US import quota.

In view of the expiration of a 1993 Sino-US import quota agreement on 31 December 1993 and wary of waiting for China to make concessions on its textile exports the US announced that it would cut by up to one-third the number of Chinese textile and apparel products allowed into the US in 1994. (IHT 07-01-94) The two sides

decided, however, to resume negotiations and agreement was reached on 17 January 1994.

China accepted a number of concessions, including slowing the growth of its textile exports to the US, allowing quota on its silk exports and setting up a tougher enforcement of quota, including joint inspections of Chinese factories and penalties for cheating. Under the agreement, if US enforcement officials find more than two cases of "clear evidence" that Chinese firms are continuing to mislabel or transship textiles in violation of the agreement, the US would be allowed to reduce China's quota by three times the value of the offending shipments. Under the terms of the three-year pact the rate of growth of Chinese exports to the US will be slowed, with no growth allowed in 1994 and about one percent growth per year thereafter. (IHT 12-01 and 18-01-94)

Re-instatement of Sino-US Joint Economic Committee

During his visit to China the US Treasury Secretary reinstated the Joint Economic Committee that had not met since 1987. The committee is meant to provide a forum to discuss China's efforts to reform its economy and US concerns about Chinese trade practices. (IHT 20-01-94)

Indonesian-US trade

During his visit to Indonesia in January 1994 the US Secretary of the Treasury sought to defuse a potential dispute over the revocation of US trade benefits because of alleged Indonesian labour right abuses. (*see* Labour) In 1993 the US imported about $4.8 billion worth of goods from Indonesia and exported around $3.2 billion. Of those totals, $580 million were Indonesian products exported to the US duty-free under the GSP trade provision. (IHT 18-01-94)

Sino-US agreement on prevention of export to the US of prison-made products

China and the US reached a renewed agreement in January 1994 to allow US customs officers to regularly visit five Chinese prisons to ensure that the prison-factories were not making products for export to the US. In 1992 agreement was already reached allowing US inspectors to visit Chinese prisons suspected of producing products for export to the American market. Under this agreement China allowed inspections of two prisons in spring 1993. It was reported in November 1993 that agreement on greater access would depend on the lifting of restrictions on the import in the US of two products previously suspected of having been made in jails. (IHT 17-11-93, 21-01-94)

US trade sanctions against Japan in the field of cellular phones

By way of retaliation for the failure of the trade talks in February 1994 (*see supra*) the US announced on 15 February 1994 that it was to impose sanctions on selected products. Acting under US law the government could impose 100 percent tariffs on selected Japanese products. The next step after the announcement was (in 100 days) for

the US government to publish a list of Japanese products that would be hit with the penalty duties. (IHT 16-02-94)

Among other things it was said that Japan had failed to comply with a 1989 agreement that was to assure Motorola Inc. of "comparable market access" to the cellular phone market. Japan said that it might submit the dispute to the GATT but in March 1994 an agreement was reached that would vastly accelerate access for American-made equipment. The agreement would have the Japanese company already operating in a certain region to build a system of base stations using the Motorola technology according to a fixed timetable. (IHT 16-02-94, 5/6, 11 and 14-03-94; FEER 24-03-94 p. 56)

Sino-Japanese trade

Trade between the two countries increased by 54 percent to $39 billion in 1993, allowing Japan to surpass Hongkong as China's biggest trading partner and putting China second to the US as Japan's biggest trading partner. Japanese investment, however, remained relatively restrained. (IHT 25-02-94)

South Korea - US

South Korea rejected US demands to reduce tariffs on vehicle imports, saying its rates were already lower than those of the European Union. The South Korean rate was 10 percent, against EU tariff rates of 11 to 22 percent. The US had a 2.5 percent tariff, but imposed 25 percent on imports of commercial vehicles. Among the alleged invisible barriers on foreign car sales in Korea were mentioned the restrictions on expanding sales outlets. (IHT 12/13-03-94)

South Korea - European Union

The European Union decided to stop granting preferential treatment to exports from South Korea under the Generalized System of Preferences for developing countries. The decision was based, *inter alia*, on South Korea's decision to join the OECD in 1996. (IHT 17-03-94)

Japanese car exports to the US

Japan announced on 29 March 1994 that it would terminate its voluntary restraints on exports of automobiles to the US at the end of the current fiscal year. The voluntary restraint began in 1981 when American carmakers suffered heavily from Japanese competition, while they were recently increasing their share of the market again. The export restraints had little actual impact during the past seven years because the exports had dropped below the limits set as Japanese companies shifted production to factories in the US. The abolition of the restraints would be in conformity with the call by the Uruguay Round agreements for phasing out programs such as voluntary export restraints. (IHT 30-03-94)

Japan's trade surplus

Japan's trade surplus reached $121.99 billion in the fiscal year ending 31 March 1994, compared to $110.89 billion for the fiscal year 1992-1993. Measured in yen, the surplus narrowed by 10 percent. The trade surplus with the US increased to $51.14 billion in 1993-1994, and that with Asia came to $55.95 billion. (IHT 19-04-94)

INTERVENTION

Iranian manoeuvres near Armenia

After warning that it would not tolerate an Armenian offensive in Azerbaijan, Iranian troops conducted manoeuvres near the Armenian border. (IHT 01-09-93) Iran also demanded a security zone for Azeri refugees. (IHT 03-09-93) Russia responded by warning that Iranian incursions into Azerbaijan would risk spreading the conflict. (11/12-09-93)

Alleged Iranian involvement in Northern Ireland

The British government accused Iran of helping the Irish Republican Army in its armed campaign against British rule in Northern Ireland but refused to specify the assistance allegedly provided by Iran. The Iranian chargé d'affaires in London denied the accusations. (IHT 29-04-94)

Pakistani support for Kashmiri militants

According to Pakistani military sources Pakistan had resumed arming, training and providing logistical support to Muslim militants in the (Indian) state of Kashmir. Pakistan suspended active support in 1993 and funneled it through non-governmental organizations when the US threatened to add Pakistan to the list of countries sponsoring terrorism which would result in the severing of US-Pakistan aid and business ties.

Pakistani political and government officials denied any active Pakistani role in arming or training militants, saying that their support was limited to aiding the insurgents through political and diplomatic initiatives. A senior official of the foreign ministry said that it was impossible for the army to halt all smuggling of weapons from Pakistan to Indian Kashmir by private groups. (IHT 17-05-94)

IRAQ - KUWAIT WAR

Return of Iraqi soldiers from Iran

When Iran returned a group of what it called Iraqi "prisoners of war" on 22 April 1993 the assumptiom was that the 200 men had been among those captured in the 1980-88 Iran-Iraq war. As it turned out, the group was part of Iraqi troops who entered Iran

during the 1991 Gulf War and the subsequent uprisings against the Iraqi government. (IHT 02-07-93)

ISLAM

The Islamic factor in the Bosnian crisis

During the ASEAN post-ministerial conference with the so-called dialogue-partners ASEAN ministers criticized the European Community for its failure to protect the Bosnian Muslims and pointed out that dismemberment of a UN member state was a dangerous precedent for other states with a multi-ethnic make-up. (IHT 28-07-93)

JAPAN'S MILITARY ROLE

US embargo on supply of military transport planes to Japan

Reportedly the US blocked the purchase by Japan of big C-17 military transport aircraft which are capable of reaching a distance of 8,300 kilometers. According to the news reports the measure was taken by the US to prevent the rebuilding of Japanese military power. (NRC 19-07-93)

Record of Japanese peace-keeping forces in Cambodia

The 600 members of an engineering battalion and 75 civilian police officers deployed in Cambodia were the first Japanese ground forces posted abroad since World War Two. There was some criticism about the privileges the Japanese forces allegedly had asked for and usually received in exchange for their participation in the peace-keeping operation and in order to avoid violations of the restrictions imposed by the Japanese "Law concerning cooperation for United Nations Peace-keeping Operations". (*see* 2 AsYIL 341 and 32 ILM (1993) 215) First, as the Law bars Japanese soldiers from involvement in hostile action, most of the Japanese force were sent to one of the safest areas of Cambodia far from the camps of the Khmer Rouge. Second, there was the allegation that the Japanese forces began pulling out relatively early while they had arrived rather late. There were also reports of instances of Japanese abandoning their posts apparently out of fear for their safety. (IHT 25-10-93)

JOINT DEVELOPMENT AND JOINT VENTURES

Malaysia-Namibia joint ventures

Malaysia and Namibia engaged in a joint venture to set up a cement plant capable of producing between 250,000 and 300,000 tonnes of cement a year. Malaysia was to have a 50 per cent stake. The memorandum of understanding for the project and five

other MOUs were signed on 10 August 1993. The other MOUs were on technical cooperation and other projects. In November 1993 an agreement was signed for a joint venture for the building of low-cost houses. It was the first construction project entered into by a Malaysian company in Namibia. At the same time other MOUs were signed covering various projects. (NST 11-08-93, 23-11-93; STAR 23-11-93)

Taiwan-British Aerospace joint venture

In January 1993 British Aerospace (BAe) and the 29 per cent government-owned Taiwan Aerospace Corporation (TAC) signed an agreement for a 50-50 venture to produce the RJ passenger jet aircraft (to be assembled in Taiwan and Britain), and to develop an advanced new aircraft, the RJX, a year later. Completion of the deal was, however, delayed by disagreement over the transfer of technology and obstacles to the financing of the respective contributions. Agreement on financing was finally reached on 27 August 1993. (IHT 21/22 and 28/29-08-93, 07-10-93, FEER 02-09-93 p. 66, 09-09-93 p. 49) As completion of the agreement appeared to stall due to British reluctance to pass on technology, the French company Dassault Aviation SA made overtures by saying to the Taiwanese Central News Agency that it would be prepared to transfer knowledge to a partner in Taiwan. (IHT 9/10-10-93) In November 1993 TAC proposed to BAe to cancel plans for co-production of the so-called RJ aircraft because of worries about weak market demand, and to limit the joint venture to the development of the new RJX passenger jet. (IHT 6/7-11-93)

Tumen River development area
(*see:* AsYIL Vol.1 p.329, Vol.2 p.342, Vol.3 p.417)

As a result of a meeting in May 1993 there were some signs that the project would be pushed forward. A private-sector corporation, the Tumen River Area Development Corp. was established, and North Korea appealed for investments in its Rajin-Sonbong free economic and trade zone, located in the north-east corner of the country and being its contribution to the project. (FEER 30-09-93 p. 72) The Tumen River Project, which was to be the centrepiece of plans for a Sea of Japan economic zone, would open the economic potential of the northeast Chinese provinces of Heilongjiang and Jilin whose only access to the sea at present is through Dalian in Liaoning Province. An alternative to building a new port at the mouth of the Tumen River could be the natural harbour at the Sarubino Bay, between Vladivostok and Tumen. (FEER 21-10-93 p. 21)

Asian aviation consortium

The Korean Daewoo Heavy Industries Ltd. in October 1993 announced the setting up of a four-member consortium for the building of mid-size passenger jets in Asia. The four companies mentioned as participants were Singapore Aerospace, Aviation Industries of China, Hindustan Aeronautics Ltd. and Daewoo, but Singapore Aerospace later denied its participation. (IHT 16/17-10-93, 23-02-94)

Indonesian-British Aerospace joint venture

The Indonesian state-run aircraft manufacturer IPTN (*Industri Pesawat Terbang Nusantara*) was reported to be in the final stage of talks with British Aerospace on planned cooperation in aircraft marketing, especially of the IPTN's N-250 aircraft. (IHT 23/24-10-93) It was reported on 25 November 1993 that the two sides reached agreement on exploring the idea of a joint venture to design, develop and manufacture regional turboprop airplanes. (IHT 26-11-93)

Hyundai-Yakovlev joint venture

The Hyundai Precision & Industry Co. and the Russian aircraft manufacturer Yakovlev set up a join venture to develop passenger aircraft with Hyundai holding 51 percent equity stake. Yakovlev would undertake design and development, while Hyundai would provide capital investment, set up a sales network and build and operate an assembly plant. (IHT 6/7-11-93)

Mekong basin

A conference took place in Manila on 30-31 August 1993 where the six Mekong littoral states (China, Myanmar, Thailand, Laos, Cambodia and Vietnam) discussed ways to improve the links between them. As a first step the six countries agreed that the ADB should start feasibility studies on four road projects. A second agreed list for study and discussion included a Chinese proposal to make the Mekong navigable for heavy commercial traffic, electricity-sharing and "soft" links such as human-resources development and environmental protection.

Thai and Chinese interests have mostly focused on a section of the Mekong region known as the "Golden Quadrangle" or "Economic Quadrangle" - comprising northern Thailand, southern Yunnan, northwestern Laos and eastern Myanmar - where prospects for early economic benefits appear greatest. The two states had urged and obtained the agreement of Myanmar and Laos to allow the area to be opened to tourism and commerce. The area is home to the Dai minority in China - part of the Thai race which also includes the Shan tribe in Myanmar and the people of northern Thailand. (FEER 16-09-93 pp. 68-72)

Malaysia-Philippines joint fishing ventures

Malaysia and the Philippines have agreed to engage in joint aqua-culture and sleep-sea fishing ventures in a small zone in the contested Spratly Islands area. (NSTY 10-12-93)

Sino-Russian free-trade zone

Heihe and Blagoveshchensk, the largest twin cities on the Sino-Russian border, would set up a 20-square kilometre export-oriented trade zone spanning the Amur River, which separates Manchuria from Sibria. (FEER 20-01-94 p. 59)

East Asean Growth Area

It was reported that in March 1994 preparatory discussions were held on launching a growth area encompassing the Southern Philippines, the East Malaysian states of Sabah and Serawak, Brunei and the Indonesian islands of Sulawesi and the Moluccas. (FEER 31-03-94 p.12) A draft air-service agreement allowing regular flights between the key cities of the area was to be presented to the four governments. (FEER 28-04-94 p.12)

A conference of government officials and business representatives was organized and held in Davao City on 26-28 May 1994 but Indonesia and Indonesian business withdrew from participation in protest against the holding of a conference on East Timor in Manila (*see supra*: Non-interference).

Thai-Malaysian joint development area

Thailand and Malaysia agreed in 1971 to form a joint development area of 7,250 square-kilometres of their overlapping continental shelf areas which are part of the coastal waters north-east of their border. The commercial and legal aspects were finalized in April 1994. Both countries on 21 April 1994 signed a Malaysia-Thailand Production Sharing Contract to jointly explore and exploit oil and gas. The Malaysian prime minister said the contract reflected the foresight of past leaders, the late Malaysian prime minister TUN HUSSEIN ONN and Thai prime minister General KRIANGSAK CHOMANAN who, in trying to resolve the overlapping claims in the Gulf of Thailand, came out with the novel idea of establishing a joint authority.

In 1979 the two countries decided to establish a Malaysia-Thailand Joint Authority (MTJA) which was formally set up in 1990 (*see* 1 AsYIL 160, 2 AsYIL 343). The MTJA would administer three separate production-sharing contracts, each relating to a different part of the area. A Thai-based subsidiary of the US Triton Oil and a subsidiary (Petronas Carigali) of the Malaysian state-owned Petronas would conclude a production-sharing contract, while two other contracts would be concluded between Petronas Carigali and PTTEP International (an extension of the Petroleum Authority of Thailand).

Taking the MTJA as a model for other maritime areas, Malaysia agreed with Vietnam and the Philippines to cooperate in any disputed area. (FEER 21-04-94 p. 80; NST 16-09-93, 08-04-94, 22-04-94)

JUDICIAL ASSISTANCE

Bhopal gas disaster

The Indian government sought the extradition of the former chairman of the US Union Carbide Company, to face criminal charges in connection with the Bhopal gas disaster. (FEER 14-04-94 p. 15)

Extradition without treaty

The Superior Court of Macau on 14 April 1994 reversed its own decision and agreed to extradite two ethnic Chinese to the mainland, where they were wanted for murder and fraud. The Court granted China's request although no extradition treaty existed between Portugal and China. Macau authorities persuaded China to send a written guarantee to the Macau Superior Court promising that the two men would not face the death penalty if convicted of crimes in China. (FEER 28-04-94 p. 15)

JURISDICTION
See: High seas, Immigration and emigration

LABOUR

US threats concerning Asian labour conditions
(*see also*: Sanctions)

Under American law a country that violates internationally recognized labour rights can, *inter alia*, have its benefits under the US Generalized System of Preferences for developing countries suspended. In response to complaints from American labour and human rights groups a US government team carried out investigations in Indonesia on working conditions and enforcement of labour regulations. Improvements were found in areas as wage levels, child labour, restrictions on trade unions and the role of the military in industrial relations. Indonesia responded by revoking a 1986 law that gave employers the right to use the security forces to break up strikes, and by raising legal minimum wage levels as of 1 January 1994. It also authorized the formation of 14 new trade unions but insisted that they remained under the supervision of the state-run labour federation. A Ministry of Manpower decree for the first time allowed collective bargaining at the plant level. Such investigations also took place in seventeen other countries. Indonesia had faced similar US investigations in 1987, 1988 and 1989. On each occasion the US concluded that Indonesia was taking steps toward internationally accepted standards. The US issued a warning on 25 June 1993 that unless six countries, including Indonesia and Thailand, would improve workers' conditions their tariff advantages would be in jeopardy. Indonesia was allowed to improve its laws on labour conditions before mid-February 1994 before measures were going to be taken under the above law.

The US had three choices: it could revoke GSP benefits on the grounds that progress toward protection of labour rights had been insufficient; it could renew those benefits unconditionally on the basis that Indonesia had made a good-faith effort and that eight months was too short a time to expect anything more, or it could maintain the pressure for another five months by keeping Indonesian labour practices under review and postponing a decision on revocation. The US finally decided to suspend its review of Indonesia's worker rights to give Jakarta more time to implement the recently

adopted regulations. (IHT 23-09-93, 17 and 18-01-94, 14-02-94; FEER 08-07-93 p. 14, 03-03-94 p. 57)

ASEAN bloc on trade-labour link

Members of ASEAN decided to act as a bloc to oppose attempts by the US and European countries to include a "social clause" linking trade and labour standards in future international trading rules. The decision reflected the deep suspicion among virtually all developing countries in Asia about the motives of Western states in pressing for such a link. In setting up the World Trade Organization US and French officials had agreed on such a connection. (IHT 04-04-94)

A conference of labour ministers of ASEAN criticized the efforts to establish a trade-labour link and urged the ILO to take into account "special circumstances" in the labour market of the developing world. The communique adopted by the conference said that the ministers were committed to improving the well-being of the workers in their countries, but observed that some countries "are concerned with the rigid imposition of labour standards and the use of rigid standards to stifle trade and economic development, which constitutes a new form of protectionism". (IHT 18-05-94)

LOANS

Issue of dragon bonds

On 14 October 1993 China started issuing 10-year dragon bonds, the first ones issued by a non-Japanese Asian country. Dragon bonds are denominated in currencies other than the issuer's - usually US dollars - and issued in Asian financial centres outside of Japan. They were issued for the first time in 1992. (IHT 15-10-93)

MIGRANT WORKERS
See also: (Non-)Interference

South Korea to admit foreign workers

South Korea said it would admit 20,000 foreigners to fill unskilled jobs. The workers would be permitted to stay for up to two years. Small business groups had lobbied for the relaxation of the ban on migrant labour. Workers from the Philippines, Pakistan, Bangladesh and China are flocking to South Korea. The South Korean government also announced the extension of a limited amnesty for illegal guest workers for six months. About 15,000 of an estimated 60,000 illegal foreign workers had registered for the amnesty. (IHT 25-11-93)

Malaysian needs

Malaysian government sources said that the country may need about a million foreign workers, a number equal to more than ten percent of its labour force, if its rapid economic growth is to continue. Malaysia ended a short-lived ban on recruitment of foreign labour in June 1993 when the government bowed to pressure from employers who warned that their operations would be crippled without more workers. Manufacturers became free to recruit skilled and semi-skilled foreigners who are urgently needed to staff new factories and were allowed to hire unskilled foreign workers from the large pool already in the country.

In 1992 nearly 320,000 foreigners - most of them from Indonesia, with smaller numbers from India, Pakistan, Burma, Bangladesh and Sri Lanka - were given work permits under an amnesty program after they had entered the country illegally. (*see* 3 AsYIL 420) (IHT 17-12-93)

MILITARY COOPERATION

Chinese military links with Western states

From the side of the Chinese defence ministry it was said that China wished to see positive steps from the West to restore military ties that were disrupted after the 1989 Tiananmen incident.(IHT 30-07-93)

The US ended the freeze in November 1993 and in January 1994 the President of the US National Defense University visited China. (IHT 19-01-94) In March 1994 the US was reported to prepare the upgrading of its defence ties with China by way of confidence-building measures. Besides, the US Defence Department was envisioning the creation of a Joint Commission on Defense Conversion to discuss how to transform Chinese and US defence industries from military to civilian use. (IHT 08-03-94)

Sino-Russian military cooperation

Three Russian naval vessels called at Qingdao, Shandong Province in late August 1993 the first Russian visit to a Chinese port since Tsarist times. (FEER 02-09-93 p. 9)

During a visit by the Russian defence minister to China, the two countries signed a military cooperation agreement on 9 November 1993. The agreement was expected to broaden the transfer of military technologies to China. (IHT 09 an 10-11-93)

Russian-South Korean joint naval exercises

During a visit by the chairman of the South Korean joint chiefs of staff Russia had proposed holding joint naval exercises to bolster military ties. The South Korean government would make a final decision and if approved the exercises would not take place before late 1994. (IHT 14-09-93)

US-Japan anti-missile plan

Out of concern for North Korea's recent tests of a new generation of missiles that could strike Japan, the US and Japan started discussions on building an anti-missile defence system for Japan that would be known as a Theater Missile Defense System (TMD), being a scaled-down version of the Strategic Defence Initiative. (IHT 20-09-93) The US had invited South Korea to take part in the project, but the latter had not yet taken a firm decision. (IHT 15-10-93) The US proposed to assist Japan in building the defence system in exchange for access to advanced commercial technologies that could help correct the imbalance in the US technological trade with Japan. (IHT 24-09-93) Japanese concerns about this idea were later allayed by the US Defense Secretary who emphasized that Japan need not get involved in technology exchange. (IHT 03-11-93)

Note: In 1989 the US and Japan considered the joint development of a Japanese next-generation fighter aircraft code-named FSX. The Japanese had given up domestic development of the new aircraft for joint development but the venture did little more than stimulate efforts to promote one's own technological capacity. The main criticism from American side was that the US was giving away military technology to Japan too cheaply and that Japan was not reciprocating with "dual-use" technology. (FEER 14-10-93 p. 22)

French-Cambodian cooperation

The Cambodian co-prime minister asked for French assistance in training the Cambodian army to combat guerrillas. France and Cambodia concluded a military cooperation accord in July 1993 and a more detailed agreement was expected to be signed soon after.(IHT 21-10-93)

Naval exercises by India with South East Asian states

Indonesia proposed a joint naval exercise with India early 1994 to be held near the Indian Andaman and Nicobar Islands. Indonesia would be the second ASEAN member to hold naval manoeuvres with India, after Singapore. (FEER 25-11-93 p. 11) At the end of February 1994 corvettes of the Singapore navy again held exercises with frigates of the Indian navy. (FEER 10-03-94 p. 15)

Malaysia-Albania cooperation

On 2 May 1994 Malaysia and Albania signed a landmark memorandum of understanding under which Malaysia would train Albanian soldiers and assist in the development of the Albanian armed forces. For the latter purpose Malaysia had approved a special fund of RM2.6 million. Malaysia and Albania would also hold exchange programmes and joint exercises, co-operate in the fields of science and technology and embark on business cooperation in the defence industry. (NST and STAR 03-05-94)

Malaysia-Philippines cooperation

Malaysia and the Philippines have agreed in principle to step up military cooperation, including joint patrols off Sabah to combat piracy. A formal agreement was expected to be signed in September 1994. (NST 25-05-94)

MINORITIES
See also: Civil war, Insurgents

Anti-Chinese riots in Indonesia

As a by-product of labour unrest ethnically charged rioting took place in April 1994 in the city of Medan, Indonesia, but police and the military were on alert. One Chinese businessman was killed. (IHT 19-04, 25-04-94)

Harassment of Koreans in Japan

It was reported that children in the Korean community in Japan were increasingly suffering attacks and harassment as North Korea's suspected nuclear program gained more attention. There are about 700,000 Korean residents in Japan, descendants of people who had come, or were brought by force, to work in Japan during the period of Japanese rule from 1910 and 1945. About one-third are believed to owe political allegiance to North Korea. (IHT 17-06-94)

MISSILE TECHNOLOGY

Russian supply of missile technology to India
(*see* 2 AsYIL 350; 3 AsYIL 426)

The US and Russia nearly reached a compromise in July 1993 in their dispute over a proposed Russian sale of rocket engines and associated technology to India. Under the expected compromise the US would allow Russia to fulfil its contract with India to sell rocket engines without the transfer of some associated technology. This technology was meant to give India the capability to make its own ballistic missile engines which could be used for military or commercial space launch vehicles. The US had argued that a viable Indian missile capability could one day pose a security threat to Russia itself, and that Russian strict adherence to the MTCR (*see* 1 AsYIL 270) would improve its stature and result in new trade with the West. On the other hand, without a settlement satisfactory to the US, American agencies and private companies would not collaborate with the Russian space station program, or conclude contracts for the launching of US satellites on Russian rockets. The economic sanctions scheduled against two Russian companies involved in the transaction would take effect on 15 July unless a deal was reached. (FEER 08-07-93 p. 14; IHT 15-07-93)

Russia finally succumbed to US pressure and decided not to fulfill its agreement with India on the sale of cryogenic - low-temperature fuel - engines and technology that would help India manufacture engines fueled by liquid hydrogen. An Indian official said India regretted the Russian decision but was not surprised. "We have been long aware that the US has been bringing to bear on Russia and India to prevent the transfer of technology." (IHT 19-07-93, FEER 26-08-93 p. 14)

Alleged Chinese supply of missiles to Pakistan in violation of MTCR
See: Sanctions

China and the Missile Technology Control Regime

In response to sanctions imposed by the US for alleged violation of the MTCR the Chinese deputy foreign minister said, *inter alia*: "Now that the US side has resumed (*see* 2 AsYIL 350) these sanctions, the Chinese government has been left with no alternatives but to reconsider its commitment to the Missile Technology Control Regime." (IHT 28/29-08-93)

China was never really asked to become a full "member" to the MTCR. The US was reluctant to let China enter as a full participant, because as a member China would be entitled to join in the determination of the rules and would have to be provided with technical information about developments in the missile technology field. (FEER 09-09-93 p. 10) The MTCR was concluded in 1987 by the Western industrial states and Japan; China and the Soviet Union were excluded. Membership expanded to 25 countries. (IHT 27-09-94)

New Indian rocket

India test-fired its *Agni-3* rocket in early January 1994 despite objections of the US, and again on 19 February. The rocket has an intended range of 2,500 kilometres but its deployment is not yet in sight in the near future. In addition there is the shorter-range *Prithvi* missile (250 kilometres) which is closer to deployment. In early May 1994 a test-launching was postponed at the request of the Indian prime minister in view of his coming meeting with the US president that month. The launching took place a month later. India claimed to need missiles for air defence and to counter the threat posed by Chinese-made M-11 missiles deployed by Pakistan. (IHT 12-01-94, 09-05-94, 06-06-94; FEER 03-03-94 p. 13, 05-05-94 p. 13, 26-05-94 p. 14, 16-06-94 p. 13)

Japan's H-2 rocket

Japan launched its first major rocket built without reliance on US technology, the *H-2*, on 4 February 1994. The *H-2* can deliver a 2,000 kilogram satellite into geosynchronous orbit, 36,152 kilometers above the equator, or a 10,000 kilogram payload into low Earth orbit, 250 kilometres from the earth surface. It will serve as the mainstay of Japan's space program for the next two decades. It has an inter-continental reach and could be adapted to carry a weapon. One of the main functions of the *H-2*

is expected to be to launch the *Hope*, a small unmanned shuttle that would deliver supplies to a space station and then return to earth. (IHT 26-01, 5/6-02-94)

NATIONALITY

Vietnamese-US double nationality
See: Diplomatic protection

Dual nationality for Russians in Central Asia
See: Inter-state relations

NON-ALIGNED MOVEMENT

Hearing at the G-7 summit meeting

In his capacity of president of the country which was the current chairman of the NAM the president of Indonesia had requested to be given an opportunity to address the G-7 leaders during their meeting in Tokyo in July, 1993. His efforts were not entirely successful, but instead he visited Japan just before the beginning of the G-7 meeting, from 4 till 6 July 1993, and was able to pass on his message to the Japanese prime minister as the host and chairman of the G-7 meeting. The Japanese prime minister promised that the interests of the developing countries would win a hearing at the summit meeting.

The NAM urged the G-7 states not to link development aid with the question of human rights. The 10-page NAM message, entitled "Invitation to dialogue", expressed the NAM's concern about the increasing flow of aid to Eastern Europe at the expense of the developing countries. The Indonesian president emphasized the debt problem of the developing countries and the importance of the current Uruguay Round of trade negotiations. (IHT 06-07-93; FEER 08-07-93 p. 14; NRC 06-07-93)

NUCLEAR CAPABILITY
See also: Environmental pollution and protection, Weapons

Suspension of French supply of nuclear fuel to India

France suspended its contractual supply to the Tarapur plant, India's oldest nuclear plant, pending inspection by the IAEA. However, India is not a party to the NPT and had so far refused to allow such inspection, although it had allowed IAEA inspectors to visit the plant. (NRC 08-07-93)

North Korea (Democratic People's Republic of Korea)

The US Secretary of State on 4 July 1993 delivered a warning to North Korea that any effort to build a nuclear bomb would not be tolerated by the US. During his visit

to South Korea the US president said on 11 July 1993 that it would be "pointless" for North Korea to build nuclear weapons because "if they ever use them it will be the end of their country". North Korea reacted by characterizing the statement as a provocation.

Meanwhile the negotiations between the US and North Korea which had started in June (*see* 3 AsYIL 431) were resumed in Geneva on 14 July 1993. The negotiations were aimed at persuading North Korea to permit inspections by the IAEA of its nuclear research facilities. (IHT 05, 12 and 13-07-93) This second round of negotiations resulted in a compromise on 19 July. Emphasizing that "full and impartial application" of international safeguards was "essential", the joint statement said that North Korea was prepared to begin consultations with the IAEA. In return the US pledged to help North Korea switch its nuclear power program to one that would be less easy to convert to nuclear weapons uses. (IHT 17/18 and 20-07-93)

On 3 August 1993 North Korea readmitted IAEA inspectors (IHT 04-08-93) who stayed a week in North Korea where they were only allowed to carry out maintenance work on monitoring equipment ("maintaining continuity safeguards") including the renewal of films and batteries of the inspection cameras and confirm the seals at the plants at Yongbyon. (IHT 14/15-08-93; UN doc. S/26456) An overall inspection was considered by North Korea to be identical to a full return to the NPT which would not be in accordance with the "suspension of the effectuation" of the North Korean withdrawal. (*see* 3 AsYIL 431) (UN doc. A/48/594, S/26733)

The IAEA and North Korea resumed discussions on opening the latter's atomic sites to inspection (IHT 19-08-93) on 31 August (IHT 26-08-93) but the first round of talks in Pyongyang was unsuccessful. The IAEA rejected North Korean proposals for a resumption of technical visits by IAEA to exclusively check its surveillance equipment. (IHT 17-09-93)

When no agreement was reached on 23 September the IAEA Board of Governors decided to pass the matter to the General Conference. (IHT 25/26-09-93) The proposal to put the North Korean issue on the agenda was adopted with 69 votes for, one against and 10 abstentions. (IHT 29-09-93) The resulting resolution fell short of an ultimatum, expressing grave concern about the fact that inspections had not been allowed and urging North Korea "to cooperate immediately". The resolution was adopted by 72 votes to 2 (North Korea and Libya) and 11 abstentions (among which China, India and Pakistan). (IHT 01 and 2/3-10-93)

On 12 October North Korea announced that it would halt talks with the IAEA and would dicuss the issue of North Korea's nuclear program only with the US. (IHT 14-10-93) It was reported on 24 October 1993 that some agreement in principle on a comprehensive settlement was reached between the US and North Korea during secret talks in New York. According to these news reports a third round of high-level talks would take place in November or December. (IHT 25 and 28-10-93)

On a report from the IAEA the UN General Assembly adopted a resolution on 1 November 1993, urging North Korea to cooperate with the IAEA in carrying out the Non-Proliferation Treaty. In his report to the UN General Assembly, the Director-General of the IAEA had stopped short of declaring that the agency no longer had any control over what North Korea did at the nuclear site that it had put under international safeguard (failure of the "continuity" of the inspections). Doing so would be tanta-

mount to saying that North Korea had abandoned the NPT and would probably prompt a US demand for Security Council sanctions.(IHT 03-11-93)

In early November 1993 the US Defense Department started to express concern about the possibility of a North Korean military attack, to the surprise of the State Department which said that concentration of North Korean forces had been going on for years and that there were no unusual troop movements or deployments recently. (IHT 6/7-11-93) The Defense Department's statements were followed up by a statement by the US president that North Korea "cannot be allowed to develop a nuclear weapon" and that a North Korean invasion of the South would be taken as an attack on the US. He declined to answer when asked whether he would consider a preemptive military attack on the North Korean atomic sites which were declared to be peaceful research facilities by North Korea. (IHT 08-11-93) On the other hand, North Korea accused the US president of making bellicose statements and said it had no plans either to develop nuclear weapons or to invade the South. (IHT 10-11-93)

The attitude of the Asian states differed greatly from that of the US. China and Japan, separately, said on 9 November 1993 that they favoured dialogue rather than pressure in dealing with the North Korean issue. The Chinese foreign minister called for continued talks between North Korea and the US, South Korea and the IAEA, and urged the parties involved to be patient. The Chinese stand was later articulated by the prime minister to the UN Secretary-General when the latter visited China in December 1993: China opposed using sanctions to force North Korea to accept nuclear inspections. China hoped for denuclearization of the Korean Peninsula, but this should be achieved through dialogue. The Japanese foreign minister said that it was important for Japan to "continue dialogue" with North Korea "rather than drive them into a corner" while the prime minister emphasized that Japan should not hastily impose sanctions against North Korea. (IHT 10-11-93, 27-12-93) Finally, according to South Korean news reports of 16 November 1993, China and South Korea held secret talks, at the request of China, on the issue of inspections of North Korean nuclear sites. (IHT 17-11-93)

On 11 November 1993 North Korea called on the US to agree to a "package solution" of simultaneous compromises to resolve their dispute over North Korean nuclear activities. A North Korean statement recalled that the proposal for a package solution proceeded from the presumption that the nuclear problem lay in the lack of trust between the countries concerned. (UN doc. A/48/594 - S/26733) US officials said on 15 November that they were considering the offer (IHT 12 and 17-11-93) and after reports about disagreements among US agencies as to the question whether or not to accept the offer (IHT 16-11-93) the US announced a "comprehensive approach to all the differences", considering a package deal with North Korea. (IHT 18-11-93, FEER 16-12-93 p. 16) What was then called the US proposal would have as its goal the gradual opening of the nuclear sites to the IAEA and resumption of North-South talks on denuclearization. In return, the US would suspend joint military exercises with South Korea and hold a third round of talks with North Korea. (IHT 22-11-93) This approach was reaffirmed after consultations between the US and South Korean presidents on 23 November 1993. (IHT 24-11-93, FEER 16-12-93 p. 16) A meeting of North Korean and US officials took place at New York on 24 November after which

the North Korean ambassador said that he was optimistic. (IHT 26-11-93, FEER 13-01-94 p. 14)

On 3 December North Korea presented new proposals in the context of the North Korean-US negotiations in New York which would work as follows: IAEA inspectors would be given unlimited access to five of the seven declared nuclear installations. As to the nuclear reactor and the nuclear processing plant the international monitors would be allowed to replace the film and batteries in the surveillance cameras (which were expected to have run out of film and batteries by November; IHT 16/17-10-93) but would not be allowed to conduct inspections. The proposals included willingness to negotiate over greater access to the reactor and reprocessing sites without offering anything specific. Such proposals were, however, already rejected earlier by the IAEA Director-General who had said that the inspectors must have the freedom to roam and seek evidence of diversions of nuclear material to weapons projects.

The North Korean offer also specified a series of steps to be taken by the US, South Korea, North Korea and the IAEA: the arrival of the inspectors was to be linked with a joint US-South Korean announcement concerning the cancellation of the Team Spirit exercise, and a joint US-North Korean announcement setting a day for a new round of high-level deliberations on broader diplomatic and economic relations, including the possibility of diplomatic recognition of the DPRK by the US. After these announcements North Korea would take steps to exchange envoys with South Korea but the proposals included no certainty about any actual realization of such exchange. Finally the proposal contained the condition that South Korea stop "international pressure efforts". (IHT 03 and 06-12-93, FEER 16-12-93 p. 16)

The North Korean proposal was rejected. (IHT 09-12-93) On 10 December the US presented a (counter-) proposal that differed little from its previous proposal made in November 1993. It did include the cancellation of the major military exercise in South Korea and the prospect of talks over economic aid and diplomatic recognition if North Korea allowed full inspection of its nuclear facilities and began an active, continuous dialogue with South Korea. The offer was meant to be final, and if rejected sanctions would be sought in the UN Security Council. It was denounced without being outright rejected by North Korea on 17 December. (IHT 13 and 18/19-12-93)

Nevertheless US officials reported progress in the latest round of US-North Korean talks (IHT 22-12-93) and in the following period these reports were repeated several times. In his New Year's message the North Korean president said that his country had agreed to a "joint statement" with the US, paving the way for the nuclear dispute to be "settled fairly", although warning at the same time that any effort to press North Korea to make broader concessions "may invite catastrophe". The North Korean foreign ministry said that under the agreement international inspectors would be permitted into the country's seven declared nuclear sites for a one-time inspection.

On 30 December 1993 the US State Department announced that the two sides had reached some kind of preliminary agreement on the inspection issue. If the inspections went ahead smoothly the two sides would meet in Geneva (in a third round of senior-level talks) to discuss a "package deal" of economic incentives in return for broader inspection rights, including those regarding "special inspections" of two nuclear waste dumps that might reveal how much plutonium had been produced in the past (*see* 3 AsYIL 430) (IHT 03 and 05-01-94). US officials said there were just some details of

inspection procedures to be worked out by the IAEA and North Korea. Once the inspection team would arrive in North Korea the US would announce the cancellation of the annual joint military exercises with South Korea and set a timetable for the talks. (IHT 04-01-94, FEER 13-01-94 p. 14)

Meanwhile there was a growing perception in US circles that the US had made unjustified concessions and that the expected accord might fall well short of what the US had previously demanded from North Korea (IHT 05 and 12-01-94). Thus the US State Department found it necessary to defend the policy behind the negotiations: the number and scope of inspections required to maintain continuity of safeguards was a matter for the IAEA to decide; the package distinguished interim measures from a final solution, the former aiming at ensuring that no more fissile material be diverted. (IHT 06, 07 and 28-01-94)

In December 1993 there were reports about further contradictory analyses on the usefulness of continued efforts to reach a negotiated settlement by different US agencies. (IHT 4/5-12-93) These contradictory analyses also concerned the current stage of the alleged North Korean nuclear weapons program and forecasts as to future North Korean abilities in the area. (IHT 27-12-93) There were also contradictory statements about US objectives. While the Secretary of Defense appeared to suggest that the US might be able to live indefinitely with North Korea's nuclear program at its current, early stage of development, the Secretary of State indicated that his government not only intended to stop the development of North Korea "still-primitive nuclear weapons program", but also to roll back whatever progress it had made so far. (IHT 20-12-93) The disagreements related not only to the analysis of North Korea's scientific and technical abilities but also involved a fundamental dispute over North Korea's intentions. (IHT 27-12-93)

In January 1994 the US president said: "Intelligence reports are divided on the question of how far North Koreans have gone in developing nuclear weapons. But everybody knows they are trying to." He then said that the US would "continue to work very hard and be very firm about not wanting Korea to join the family of nuclear states." (IHT 22/23-01-94)

The South Korean view was expressed by the South Korean president on 28 December 1993 when he said that "North Korea has strong intentions to develop nuclear weapons" but added that "I cannot say North Korea possesses any nuclear arms at the moment", emphasizing "We have accurate information about that." (IHT 29-12-93)

The IAEA-North Korean meetings started on 7 January 1994 (IHT 8/9-01-94). North Korea rejected an eight-page document listing the sites that the IAEA wanted to inspect (IHT 21-01-94). The North Korean foreign ministry stated on 21 January 1994 that IAEA inspectors would be allowed to check monitoring equipment previously set up (provide "the continuation of [the] safeguard [system]"), but would not be allowed to resume regular inspections or enter undeclared sites until a separate deal with the US was reached. (IHT 22/23-01-94; UN doc. S/1994/254)

The resulting situation led to new threats by the US and South Korea that if an agreement with the IAEA was not reached by the time of the IAEA Board meeting on 20 February they would ask for sanctions by the UN Security Council. (IHT 29/30-01-94) Besides the US Senate passed a resolution in early February urging the government

to prepare to return tactical nuclear weapons to South Korea if talks with North Korea remained at an impasse (IHT 04-02-94) and there were reports of new US military preparations (*see* Inter-state relations: North Korea-US, *supra* p. xxx) (IHT 08-02-94). Amid the increasing tension the South Korean president issued conciliatory messages saying that dialogue would be maintained as long as possible, and the South Korean government came with a new strategy to persuade the North to relent on inspections, such as not discussing the Patriot anti-missile issue. Both South Korean and Japanese officials expressed concern about announcements from the US which could create an atmosphere in which North Korea would feel it could not back down. (IHT 09 and 14-02-94)

On 15 February 1994, some days before the meeting of the IAEA Board was to take place, agreement was reached covering the inspection of the seven declared sites [including the main nuclear reactor and the fuel reprocessing plant]. The IAEA statement said that the aim of the inspection was "to verify that nuclear material in these facilities ha[d] not been diverted since earlier inspections [summer 1993]." (IHT 16-02-94) A later North Korean memorandum, however, cited the agreement as stating that the inspectors were "not to perform routine and ad hoc inspections under the Safeguards Agreement" and consequently did not include verification of the completeness of the initial inventory of nuclear material. (UN doc. S/1994/337)

The implementation of the agreement met with some difficulties when North Korea linked it to its negotiations with the US, whereas the latter was not prepared to set a date for resuming the talks until the inspections had begun (IHT 22-02-94). During "working-level" talks in New York the following days North Korea offered to allow inspections to begin on 1 March if the US accepted a small "package deal" calling for setting a date for the "high-level" talks. The deal would include the cancellation of the "Team Spirit" military exercises and "consideration" by North Korea of exchanging presidential envoys with South Korea (IHT 25-02-94). Agreement was finally reached and North Korean assent for inspection was accordingly given on 25 February, just before the February 28 deadline set by the IAEA Board, with the US agreeing to suspend the annual military exercises with South Korea. The US also committed itself to holding a third round of high-level talks although, as stressed by a State Department spokesman, "based on the premise that the IAEA inspections will be fully implemented and the North-South dialogue will resume." For its part South Korea would resume talks with North Korea, which took place on 1 March 1994 (IHT 28-02-94). On 3 March the suspension of the military manoeuvres was announced (on condition of the successful completion of the inspection) and so was the resumption of the high-level US-North Korean talks scheduled for 21 March (IHT 04-03-94).

The IAEA inspectors arrived in North Korea on 1 March 1994 and reported that they had found the IAEA seals, put on to the entry to the most critical room of the Yongbyon reprocessing plant by them in August 1993, broken. The room or "hot cell" was the place where plutonium is separated from the irradiated spent fuel taken out of a reactor of the Yongbyon reprocessing plant in August 1993. Monitoring of unauthorized activity by surveillance cameras had not worked since the batteries and film had run out and were never renewed.

North Korea prevented the inspectors from conducting two significant investigations. First, they were not allowed to take samples of radio-active material from the so-

called "glove box" (an enclosed area in front of the hot cell in which mechanical gloves are used to handle radioactive material) for tests that could reveal whether any new quantity of spent reactor fuel had been handled by the gloves. Analysis of the swab samples would have revealed the time any such reprocessing had taken place. Over time plutonium decays into americium, and since the decay proceeds at a fixed rate the current level of decay could indicate whether any plutonium had been processed since North Korea had accepted safeguards. North Korean officials argued that the IAEA had never before tried to gather a so-called glove-box sample and that the agreement for inspection did not cover any new procedures. The North Korean side also prevented the inspectors from conducting so-called "gamma-mapping" in which ultra-sensitive equipment is used to pick up traces of gamma rays emitted by nuclear material that may have passed through an area. Such scanning would have indicated whether fresh nuclear material had been present in the plant since the previous inspection. These procedures would fall in the "category of the verification of correctness and completeness of the initial report on nuclear material" (North Korean memorandum of 20 April 1994, UN doc. S/1994/484). [The deadlock lasted till May 1994 when a compromise was found and a loose arrangement was reached under which inspectors were permitted to finish substantially all of the testing and sampling that they were prevented from carrying out in March. On 25 May the IAEA finally announced that its experts had been allowed to complete their inspection after taking samples.]

The interruption and incompletion of the inspection scuttled the North Korean-US talks scheduled to be resumed on 21 March which the US side had made contingent on a "successful inspection", and on 19 March 1994 the talks between North and South Korea also broke down. As a result the US started threatening again with trade sanctions and endorsed proceeding with military exercises with South Korea and sending Patriot anti-missile batteries for the defence of US military bases near Seoul (but, according to North Korea, the purpose of which can be changed by the kind of warhead used). The US later announced sending other sophisticated weapons to South Korea as a precaution against an attack by the North and urged South Korea to buy additional Patriot systems (from the US) to protect major cities south of Seoul. A hardening of the US position was particularly apparent from a blunt warning from the Defense Secretary on 30 March that the US intended to stop North Korea from developing a substantial arsenal of nuclear weapons even at the potential cost of another war on the Korean peninsula.

As a result of the deadlock in the inspections the IAEA Board decided by resolution of 21 March 1994 to refer the Korean issue to the UN, stating that it "remain[ed] unable to verify that there ha[d] been no diversion of nuclear material" (IHT 02, 15, 16, 17, 21, 22, 26/27 and 29-03-94, 01-04-94, 03, 12, 13 and 26-05-94; FEER 31-03-94 p. 14). North Korea responded by issuing a statement on 24 March 1994 (UN doc. S/1994/344) in which the position was taken that "... we are in a special status with the temporary suspension of the effectuation of the Democratic People's Republic of Korea's declared withdrawal from the Non-Proliferation Treaty. So, we are not under obligation to accept routine and ad hoc inspections under the Safeguards Agreement. What we can allow at this moment is only an inspection for the maintenance of the continuity of safeguards."

This position was repeated in a Memorandum of 20 April 1994 (UN doc. S/1994/484) in which North Korea started from its "unique status based on its temporary suspension of the effectuation of its announced withdrawal from [the] Non Proliferation Treaty" which was taken "unilaterally on the premise that the negotiations between the DPRK and the US would continue". "As far as the Safeguards Agreement is concerned, the Agreement was concluded pursuant to paragraph 4 of Article III of [the] Non Proliferation Treaty, and therefore the legal validity of the Agreement has been as good as suspended since 12 June 1993, when the Democratic People's Republic of Korea's withdrawal from the Treaty was to come into force in the absence of any subsequent particular agreement thereon between the Democratic People's Republic of Korea and the International Atomic Energy Agency .... Any inspections under the Safeguards Agreement will never be allowed, as long as the current situation continues with the DPRK's unique status based on its temporary suspension of the effectuation of its declared withdrawal from Non-Proliferation Treaty."

In an interview on 31 March 1994 the spokesman of the North Korean foreign ministry also referred to the agreement of December 1993 between the US and North Korea on renewed inspection in which "the [two] sides promised that it should be a strictly limited inspection for the maintenance of the continuity of safeguards, not a routine or ad hoc inspection pursuant to the Safeguards Agreement. At that time, the United States side asked the Democratic People's Republic of Korea not to announce to the world that it would be a limited inspection to save its face". (UN doc. S/1994/381)

Meanwhile Russia on 24 March 1994 proposed an international conference on the nuclear issue. On the same day the US presented the Security Council with a draft resolution calling on North Korea to permit new inspections within a month and reserving the possibility for the Security Council to "consider further action if necessary", but due to South Korean and Chinese efforts the UN Security Council only issued a Presidential statement on 31 March calling on North Korea to allow completion of the inspections and setting a deadline of about six weeks for the IAEA to report back. The Council committed itself to "further consideration" of the issue if necessary "to achieve full implementation" of the agreements concerned. (IHT 28 and 29-03-94, 01 and 2/3-04-94)

The response of North Korea of 4 April 1994 was negative, announcing "normalization" of its nuclear activities which had been frozen during the negotiations with the US. Resumption of the activities might include proceeding with unloading spent nuclear fuel rods from its reactor, giving access to additional plutonium. (IHT 05-04-94)

While rejecting the UN call North Korea proposed fresh inspections if the US agreed to resume negotiations and stopped pressuring it to exchange envoys with South Korea. This was rejected by the South as it would effectively cut South Korea out of all negotiations on the nuclear issue. Yet on 15 April it withdrew its demand for an exchange of envoys. This was followed by a written response by the North Korean president to questions submitted by the Japanese television network, emphasizing that direct talks with the US were the only way to resolve the dispute over North Korea's nuclear program. (IHT 07, 16/17 and 19-04-94) For its part South Korea announced on 20 April 1994 that the US-South Korean military exercises would be deferred until

later in 1994 and could be cancelled altogether as a gesture of good will. (IHT 21-04-94)

On 8 April 1994 the Russian deputy foreign minister said that Russia had informed North Korea, South Korea and the US that Russia is carrying obligations from Soviet treaties and that, accordingly, Russia would help North Korea if it were unprovokedly attacked. He repeated the earlier Russian proposal (*supra*) of an international conference of six countries (North and South Korea, US, Russia, Japan and China) and representatives of IAEA and the UN to find a way out. (IHT 9/10-04-94)

In the middle of April 1994 North Korea informed the IAEA of its plan to proceed with the renewal of the nuclear fuel of its five-megawatt experimental reactor in early May and offered to allow international inspectors to witness the extraction and refueling, giving the IAEA 10 days to accept the offer. The IAEA responded favourably, emphasizing monitoring of the refueling was necessary "to verify that there has been no diversion of nuclear materials." In a press-interview of 3 May 1994 the North Korean foreign ministry emphasized that the fuel renewal was placed under the surveillance of IAEA, allowing the inspectors to observe and verify the non-diversion of nuclear material to non-peaceful purposes, but that this did not include selecting, preserving and measuring of fuel rods as demanded by the IAEA, since this would mean routine and *ad hoc* inspections and would be contrary to the "unique status" of North Korea in respect to the obligations under the Safeguards Agreement (*see supra*). Placement of the replaced fuel under the control of IAEA and allowing its measurement would take place when the nuclear issue is resolved in a package deal with the US. (UN doc. S/1994/540)

Fuel renewals take place once every few years and used fuel rods can be reprocessed into plutonium. After operating for several years the North Korean reactor was shut down for 100 days in 1989, giving rise to suspicions that North Korea had used the time to replace the nuclear core and reprocess the spent rods to produce plutonium. However, North Korea has always claimed that it had only withdrawn a small portion of the fuel and that it had turned over to the IAEA all the plutonium it had reprocessed at that time. Now certain tests could be conducted during the fuel-extraction operation which could indicate whether the removed rods had been installed when the reactor began operating in 1986 or after the 1989 shutdown. In that way one could also deduce how much plutonium North Korea might already have accumulated. (IHT 22 and 29-04-94, 03-05-94; FEER 12-05-94 p. 14)

On 14 May North Korea announced that for safety reasons it had already begun to remove spent fuel rods from the reactor although the inspectors had not yet arrived and, consequently, were not in a position to monitor the removal process. This in itself was a violation of the safeguard agreement. North Korean officials emphasized, however, that the IAEA had had plenty of notice of the start of the refueling on 14 May and that the inspectors could have arrived in time. North Korea denied any default on its part and said that, moreover, the withdrawal process would be recorded by the cameras installed by the IAEA at the reactor site. (IHT 16, 17 and 21/22-05-94)

Upon starting inspection the IAEA team determined that the North Koreans were still at the early stage of the with-drawal process, which was expected to take roughly two months. On 20 May the team also reported that they were confident that the Koreans had not diverted the spent nuclear fuel. (IHT 19, 20 and 21/22-05-94) North

Korea subsequently agreed on 21 May to receive another IAEA team and hold talks about the handling of the removed fuel rods on condition that the US was prepared to resume its talks with North Korea. (IHT 23-05-94) These efforts failed to produce results, apparently over the same issue as during the March inspection, namely the taking of samples. The failure was reported by the IAEA to the UN Security Council and the IAEA negotiation team (but not the monitors of the removal process) returned to Vienna on 29 May 1994. (IHT 30-05-94)

On 30 May 1994 the UN Security Council issued a statement observing the seriousness of the situation. (UN doc. S/1994/SR.3383) The following day North Korea announced that it was keeping aside the fuel rods which it had removed from its reactor for eventual inspection by the IAEA, but continued the withdrawal of fuel rods from its nuclear reactor. The resulting concern led to renewed discussions in the US and South Korea on economic sanctions against North Korea, either inside or outside the UN context. (IHT 01, 02, 03-06-94) Meanwhile China continued to resist the idea of sanctions and the Russian president said on 2 June 1994 that Russia would not support sanctions until a Russian-proposed international conference (*see supra*) on the question could be convened. On the same day the Russian and South Korean presidents signed a mutual declaration urging North Korea to observe the IAEA control agreements. (IHT 03-06-94) On 10 June the US finally won support from Russia for sanctions after promising to back a Russian-proposed conference as part of a sanctions resolution. (IHT 08 and 11/12-06-94)

The US started consultations about plans for sanctions in phases which won support from Japan. The draft resolution called for a mandatory arms embargo, a cut-off of UN assistance, a ban on scientific and technological cooperation and the reduction of diplomatic ties. There would be a 30-day grace period after the measures were adopted and before they took effect. (IHT 13 and 17-06-94; FEER 23-06-94 p. 14)

In his report to the Board of Governors of the IAEA the Director General stated that since North Korea was preventing the IAEA from inspecting the removed fuel rods it had become even more important to get access to the two undeclared waste sites (*see supra*). The North Korean authorities declared that they would never allow this access. The Board then adopted a resolution on 10 June, condemning North Korea and suspending the technical aid to North Korea (China, India, Lebanon and Syria abstained from voting, Libya voted against), to which the North Koreans responded by saying that they could no longer guarantee that the monitoring equipment installed by the IAEA at the reactor site would remain intact. (IHT 08 and 11/12-06-94)

Meanwhile it was reported that the North Korean president had made a conciliatory gesture by offering the suspension of the plutonium processing in exchange for US diplomatic recognition and assistance in building less dangerous forms of nuclear power plants (a light water reactor at an estimated cost of $2 billion to $3 billion instead of the present graphite-based reactors). The offer was made through the director of the East Asian arms control program of the Carnegie Endowment for International Peace. The offer included a two-phase deal. The first phase would include diplomatic recognition by the US and North Korea's return to the NPT. During the second phase North Korea would freeze its nuclear development program which would be linked to a financial commitment and a delivery schedule for a light-water reactor. When this reactor would go into operation the existing reactor and reprocessing plants would be

"discarded altogether". The US, Japan and South Korea could collectively pay for a Russian light water reactor. Special inspections of two undeclared waste sites could only be negotiated after "the end of our hostile relationship". (IHT 13 and 17-06-94; FEER 23-06-94 p. 14; see also the statement of the head of the North Korean delegation to the DPRK-US talks, 3 June 1994, UN doc. S/1994/669)

On 14 June North Korea informed the US that it was withdrawing from the IAEA but at the same time it allowed the IAEA inspectors who had stayed behind to carry out routine monitoring of its nuclear plant, making sure that no reprocessing of the removed fuel rods would take place. (IHT 15 and 16-06-94; FEER 16-06-94 p. 15)

On 15 June 1994 the former US president CARTER arrived in North Korea at the invitation of the North Korean president for a three-day visit and had discussions with the president and other officials (IHT 16-06-94). It was affirmed that North Korea would allow the IAEA inspectors who were still there to remain and that the surveillance instruments were being kept in working order (IHT 17-06-94). There would be a resumption of high-level talks with the US and a freeze of the North Korean nuclear program so long as the negotiations are under way, i.e. a halt in the operations of the nuclear fuel reprocessing plant, a cancelation of the reloading of the nuclear reactor with fresh fuel and permission for normal inspections. North Korea also proposed a summit meeting between the presidents of South and North Korea which was accepted by the South. The US then dropped its condition of inspections about past nuclear fuel reprocessing before talks would be resumed, although defence officials proceeded with preparations of a military package in case of possible war. (IHT 18/19, 20, 22 and 24-06-94)

The US and North Korea agreed to meet in Geneva on 8 July to resume the third-round dialogue which was broken off earlier in the year (IHT 24-06-94). Some of the key issues were: a permanent freeze of the North Korean nuclear program in its present form, the investigation of North Korea's past efforts to divert plutonium, the US counter-offers of light-water reactors and who should provide and pay them, the North Korean demand for a pledge of non-use of nuclear weapons by the US. The talks would be open-ended and would include US political relations and security on the Korean Peninsula. (It had been reported in December 1993 already that US nuclear experts were considering to offer North Korea an idle US-built light-water nuclear reactor in the Philippines. FEER 09-12-93 p. 9)

Meanwhile the fuel rods that had been removed from the reactor had been put in a cooling pond. The magnesium oxide sheathing cover deteriorates over time, about six months, so that at some time the rods would have to be taken to their reprocessing plant for safety reasons. Such reprocessing and the resulting production of plutonium are allowed under the NPT, provided it is done under international control. (IHT 25/26, 27 and 28-06-94)

Kazakhstan

The president of Kazakhstan told a US envoy that Kazakhstan would approve the Nuclear Nonproliferation Treaty in 1993. Kazakhstan had approved the START-I treaty but refused to accede to the NPT until its security concerns were met. (IHT 13-09-93) Kazakhstan pledged on 24 October 1993 to ratify by the end of the year an agreement

with the US on dismantling its nuclear weapons. In a joint statement it was said that the US would pay $80 million for the dismantling program. Besides, it would provide $140 million in economic aid, and technical and financial help in cleaning up the environment. (IHT 25 and 26-10-93)

Pakistan and India

The prime minister of Pakistan announced that Pakistan had halted its nuclear programme, and emphasized that the country was not working on making nuclear weapons of any kind. (IHT 25/26-09-93) Yet in November 1993 she said that Pakistan would not give up its nuclear programme despite pressure from the US. The foreign minister, on 5 December 1993, said that Pakistan would continue with its nuclear program until threats of war with India no longer existed: "Pakistan will roll back the program the soonest India signs the Nuclear Nonproliferation Treaty." He also said: "We have acquired the know-how to build nuclear weapons, but have time and again assured the world that we will not make a bomb for use against any country." (IHT 06-12-93, 14-03-94, 11-04-94)

At the end of March 1994 the US launched new efforts to revive nuclear arms control talks between India and Pakistan. Under a new proposal designed to overcome Indian objections to a nuclear arms regime restricted to South Asia, the earlier idea of five-power talks (India, Pakistan, US, Russia and China) that dated from 1991 was replaced by a broader participation of nuclear powers and non-nuclear ones (Britain, France, Japan, Germany) in order to give the talks a more "global" character. On the other hand Pakistan would be offered the release of the 38 F-16 fighter planes which it had bought and paid (*see infra*: Sanctions) but would have to agree to the freezing of its uranium enrichment process and the inspection of its nuclear facilities. The important difference with previous US demands was that the requirement of a "roll-back" of its nuclear program had been dropped. Pakistan, however, had so far linked its nuclear program with that of India, and would demand the simultaneous solution of the Kashmir issue. It would also demand the delivery of the entire package of 72 F-16s it originally ordered. It would, further, allow inspections only if India does the same.

India, for its part, responded negatively to the US attempts to prevent a nuclear arms race between India and Pakistan, and said it would not accept the halting of the production and deployment of nuclear weapons if the agreement were limited to India and Pakistan and did not include the major nuclear powers. It was also unlikely to cede on Kashmir and to agree to be equated with Pakistan over the nuclear issue. It would reject the idea of Pakistan obtaining the fighter planes and not being required to 'roll back'. (IHT 28-03-94; FEER 07-04-94 p. 14; 21-04-94 p. 22)

Meanwhile, at an academic conference in Shanghai on the subject, with participants from China, India, Pakistan and the US, Indian as well as Pakistani experts agreed that there was no likelihood of a nuclear conflict between the two countries. The Chinese experts shared this view and did not see any possibility either of a nuclear conflict between China and either India or Pakistan. One of the proposals discussed which received most support (though not from the US experts) was a No First Use Convention that would serve as a confidence-building measure enabling the various

states to agree to a program to eliminate nuclear weapons by a given time. (FEER 21-04-94 p. 29)

US plutonium policy

In a policy statement the US, while calling for an end of plutonium production for weapons, stipulated that "the US does not encourage the civil use of plutonium" but would "maintain its existing commitments", permitting Japan and several European countries to turn nuclear waste into plutonium fuel. The decision sidestepped a confrontation with Japan over energy and non-proliferation policy. (IHT 04-10-93)

Iran

Responding to pressure from the US the Czech Republic promised to stop a Czech engineering company from exporting nuclear technology to Iran. US officials argued that a civilian power program would give Iran spent nuclear fuel that could be reprocessed into plutonium, a main ingredient of atomic weapons. (IHT 17-12-93)

Japan

According to a British newspaper report the British Ministry of Defence warned that North Korea's nuclear program may force Japan to abandon its non-nuclear stance. The report was denied as groundless by the Japanese deputy foreign minister who said that Japan maintained its three-point policy of not producing, possessing or bringing in nuclear weapons. A later statement from the government said that even if North Korea developed a nuclear bomb "there is no nuclear option for Japan". (IHT 31-01-94, 01 and 02-02-94)

However, it was reported that Japan had decided (but yet to be announced formally) to postpone for twenty years its nuclear program (*see* AsYIL Vol. 2 p. 357, Vol. 3 p. 428) in spite of official denials. This would be motivated by international pressure but also by fears that the policy of creating a "nuclear fuel cycle" was quickly becoming a financial fiasco. (IHT 23-02-94) The first of the two projected reprocessing plants would be in use by 2002, but the second plant that was to start operations in 2010 would now not be ready till 2030. (FEER 03-03-94 p. 21)

On 5 April 1994 sustained nuclear reaction was started in an experimental plutonium-fueled power plant at Monju, the first of a series of projected breeder reactors. Mindful of criticism of the Japanese plans for the development of nuclear energy, officials started stressing another aspect of the breeder-reactor concept: with some design changes the reactors would remain to be plutonium-fueled but would no more breed new fuel. (IHT 06-04-94)

IAEA safeguards for Indian plants

The IAEA and India agreed on the application of IAEA safeguards to the Tarapur nuclear energy plant near Bombay. India hoped that the arrangement would convince foreign suppliers of enriched uranium fuel to the plant that no spent fuel would be

diverted to weapons programs. However, the US and France insisted on "full-scope" safeguards covering the entire Indian nuclear industry before they would supply uranium. (FEER 10-03-94 p. 15)

Chinese nuclear plants

The first international inspection of China's two nuclear power plants took place in early May 1994. The Daya Bay plant is located in southern Guangdong Province and the Qinshan unit in Zhejiang Province. The IAEA inspection lasted 2 weeks and concluded that the plants met world safety standards while it helped China recognize some weak points in its management. (IHT 12-05-94)

OIL AND GAS

See also: Foreign investment,Territorial claims

OPEC general limits on production

OPEC reached agreement on 27 September 1993 on a limitation of the group's total output to 24.5 million barrels a day over the next three months. That implied a production at or slightly below current levels which were about 1 million barrels a day more than the official limit of 23.6 million barrels a day for the third quarter. Agreement on the apportionment of the production quota was reached a day later. Kuwait, which had insisted on a higher quota to recoup oil revenue lost during the Gulf War was granted an increase of 400,000 barrels a day, and Iran received a new quota of 3.6 million barrels a day, up from the previous 3.3 million. Saudi Arabia reiterated, as always, that it would be free to pump more oil than its official quota if the new OPEC ceiling was not respected by all members. The best reason for believing in the accord was the fact that it represented about all the oil OPEC could currently produce, with the exception of Saudi Arabia which could increase its output by at least 1 million barrels a day. (IHT 28 and 30-09-93)

As the arrangement did not lead to higher prices the Iranian oil minister said on 31 October 1993 that OPEC would have to re-examine its September output agreement and cut its ceiling. (IHT 01-11-93) The member states met in late November but failed to agree on even a token cut in output, while the price of oil fell to lowest level since November 1988. In fact current prices, allowing for inflation, were weaker than at any time since before the 1973 oil embargo. The communique issued at the end of the meeting said, *inter alia*, "The conference does not consider that OPEC alone should continue to bear the burden of balancing supply and demand and believes that all producers should join in this effort." This raised the impression that OPEC was abandoning its pricing role and returning to a fight for market share. (IHT 26-11-93)

In late March 1994 the best OPEC could do was again freezing the current output quotas at a total of 24.52 million barrels a day until the end of the year. The biggest exporter, Saudi Arabia, refused to cut oil production despite opposition of Iran and other members who wanted one million barrels taken off the market. (IHT 28-03-94)

New incentives for oil exploration in Indonesia

Indonesia announced new incentives for oil exploration in remote and high-risk areas such as Irian Jaya. They principally consisted of an immediate increase to 35 percent (from 20 percent) in the oil output share for contractors working under the umbrella of Pertamina, the state-run oil company. (IHT 04-01-94)

Export routes for oil and gas from Turkmenistan

The Amu Darya river basin in Turkmenistan holds an estimated 8 trillion cubic metres of gas and 700 million tons of oil. Foreign involvement has been limited so far. Exploration and oil-extraction joint ventures have been set up with Bridas (Argentina), Larmag (Netherlands), Eastpak (US) and Tecnologie Progetti Lavori (Italy). The US company Occidental Petroleum won a tender to explore the Burun field in Western Turkmenistan and a US-Turkish venture won exploration rights for an offshore bloc. At present exports take place through the former Soviet pipeline system, owned by the Russian state gas concern, Gazprom. The gas flows to Russia, where a portion is exported to Europe, the Caucasus republics and some Central Asian states.

Two options for alternative export facilities exist. First, a 845-kilometre pipeline through Iran and Turkey to serve Europe, for which a memorandum of understanding has been signed with both countries. A second option is a 1,800-kilometre pipeline through western Afghanistan to the Pakistani port of Karachi, providing access to East Asia. This option would coincide with existing plans by Turkmenistan, Afghanistan and Pakistan for road improvements between Herat and Quetta (Pakistan) and plans for a railway along the same route. (FEER 24-02-94 p. 71)

Asian demand for oil

A study by the East-West Center in Honolulu showed that Asia's projected demand for oil would rise from 14.7 million barrels a day in 1993 to nearly 20 million barrels by the year 2000. The region overtook Europe as the No. 2 market in 1990 and will surpass the US as the top oil consumer by the end of the decade. China would become a net importer for the first time in 1994 and Indonesia by the end of the decade.

East, South East and South Asian countries account for only 4.5 percent of the world's proven reserves of 1 trillion barrels. Most of the Asian oil imports would have to come from the Gulf area. Consequently Middle East oil companies such as National Iranian Oil Company, Kuwait Petroleum Corp. and Saudi Aramco were looking for investment projects in Asia. (IHT 21 and 24-06-94)

PASSPORTS AND VISAS

Confiscation of passport

On 28 July 1994 the Malaysian cabinet decided that the passport of a prominent businessman, who is the brother to the current Paramount Ruler ("King"), be

impounded for visiting Israel and having discussions with the Israeli prime minister. Malaysia does not recognize Israel. (NST 29-12-93, 29-07-94)

PIRACY
See also: High seas, Military cooperation

Piracy declines in Straits of Malacca

Piracy in the Straits of Malacca showed a decline in 1993 owing to stringent enforcement and joint operations by Malaysian and Indonesian authorities. The Regional Piracy Centre (RPC), operated by the International Maritime Bureau (IMB) received five reports of pirate attacks in the Straits between January and August 1993. One was reported to have occurred in Malaysian waters, the remainder in Indonesian waters. (NST 04-10-93)

Piracy at Asian seas

The International Maritime Bureau, set up by the International Chamber of Commerce to monitor piracy, recorded more than 90 pirate attacks in 1993 by November 20. Recorded attacks totalled 106 in 1992 and 107 in 1991, 33 in 1990 and just 3 in 1989. Among the attacks investigated by the Maritime Bureau from January through August 1993 fourty-nine occurred in the South China Sea and North Asia, and only 10 outside Asia. (IHT 30-11-93)

REFUGEES
See also: Immigration

Cessation of flow of refugees from Indo-China

In 1992 there were practically no more clandestine departures from Vietnam or Laos. The trend in the numbers of Vietnamese asylum-seekers arriving by boat in other countries has been as follows: 1989: 71,364; 1990: 30,936; 1991: 22,422; 1992: 55 and 58 during the first six months of 1993.

The first instance refugee status procedures were completed in early 1992 in the Philippines and in early 1993 in Malaysia and Indonesia, and were expected to be completed before the end of 1993 in Thailand and Hongkong. It was also foreseen that the appeals level procedures would be completed before the end of 1993 in Indonesia, Malaysia and the Philippines, in early 1994 in Thailand, and before the end of 1994 in Hongkong.

As to voluntary returns to Vietnam, the numbers are as follows: 1989: 916; 1990: 6,304; 1991: 12,109; 1992: 16,952 and during the first six months of 1993: 6,794. (UNdoc. A/AC.96/808 (Part II) pp. 5-6.)

From 1975 till 1993, some 1,810,000 Vietnamese, 650,000 Cambodians and 365,000 Lao had left their countries. By the end of 1993 some 2,375,000 of them were

either resettled, repatriated or integrated locally, and the numbers of those for whom durable solutions had yet to be secured were 58,107 Vietnamese in camps in Hongkong and South East Asia, 23,860 Lao in Thailand and 5,629 Cambodians. (UN doc. E/1994/41)

Repatriation of Sri Lankan refugees

A second phase of repatriation commenced in early 1992 under a bilateral Indo-Sri Lankan agreement (2 AsYIL 365). In July 1992 India and UNHCR reached an agreement on UNHCR verification of the voluntary nature of the repatriation. Some 29,000 refugees returned in the course of 1992, leaving about 80,000 in 131 camps and an estimated 30,000 outside camps in the Indian state of Tamil Nadu. (UNdoc. A/AC.96/808 (Part Two) p. 9) During 1993 another 10,501 persons have returned.

On 12 January 1994 Sri Lanka and Switzerland signed an agreement on the repatriation of rejected Sri Lankan asylum seekers. (UN doc. E/1994/41)

Repatriation of Myanmar refugees in Bangladesh

At the end of May,1993, there were 224,942 refugees in twenty camps in the districts of Cox's Bazar and Bandarbhan of Chittagong Division. On 28 April 1992 the two countries signed an agreement on the voluntary repatriation of the refugees but UNHCR received reports of coercion being applied in the repatriation of about 17,000 persons between September 1992 and January 1993. (UN doc. A/AC.96/808 (Part Two) p. 13) A further agreement on voluntary repatriation was reached in two Memoranda of Understanding of 12 May 1993 ((Dhaka) and 5 November 1993 (Yangon) and organized return movements were expected to commence in 1994 (UN doc.E/1994/41) and to be completed by the end of 1995. (FEER 26-05-94 p. 13)

Other refugees in Asian countries

As of 31 December 1992 China hosted a refugee population of 288,123 persons, comprised of 285,543 Vietnamese, 2,548 Lao, 32 Cambodians and 18 non-Indo-Chinese from Afghanistan, Iran, Iraq, Liberia, Palestine and Sri Lanka. The Vietnamese were settled in 194 state farms and production sites in various provinces. There is a bilateral agreement of April 1991 governing the repatriation of Lao refugees in China. (UN doc. A/AC.96/808 (Part Two) p. 30)

During 1992 a total of 9 Vietnamese asylum-seekers arrived in Hongkong, which represented a dramatic decrease compared to 20,208 arrivals in 1991. At the end of April 1993, the total Vietnamese camp population stood at 42,515 of whom 2,442 were recognized refugees and 31,218 had been determined not to be refugees. The remainder were asylum-seekers awaiting refugee-status determination. (Loc. cit. p. 36)

At 31 December 1992 Indonesia hosted 15,585 refugees and asylum-seekers, comprising 14,990 Vietnamese, 576 Cambodians and 19 refugees from other countries, including Afghanistan, Ethiopia, Somalia, Sri Lanka and former Yugoslavia. The Vietnamese and the Cambodians reside in a camp on Galang Island. In December 1992 the Indonesian government stated its intention to close the Galang camp at the end of

1993 in connection with the implementation of a comprehensive industrial development plan for the island. Rejected asylum-seekers should, therefore, opt to return to Vietnam. (Loc. cit. p. 44)

At the end of 1992, a total of 15,065 asylum-seekers and refugees were living in Malaysia including 10,359 Vietnamese, 42 Cambodians and 4,664 persons from other countries, such as Afghanistan, Bosnia-Herzegovina, China, Indonesia, Myanmar, Pakistan, Somalia, Sri Lanka and Sudan. (Loc. cit. p. 52)

At 31 December 1992 Nepal hosted 75,441 refugees and asylum-seekers originating from Bhutan, 65,000 of them having arrived in the course of 1992. They are mainly Hindus of Nepalese extraction claiming to originate from southern Bhutan. (Loc. cit. p. 61) A joint ministerial committee of the two governments, established in July 1993, grouped the refugees in four categories but no decisions were yet taken with regard to each of the categories. (UN doc. E/1994/41)

On 31 December 1992, 5,807 refugees and asylum-seekers were registered with UNHCR in the Philippines, most of whom were Vietnamese. The Indo-Chinese asylum-seekers and refugees were living in separate camps. (UN doc. A/AC.96/808 (Part Two) p. 67)

At the end of 1992 the total number of Indo-Chinese refugees and asylum-seekers in Thailand who were assisted by UNHCR stood at 63,625, most of them Lao. The voluntary repatriation of 378,906 Cambodians who were present in the country at the beginning of 1992 was completed during the first quarter of 1993. (Loc. cit. p. 79)

In Vietnam there were 16,263 Cambodian refugees at the end of 1992. (Loc. cit. p. 91)

Besides the Sri Lankan refugees referred to above India hosted 11,002 Afghans, 295 Iranians and 511 refugees of other nationalities, mainly Somalis, in New Delhi at the end of 1992, and, according to government estimates of March 1993, some 53,000 Chakma refugees from Bangladesh. There was an increase of some 25,000 by the end of May 1993 due to a large influx of Hindu and Sikh Afghans, owing to events in Afghanistan. (Loc. cit. p. 98)

The total number of Indo-Chinese refugees and asylum-seekers in Japan at the end of 1992 was 8,707, in South Korea 149 and in Singapore 92. (Loc. cit. p. 99, 102, 105)

Papua New Guinea hosted some 6,300 refugees from Irian Jaya at 31 December 1992. (Loc. cit. p. 102)

Repatriation of Vietnamese from Indonesia

Because of the Indonesian government's plans for the development of a group of islands in the Riau archipelago, Galang Island which had served to provide accomodation for Vietnamese refugees for the past 14 years, was to be closed. Of the some 123,000 refugees who had landed in Indonesia since 1979 most had found resettlement in third countries while some 10,000 had been screened out. For the latter repatriation appeared to be the only option. Since most of them did not want to return to Vietnam the solution would have to be found in some sort of "orderly return", to be distinguished from "forced return". This refers to people who "don't volunteer to go home, but have no objection to being sent home."

The option met with the general approval of Vietnam which was formulated as follows by the Vietnamese ambassador to Indonesia: "The Vietnamese government, in sympathy with those Vietnamese migrants who are denied resettlement in third countries, is ready to receive them back on the basis of orderly and safe repatriation, respect for their dignity and necessary financial assistance from the international community. ... Such a separation should be carried out step by step, not *en masse*." (FEER 19-08-93 p. 15)

Repatriation of Vietnamese to China

In early September 1993 Hongkong would start repatriating to China some 2,400 ethnic Vietnamese who recently entered Hongkong illegally. The persons had fled from several Chinese provinces. (FEER 02-09-93 p. 14)

Repatriation of Bhutanese refugees
(*see* 2 AsYIL 349)

Nepal and Bhutan set up a joint ministerial committee to tackle the inflow of refugees from Bhutan into Nepal by facilitating repatriation. About 63,000 Bhutanese entered Nepal in the past three years. (FEER 23-09-93 p. 14) UNHCR officials said that arrivals in the refugee camps in the southeastern corner of Nepal peaked in April-July 1992, but more recently Bhutan seemed to have softened its policies and the numbers had since fallen to a trickle. Both Bhutan and Nepal had come under strong pressure from India to solve the refugee issue bilaterally. (IHT 11-11-93)

Azeri refugees to Iran
(*see also supra*: Intervention)

Iran rejected up to 20,000 Azerbaijanis who fled from Armenian attacks to Iran. Iran already had more than 2 million Afghan and Iraqi refugees. The new refugees were being sent back into Azerbaijan to a tent camp in the Imishli region, set up and run by Iran. (IHT 27-10-93)

Chinese refugees in Australia

Australia granted permanent residency to 19,000 Chinese students who were in Australia at the time of the 1989 riots and who were given temporary asylum. (IHT 02-11-93)

Vietnamese Cambodian refugees
(*see also*: Inter-state relations)

In early 1993 some 35,000 ethnic Vietnamese Cambodians escaped ethnic persecution and were granted refuge in Vietnam. By the end of 1993 some 6,000 persons remained stranded along the Cambodian-Vietnamese border. (UN doc.E/1994/41)

Achenese refugees in Malaysia

In February 1994 the Malaysian authorities finalized a solution for the issue of some 180 refugees from Aceh, Indonesia. Attempts were made to legalize their status in Malaysia. (UNdoc. E/1994/41)

Chakmas in India

The Chakmas belong to the tribal people from the Chittagong Hill Tracts in Bangladesh and constituted most of those who crossed into the Indian state of Tripura in the early 1980s when being caught in the crossfire between tribal guerillas of the Shanti Bahini and the Bangladesh army. Under an agreement between India, Bangladesh and tribal leaders, batches of several hundreds of them were repatriated to Bangladesh in February 1994 and would receive a sum of money with which to buy bullocks, free rations for six months and home-rebuilding materials. (FEER 17-02-94 p. 13, 03-03-94 p. 19)

Cambodian refugees in Thailand
See supra: Cambodia

REGIONAL SECURITY

ASEAN Regional Forum
(*see* 3 AsYIL 439)

In accordance with earlier plans the annual ASEAN foreign ministers meeting on 23-24 July 1993 at Singapore was followed by an informal gathering of the ASEAN states with ten other states (Australia, Canada, China, Japan, Laos, New Zealand, Papua New Guinea, Russia, South Korea, United States and Vietnam) and the EC to discuss political and security issues in the region. It was the first such gathering and could pave the way for regular annual meetings on problems and sources of regional instability. The new security dialogue was to be called "ASEAN Regional Forum". (IHT 19 and 26-07-93)

At a meeting in Pattaya in the last week of April 1994 procedural matters relating to the projected ARF were discussed. It was decided, *inter alia*, to apply the ASEAN formula of action by consensus to ARF, not to try to secure agreement on any issue, and to close the meeting without issuing a joint communique. The forum itself would be launched on 25 July 1994, following the ASEAN summit meeting. (FEER 12-05-94 p. 38)

Curbing the spread of weapons of mass destruction

It was reported that during the dialogue of ASEAN and other Asia-Pacific countries in July 1993 the US stressed that Asian participation in international agreements, including export controls, to curb the spread of weapons of mass destruction, such as

chemical and biological weapons and the missiles that can deliver them, was "absolutely essential". The US was reported also to seek tighter controls in Asia on the export of so-called dual-use equipment, components and technology. (IHT 27-07-93)

US involvement

Concerned about the reduction of US armed forces, the president of the Philippines on 5 November called on the US to continue its military involvement in Asia. Since the 1950s the US has active defence treaties with five Asia-Pacific states: the Philippines, Australia, Thailand, Japan and South Korea. (IHT 6/7-11-93)

Trilateral Forum on North Pacific Security

The first two-day meeting of the Trilateral Forum on North Pacific Security, including officials, military officers and researchers from the US, Japan and Russia, took place in early February 1994 in Japan. The meeting could result in the holding of joint military manoeuvres by the US and Russia as part of efforts to build mutual trust.

The forum was designed to facilitate an exchange of views on possible policy recommendations to the three governments. A next round was to be held in Russia in the fall of 1994.(IHT 03-02-94)

SANCTIONS

US economic sanctions against Vietnam
(*see also*: 2 AsYIL 368)

The US had announced in late June 1993 that it would stop blocking international loans to Vietnam. As a result a French-led initiative of lending Vietnam $140 million to pay its arrears to the IMF could go ahead, after which the IMF and the World Bank could grant new loans. The IMF planned to extend $300 million in loans, the World Bank $350 million and the Asian Development Bank $250 million.(IHT 07-07-93)

On 13 September 1993 the US president decided to relax sanctions by allowing US companies to bid on Vietnamese projects financed by international lenders such as the World Bank. This was the third time in less than a year that the US had modified the sanctions against Vietnam in an attempt to reward Vietnam for its help on the so-called MIA-issue while keeping up the pressure to do more.The Vietnamese ministry of foreign affairs expressed its regret that the US continued its embargo policy and described the embargo as a violation of Vietnam's right to develop. (IHT 15-09-93, FEER 23-09-93 p. 14)

On 27 January 1994 the US Senate voted by a wide margin for a resolution urging the President to lift the embargo on trade with Vietnam. In a broader sense, the debate was about whether the war was finally over. The resolution, attached to the State Department Authorization Bill, did not call for establishing diplomatic relations with Vietnam or sending an ambassador. (IHT 28-01-94) The US president decided to lift the trade embargo on 3 February 1994, but remarked that the decision was not "irre-

versible" and that the embargo could be reimposed if Vietnam fell short in helping to account for Americans missing from the Vietnam War. The Vietnamese Deputy Foreign Minister said that the embargo "a policy of power" and "not consistent with international law".

The two countries agreed to the establishment of liaison offices in Washington and Hanoi "as a transitional step toward full diplomatic relations." (IHT 04 and 5/6-02-94)

US sanctions against China for violation of MTCR
(*see also* 3 AsYIL 428)

In 1991 the US Congress passed the Arms Control Export Act which prescribed, *inter alia*, that if a state sells missile technology in violation of the Missile Technology Control Regime (*see* 1 AsYIL 270) US firms would be banned from selling certain high technology equipment to that state for two years. The US imposed economic sanctions on China on 25 August 1993 after concluding that China had violated the MTCR by selling advanced missile technology to Pakistan (*see* 3 AsYIL 425). At issue was the Chinese export of M-11 missile technology in December 1992, a few months after the US government had decided to allow the sale of F-16 fighter jets to Taiwan. (*see* 3 AsYIL 346) According to both China and Pakistan the missiles fell outside the scope of the MTCR and US officials admitted that technically speaking the missiles allegedly supplied by China were not covered by the MTCR. Besides, China was not a party to the MTCR although it had, along with several other countries, like Israel and Argentina, declared its intention to observe the "guidelines and parameters" of the MTCR in 1991 (2 AsYIL 350). The pledge was repeated on 21 July 1993. (IHT 22-07-93, 26 and 27-08-93; FEER 26-08-93 p. 11)

A consensus had emerged in the US that the technology would enable Pakistan to assemble M-11 missiles which were believed to be capable of carrying a 1,100 pound nuclear warhead up to 300 kilometres (IHT 25-08-93). The sanctions came into effect on 27 August 1993 and would lead to a two-year ban on the sale of sensitive US technology, amounting to a yearly value of four to five hundred million dollars. The ban did not include the satellites themselves which are, moreover, not sold to China but to Asian telecommunications groups, but referred to the "kick motors" which are installed on the satellites to steer them into orbit. The sanctions were denounced by China as a "naked hegemonic act".

In October 1993 US satellite producers were intensively lobbying the US government to have the sanctions on sales of communications satellites lifted as they would cause thousands of US workers to be laid off (IHT 21-10- 93). Shortly afterwards it was reported that the US had offered to cancel the sanctions if China would promise anew, in somewhat greater detail and with more legal force, that missiles of the kind concerned and related components would not be exported. The waiver of the sanctions would allow at least seven US commercial satellites to be launched by Chinese rockets, a deal from which both countries would benefit. (IHT 12-11-93)

During the APEC ministerial meeting in Seattle in November 1993 the US decided to agree on the sale of a supercomputer to China and to lift the ban on generators and other components for nuclear power plants, decisions that would benefit Cray Research Inc. and General Electric Co. There had never been a statutory ban on the

supercomputer sale, but it was postponed in December 1992 after intelligence reports showed that China had exported missile technology to Pakistan. The US Secretary of State also offered US willingness to interpret the law in such a way as to allow the export of two of the seven American-made satellites which was banned by the sanctions, if China were prepared to open formal talks on the sanctions and the missile sales.(IHT 20/21-11-93) [The US government announced on 6 January 1994 that commercial satellites under the jurisdiction of the US Commerce Department were not covered by the sanctions and that export licenses for them could be approved.] It was reported in January 1994 that China had indicated its willingness to meet and discuss the matter, and that the US Commerce Department was authorized to approve the sale of three US satellites destined for launching on Chinese rockets on the condition that the discussions on the missile-export issue be "successful". Subsequently the Asia Satellite Telecommunications Co. of Hongkong (jointly owned by British, Hongkong and Chinese interests) said a license was granted for the export of the Martin Marietta Astro Space-built AsiaSat-2 satellite. However, difficulties were expected in getting final export approval for the Hughes Space and Communications-built APSTAR-2, and especially its kick-motor rocket, ordered by APT Satellite Co.of Hongkong which has Chinese military-controlled companies among its shareholders. (IHT 8/9-01, 14-01 and 15/16-01-94)

US sanctions against Indonesia
(*see also*: Labour)

A proposed US Senate amendment to ban arms sales because of Indonesia's human rights record in East Timor was dropped on 27 September 1993. The proposal called for the ban unless Indonesia allowed international human rights groups unrestricted access to East Timor. (IHT 28-09-93; FEER 07-10-93 p. 15)

Lifting of US sanctions against Pakistan
(*see* AsYIL Vol. 1 p. 271, Vol. 2 p. 286)

In September 1989 the US decided to supply Pakistan with 71 F-16 aircraft for which Pakistan made advance payments in instalments under an agreed schedule. In 1991 the US applied the so-called PRESSLER Amendment to Pakistan. According to this Amendment the US law linked arms sales and economic aid to US concerns over nuclear non-proliferation goals. When Pakistan ceased further payments (having already paid $600 million of the $1.4 billion it owed) in July 1993 the US sent a negotiating team in early August with a four-alternatives plan to break the impasse: first, work on the aircraft would be halted; second, Pakistan would pay for the aircraft currently being built which could be sold to a third country; third, Pakistan would immediately pay for the aircraft already built; fourth, Pakistan would stick to the payment schedule of all instalments and await either the lifting of the US embargo or the sale of all the aircraft to a third country. (FEER 26-08-93 p. 20, 09-12-93 p. 31)

According to an assessment by the US State Department, economic and military sanctions would not halt Pakistan's nuclear arms race with India and the administration might ask Congress to consider lifting the sanctions that were imposed in October

1990. (IHT 27/28-11-93) These plans were elaborated in March 1994 when the US government proposed to Congress to lift the ban on military aid in return for a verifiable Pakistani commitment to halt production of nuclear weapons materials. Besides Pakistan would be allowed to take possession of the F-16 fighters which it had already paid for. When the US made the proposal in April 1994 key aspects of it were rejected, but discussions were to be continued and a counter-proposal was made. (IHT 14-03-94, 11-04-94)

Lifting of sanctions against South Africa

The Commonwealth Heads of Government Meeting (CHOGM) in Harare in October 1991 decided on the lifting of sanctions against South Africa. Acting accordingly, Malaysia announced the lifting of sanctions on 23 September 1993. It was the first ASEAN country to do so. (NST 25-09-93)

Suspension of gas supplies by Turkmenistan

Turkmenistan announced on 21 February 1994 that it was cutting off natural gas supplies to Ukraine because of unpaid debts. Gas supplies from Turkmenistan represent 25 percent of Ukraine's needs. (IHT 22-02-94)

SEABED EXPLORATION AND EXPLOITATION
See also: Foreign investment, Oil and gas

Exploitation of sub-marine areas

The Republic of Korea applied for registration as a pioneer investor under resolution II of the Third UN Conference of the Law of the Sea. (UN doc. LOS/PCN/134, 20 Jan. 94)

SETTLEMENT OF DISPUTES
See: Borders

SPACE ACTIVITIES

Indian satellite launch

India announced that it was to launch a one-ton remote sensing satellite with a locally built rocket, the Polar Satellite Launch Vehicle. (IHT 04-08-93) Meanwhile its second geostationary satellite in the Insat-2 series was launched on 22 July 1993 by a European Arianespace rocket. (FEER 12-08-93 p. 79)

Developments in Indonesian satellite activities

A new generation of Indonesian satellites, the Palapa C, was about to be introduced by the Indonesian Satelindo company. The first one, Palapa C1, would be launched in 1995 by Arianespace. The Palapa B1 satellite, originally owned by the state-run Telkom and acquired by a private company in 1991, would cease functioning soon (Three B-series satellites would remain operational, with retirements due between 1995 and 2001) and would be replaced by the C1. The latter is twice as big, will carry 34 transponders and will have a footprint stretching from the Middle East to New Zealand and as far north as Japan. (FEER 07-10-93 p. 83)

Thai communications satellite

The first, US-made, Thai communications satellite was to be launched on 17 December 1993 on a European Space Agency rocket. It is owned by Shinawatra Satellite Co. A second, twin one was planned to be put in orbit in May 1994. The satellites would have a footprint covering most of East Asia, from Japan to Indonesia. (IHT 17-12-93)

Chinese launching of satellites

China Great Wall Industry Corp. signed a contract on 22 February 1994 to launch two broadcast satellites for the US EchoStar Satellite Corp. The launchings would take place in late 1995 and mid-1996. (IHT 23-02-94) Later it was reported that Hughes Communications of the US and Great Wall had signed a contract for the launching of the Optus B3 telecoms satellite in 1994 and that an additional 10 Hughes satellites would be launched by Chinese rockets during the next 12 years. (FEER 17-03-94 p. 54) On 10 May 1994 Chinese officials disclosed that China would launch 30 foreign-owned satellites over the next seven years, a figure that was much higher than previously estimated. (IHT 11-05-94)

Malaysian plans

A Malaysian company had bought a number of satellites from the former Soviet Union in 1991 and was planning to put them in orbit in 1996. The main customers would be in Afghanistan, India and Indochina, where the Soviet Union had built earth stations compatible with the satellites. (IHT 7/8-05-94)

SPECIFIC TERRITORIES WITHIN A STATE: EAST TIMOR

Intra-Timorese talks

The Indonesian government said on 20 July 1993 that it was willing to allow and take part in talks between pro-Indonesian figures in East Timor and exiles who oppose Indonesia's presence in the territory. It was stressed that such talks, proposed by

Timorese exiles, would be informal and would not include Indonesia's sovereignty over the territory. (IHT 21-07-93)

Reduction of sentence

The Indonesian president decided to reduce the sentence on JOSÉ ALEXANDRE GUSMAO, leader of the separatist movement, from life imprisonment to 20 years. (IHT 14/15-08-93)

SPECIFIC TERRITORIES WITHIN A STATE: KASHMIR

New Indo-Pakistani talks

After 14 months India and Pakistan met again to address the Kashmir issue in Islamabad on 1-3 January 1994. They failed to make any progress. Since 1990 the foreign ministers had held seven rounds of talks, but the current talks were the first at which India agreed to discuss the Kashmir issue.

Pakistan's position remained based on the 1948 UN Resolution on Kashmir, which called for a plebiscite among Kashmiris on whether they want to join India or Pakistan, and the Simla Accord of 1972. This accord prescribed that the two countries must settle the dispute bilaterally, and that a meeting of heads of state convene to find a final settlement. India has always rejected the UN resolution.

Both parties oppose a "third option" involving some form of independence for Kashmir after a transition period under UN supervision. India claims the whole former princely state, and for Pakistan an independent Kashmir would mean losing the part it now controls which provides a strategic corridor with China.

Independence is the publicly declared policy of the Pakistan-based militant Jammu and Kashmir Liberation Front (JKLF). The Al-Hurreyat Conference, an umbrella group of 33 militant Kashmiri groups, rejects the idea of independence and aims at accession to Pakistan.

The present *de facto* border is the Line of Control in Kashmir established after the 1970 war. India raised the issue of recognition of the LOC as the international border but Pakistan rejected such recognition.

As to future talks India unveiled proposals including redeployment of forces in the Siachen glacier, demarcation of a disputed maritime boundary and stabilizing the line of control in Kashmir, as well as additional measures covering general confidence building, nuclear non-proliferation, sharing of river waters and economic cooperation. (FEER 23-12-93 p. 18, 23; 13-01-94 p. 12)

Chinese position on Kashmir

It was reported that China is opposed to the idea of independence for Kashmir, as it fears that an independent Kashmir would become a pro-American surrogate on its southern border. With three ongoing armed conflicts in the region - Afghanistan, Tajikistan and Kashmir - where the main protagonists are Islamic fundamentalists,

China was said to be deeply concerned about the spread of Islamic radicalism in Xinjiang. (FEER 13-01-94 p. 12)

SPECIFIC TERRITORIES WITHIN A STATE: TIBET

Chinese offer rejected by the Dalai Lama

The Chinese government extended an invitation to the Dalai Lama to return to China and said that doors for negotiation were open on all matters except the issue of Tibetan independence. The Dalai Lama's chief representative said on 25 August 1993 that the invitation could only be considered if the precondition was dropped. On the other hand, not long before the Dalai Lama had renewed an offer to drop his demand for independence in exchange for autonomy except in the fields of foreign affairs and defence.(IHT 26-08-93)

TERRITORIAL CLAIMS AND DISPUTES

See also: Inter-state relations

Russo - Japanese dispute

During his visit to the G-7 meeting in Tokyo early July 1993 the Russian president acknowledged the dispute over the four islands and said that the problem should be discussed at the time of his official visit. (IHT 09-07-93) However, during a visit to the chain of islands the Russian Prime Minister said on 17 August 1993 that Russia would "never" return the four disputed islands to Japan. The four islands were given by Russia to Japan in 1875 in exchange for Sakhalin Island and were occupied by the Soviet Union at the end of World War II. (IHT 18-08-93)

During his visit to Japan in October 1993, taking place just a few days after he had forcefully crushed the Russian opposition, the Russian president carefully avoided to get involved in concrete discussions on the issue. As to the question whether he would explicitly recognize the 1956 treaty between the two countries which called for the return of two of the four disputed islands the Russian president said that as "the successor state" to the Soviet Union, Russia would "execute the agreements and treaties that were concluded between Japan and the Soviet Union with respect to any issue." (IHT 13-10-93)

Shooting and detention of Japanese trawler

In late November 1993 the Russian Coast Guard opend fired at a small Japanese trawler and detained it and its crew off Cape Nosappu on the eastern tip of the Island of Hokkaido, about two miles from the nearest Russian-held island. According to the Russian news agency the incident occurred inside Russian waters. It was the first case where Russian border guards fired at Japanese fishermen to stop their boats. The normal procedure for coast guard cutters challenging intruding vessels is to fire shots

across the bow before aiming directly at the vessel, but it was not clear whether such warning shots had been fired. In the course of 1993 13 Japanese ships were detained by Russian authorities. (IHT 01-12-93)

Another incident of a Russian ship firing warning shots at six Japanese fishing vessels occurred on 4 June 1994 in the Kunashiri Straits, near the disputed islands. (FEER 16-06-94 p. 13)

Cambodian territorial claims

It was reported that Cambodia will demand that Vietnam and Thailand return large areas of Cambodian territory annexed by the two states in the 1980s. During 1993 King NORODOM SIHANOUK sent several private communiques to Vietnam accusing Vietnam of moving border posts and demanding the return of territory and the respect of maps based on agreements set in the early 1960s (*see supra*: Inter-state relations). He also accused Vietnam or the French colonial government of severing huge areas from Cambodia at the turn of the century. It was said that the UN, which conducted mapping surveys ahead of the elections in May 1993, agreed that Vietnam and, to a lesser extent, Thailand are in illegal possession of Cambodian territory. (FEER 28-10-93 p. 32)

Spratly Islands

The Indonesian foreign minister suggested that countries around the rim of the Sout China Sea should meet in more formal government-to-government settings to discuss the status of the disputed Spratly Islands. But a Chinese official attending an informal workshop (*see also* 3 AsYIL 449) on the question in Surabaya, Indonesia, rejected the proposal. (FEER 02-09-93 p. 14)

At a meeting of senior officials of ASEAN and other countries in Manila on 5 December 1993 the Deputy Prime Minister of Vietnam as well as the President of the Philippines emphasized the need for peaceful settlement of the different claims in respect of the Spratly Islands (IHT 06-12-93).

During a visit to Vietnam in late March 1994 the Philippine president pleaded for demilitarization of the area and called for confidence-building measures like marine research, environmental protection and joint development programs for oil, gas, fisheries and other resources (FEER 31-03-94 p. 30).

In an apparent attempt to increase Vietnamese presence on the islands, Vietnam introduced a three-year tax holiday for companies and individuals willing to exploit and export sea products from the archipelago (FEER 16-09-93 p. 14).

Meanwhile it was reported that China had announced extension of its administrative control by setting up "an independent oceanographic body" to supervise the disputed islands (IHT 30-03-94; FEER 07-04-94 p. 13). There were also reports that China Petroleum of Taiwan, China National Offshore Oil of China and Chevron of the US had agreed to form a joint venture for oil exploration in the East China and South China Seas. (FEER 31-03-94 p. 30)

In 1992 China granted exploration rights to the US company Crestone Energy Corp. for an area of the South China Sea near the Spratly Archipelago (*see* 2 AsYIL

378). In April 1994 the company announced that it had begun its search for oil, to which the Vietnamese foreign ministry responded by saying that "No other country or company is allowed to carry out exploration and exploitation of resources on the continental shelf and [in] the special economic zone of Vietnam without the permission of the Vietnamese government." Vietnam maintained that it had been exercising its right to sovereignty over its continental shelf, including the Crestone contract area, for years by offering exploration blocs for bids. It also said that it had scientific and oil-services facilities, including a sea lighting system and a meteorology station, in the area. The area to which Crestone has access under the contract, about 25,000 square kilometre, is the largest area ever included in a prospecting contract in Southeast Asia. It was said that the exploration area has an estimated 1 billion barrels of oil.

A few hours after Crestone's announcement Vietnam signed contracts with Mobil Corp., Russian and Japanese companies, for exploration of the Thanh Long [Blue Dragon] field, lying west of the Crestone concession and within China's territorial claim (IHT 21-04-94; FEER 05-05-94 p. 13). On 12 May China called the contract illegal because, as the spokesman of the Chinese ministry of foreign affairs put it, the area "belongs to the adjacent waters". On the other hand a Vietnamese foreign ministry statement said that the Blue Dragon field was "entirely under Vietnam's sovereignty". (IHT 13-05-94) In June 1994 an exchange of protests between China and Vietnam took place, accusing of encroaching on each other's territory (FEER 30-06-94 p. 20).

It was reported on 22 June 1994 that Vietnam had sent a drilling rig to work on the Vanguard Bank which forms part of the area awarded by China to Crestone. Vietnam calls the area in which the Crestone block is located the Tu Chinh region and asserts that it is an integral part of Vietnam's exclusive economic zone and continental shelf. (IHT 23-06-94)

Reflecting growing US interest in the South China Sea following the lifting of the US economic embargo against Vietnam, Occidental Petroleum Corp. had bought a 45 percent stake in an exploration block 300 kilometres off the coast of southern Vietnam which was held by PT Astra of Indonesia. Earlier, Atlantic Richfield Co.had bought 50 percent of an adjacent block held by British Gas PLC. Both blocks are just north of Blue Dragon and Big Bear, the latter being operated by the Australian company Broken Hill Pty in partnership with Malaysian, Vietnamese, Japanese and French companies. All four blocks were also claimed by China. Exploration of blocks closer to the Vietnamese coast had not led to the finding of commercial deposits. Other large offshore petroleum projects which are also inside the Chinese claim include the Natuna gas field, awarded by Indonesia to Exxon Corp. and the Indonesian state oil company Pertamina, and the Jintan gas field, awarded by Malaysia to Occidental Petroleum Corp., Nippon Oil Co. and the Malaysian state oil company Petronas. (IHT 06-06-94) On 8 May 1994 the Philippines granted an oil exploration permit to Vaalco Energy of the US and its Philippine subsidiary, Alcorn Petroleum and Minerals. The permit covered the so-called Recto Bank (Nanshan for the Chinese), including the Patag, Lawak and Parola islands, a portion of the disputed Spratly Islands, 400 kilometres west of Palawan Island. The Chinese foreign ministry issued a statement reaffirming China's sovereignty over the area and a protest was lodged with the Philippine foreign ministry. In reply the latter said that the Philippines "meant no harm nor offence" as

the area was within Philippine territory. A decree by the then president MARCOS had declared the area off Palawan to be a Philippine municipality. (FEER 30-06-94 p. 21)

East China Sea

China opened to bidding by foreign oil companies parts of the East China Sea which slightly overlap a line equidistant with South Korea and Japan. The northern bloc overlaps South Korea's claimed shelf in two areas, the southern bloc apparently overlaps with an area held by JAPEX, the Japanese state oil exploration company. Besides there is a major overlap of both Chinese blocs with Taiwan's concession system. (M.J.Valencia, IHT 03-02-94)

Sipadan and Ligitan
(*see* 1 AsYIL 348, 2 AsYIL 379, 3 AsYIL 451)

At their working summit meeting in Langkawi in July 1993 the Indonesian president and the Malaysian prime minister reached a mutual understanding that the territorial dispute would be resolved through peaceful means and should not be overplayed as to become a hindrance to cordial and productive relations. The two parties affirmed their resolve to settle their dispute over the two islands in accordance with international law after their talks in January 1994. Further talks on 26-28 May 1994, however, did not result in an agreement either. (NST 18-07-93, 29-01-94, 01-02-94; FEER 10-02-94 p. 13, 09-06-94 p. 13) The Joint Working Group of the Malaysia-Indonesia Joint Commission would meet again in September 1994.

Malaysian tourism development on the island of Sipadan seemed to irritate the Indonesian side. Indonesia cited a verbal agreement of 1969 between the two sides to maintain the status quo until the dispute was resolved, but Malaysia denied the existence of such an agreement. The Indonesian claims were first asserted when the two countries began drawing up their maritime boundaries in the late 1960s. Malaysia bases its claim to Sipadan and Ligitan on the historic colonial administration of the area. A 1916 document in the Sabah state archives confirming turtle egg collection rights for local families under the British North Borneo government and signed by a British colonial official seems to be one of the sources of the Malaysian claim. An exchange of documents between the British authorities and the US government demarcating territory in the Sulu Sea is another basis of the Malaysian claim. Indonesia bases its claim on a 1891 Anglo-Dutch boundary agreement. One of its provisions reads: "The boundary between Netherlands possessions in Borneo and those of British protected states in the same island shall start from 4 degrees 10' north latitude on the east coast of Borneo." Sipadan lies below this latitude and Ligitan falls just north of the line. The matter never became an issue in the colonial period as maritime boundaries only extended 3 miles. The breadth of the territorial sea has meanwhile become 12 nautical miles or 19.2 kilometres. (FEER 17-03-94 p. 32)

The Senkaku Islands

In view of Article 2 of the Chinese Law on the Territorial Sea and the Contiguous Zone which stipulates that the territory of China includes the Senkaku Islands (in Chinese: Diaoyu Islands), the Japanese Minister to China made a formal protest to the Chinese government to the effect that from a historical as well as international law perspective the Senkaku Islands are proper Japanese territory and effectively under the control of the Japanese government. It found the Chinese attitude regrettable and requested a correction. The Chinese responded that the protest was irrelevant as there was no doubt that the islands had been Chinese territory from ancient times.

Hitherto the Chinese government had proposed joint exploitation of the ocean floor resources around the Senkaku Islands while leaving the territorial question unsettled, but this idea has been rejected by the Japanese government which took the position that the Senkaku islands are Japanese territory and consequently there was no territorial question.

UNITED NATIONS

Attitudes toward Japanese permanent membership of Security Council

Japan formally declared its wish to be given a permanent seat in the UN Security Council in July 1993 but the US president said he did not intend to press the UN Security Council to extend permanent membership to Japan and Germany until issues of bilateral relationship had been settled. North Korea criticized Japan's bid as "impudent and indiscrete". (IHT 07-07-93, 16-07-93)

Views of Asian member states on the question of equitable representation on and increasing the membership of the Security Council

The *Chinese* reply read, *inter alia*:

"(2) ... It is the view of the Chinese government that there is a need to expand the membership of the Security Council in an appropriate manner when the time is ripe, so that the Council, in keeping pace with the changing situation both inside and outside the United Nations, will carry out its functions in an even more effective and vigorous way in international affairs. ...

(3) ... it is China's conviction that the proposed expansion of the Council should be instrumental in further promoting its efficacy ... It should not affect the Council's efficacious role or erode the existing effective mechanism. ...

(6) As the proposed restructuring of the Council has a direct bearing on the interests of all states members of the United Nations and may entail the revision of the Charter, this process will necessarily be a fairly long one involving complicated political, legal and procedural issues. China maintains that any measure aimed at restructuring the Council should therefore be considered in aprudent and cautious manner. Any proposal in this regard should be judged in light of extensive and comprehensive discussions

among various interested parties and sanctioned on the basis of broad consensus and universal acceptance of the member states."

The reply of *North Korea* read, *inter alia*:
"(4) ... the reformation of the Security Council should be done on the principles of guaranteeing democracy and openness so that the views of all the member states ... are fully reflected in decision-making ...
(5) The efficiency and effectiveness of the Security Council could be improved and its role strengthened when the unanimous will and aspirations of the member states are correctly and fully viewed and reflected in any action or activity ...
(7) ... it is necessary to increase the membership of the Security Council with a view to keeping the balance between the membership of the Security Council and that of the Organization. ...
(9) The Democratic People's Republic of Korea holds the view that the relationship between the General Assembly and the Security Council should also be reviewed and dealt with according to the newly developed situation so as to improve decisively the role of the General Assembly and strengthen its function ... in preserving international peace and security."

India was of the opinion that the Security Council should be expanded in view of the need to restructure the UN in order to adapt to changing circumstances. Its reply read, *inter alia*:
"(2) ... The ratio between the Security Council membership and the General Assembly membership has declined from 1:4.6 in 1945 to 1:12 today. ... there has been a particularly steep fall in the ratio between the number of permanent members [of the Security Council] and the General Assembly membership, which has declined from 1:10 in 1945 to 1:36 today. ... India is of the view that the number of permanent members of the Security Council should be increased to 10 or 11 and the non-permanent members to 12 or 14. ...
(5) India is of the view that the review in question should be undertaken on the basis of equitable regional representation, consistency in support for, and participation in, important political and economic activities and peace-keeping operations ... and consistency in fulfilling financial obligations towards the United Nations ... population, size of the economy and future potential of the countries concerned should also be taken into account.
(6) Population represents both an expression of the principle of democracy and an element of power. With increasing emphasis on the principle of democracy at the national level, there is a need for extending this principle to the international level also. The present permanent members of the Security Council have a combined population of less than 1.75 billion. This leaves two thirds of the world's population without representation in the permanent members' category. Population, combined with rising levels of literacy and growing industrialization, is also an element of power.
(7) Size of economy, its resilience and self-sufficiency in terms of raw material supply and markets are factors which have a bearing on a particular country's ability to exercis independence of judgement and action on international issues. ...

(8) ... Financial contribution and support to United Nations activities need also to be considered. Here, it is important to bear in mind not just the financial contribution in absolute terms, but also in relative terms. For a country with low per capita income, assessed contribution as per the United Nations scale may entail proportionately higher sacrifice. The record of timely payment should also be taken into account.
(9) ... It is ... essential to take into account both the present and future dimensions of power. Future potential as a criterion for inclusion among permanent members of the Security Council is not a new principle. This indeed has been an important consideration in making the choice of permanent members in the past.
(10) ... The principles of interdependence must be recognized and reflected in the composition of the Security Council by accomodating developing countries in the permanent members' category.
(11) The imperative necessity of reviewing the membership of the Security Council ... can be given effect by amending Articles 23, paragraph 1, and 27. ...
(12) ... The principle of rotation is already embodied in the non-permanent members' category ... Therefore, this principle need not be replicated with the introduction of permanent membership on a rotational basis. This would compromise the element of predictability in the decision-making ... and further accentuate the inequities of the present structure. ..."

Japan put forward that:
"(5) ... [in] view of [the Security Council's primary responsibility for the maintenance of international peace and security] as well as its authority to make decisions which legally bind Member States, the legitimacy and credibility of its actions will be enhanced to the extent they accurately reflect the general will of the member states.
(6) ... those countries that are clearly capable of assuming responsibility for the implementation of its resolutions, for example, by making financial contributions, should be more actively involved in the decision-making process so as to ensure that the resolutions ... are in fact implemented. ...
(9) ... [T]he Council should be enlarged to have around 20 members at most, by adding to the current permanent members a certain number of permanent and non-permanent seats in an appropriate ratio. In so doing, special consideration should be given to the question of equitable geographical distribution in relation to non-permanent membership.
(10) The efforts to enlarge the membership of the Council should be guided by the principle that underlies paragraph 1 of Article 23 of the Charter ...
(11) Further, a consultative process on an *ad hoc* basis involving major Member States not represented on the Security Council should be encouraged in conjunction with the Council's decision-making. Thus the transparency in the Council's decision-making would be enhanced. ..."

In its reply *Malaysia* put forward that:
"(2) ... [r]eform in the Council is necessary not only to reflect a more equitable geographical representation but also to contribute to the strengthening of the democratization process within the United Nations system ...

(5) ... the ratio of the total number of states [members of the United Nations] to the number of Council seats [has changed] from 5:1 in 1945 to 8:1 in 1963 ... to 12:1 now in 1993. In other words, only 8 per cent of the general membership is now represented by the Council compared to 20 per cent in 1945. ...
(7) The current membership structure of the Council is not consistent with Article 23, paragraph 1, of the Charter, which requires the Council to consider, *inter alia*, equitable geographical distribution in the elections of its non-permanent members which, as currently constituted, has too many from the European/Western groups, at the expense of other regions.
(8) ... [T]he ratio of the average number of countries in a region represented by one [non-]permanent seat in the Council reveals that currently the ratio is 24:1 for Asia; 17:1 for Africa and Latin America; 12:1 for Western Europe and others; and 11:1 for Eastern Europe. ...
(9) In addition, the European/Western group of countries is overrepresented in the Council, holding four out of five permanent memberships. All in all, the European/Western group of countries with 37 members has seven members in the Council, whereas the rest of the 133 members from Asia, Africa and Latin America have to share the remaining seven seats on the Council, excluding one permanent seat held by China.
(10) Therefore, ... the membership of the non-permanent members should be increased by an additional 10 seats, according to the following distribution: (a) Asia (47) 4 seats; (b) Africa (52) 4 seats; (c) Latin America (34) 2 seats.
(11) ... [T]here must be a redefinition of what constitutes eligibility for a permanent membership in the future...
(12) ... Malaysia has serious reservations about the idea of increasing the number of permanent members. However, we are prepared to consider the idea of establishing a third category of membership as semi-permanent members, electable for a period of five to six years, without the veto right.
(13) In the long term, consistent with many changes that are taking place around the world, a new mechanism that would abolish the vetoing power ... needs to be introduced. ...
(15) ... Since the inception of the United Nations in 1945, a total of 280 vetoes were exercised by the permanent members of the Security Council, as follows: USSR (Russian Federation) 124 (1); USA 82; UK 33; China 22; France 18. ...
(16) ... [I]deas such as the one suggested by the Netherlands should be closely examined. In order to restrict any abuse of the privilege of veto, the Netherlands suggested the adoption of a double veto, i.e. two negative votes by permanent members being required to veto a decision instead of one. ..."

Nepal replied, *inter alia*:
"(3) ... The provision of Article 24 ... is based on the understanding that in carrying out its tasks, the Council acts on behalf of the membership as a whole. This introduces the fundamental democratic priciple of representativeness of the Council. ... The membership of the Council has not increased in 30 years while membership of the

Organization, during the same period, has grown by almost 60 per cent. A limited increasee in membership of the Council would, therefore, reflect the increased membership of the United Nations ..."

The reply from *Pakistan* also emphasized that increase in the UN membership from 52 to 183 states is not effectively reflected in the Security Council and that the change in geographical composition of member states and the larger number of small and medium states requires particular reflection in the Council's composition. In consonance with the position of the non-aligned countries, particularly paragraph 30 of chapter II of the Final Documents [of the 10th Summit Conference at Jakarta] any decision on the question of equitable representation on and increase in the membership of the Council should conform to a number of criteria, such as (a) the Council's representative character, (b) the enhancement of its ability to discharge its responsibilities under the Charter, (c) greater democratization, (d) preventing any enlargement of existing inequalities in the rights and privileges of UN members, (e) compatibility with the overall measures to restructure and strengthen the UN, and (f) the decision should be achieved through consensus and agreement among the UN members. Finally reference was made to the need for greater transparency in the work of the Council in order to ensure the broadest possible support for its decisions.

The Philippines listed three reasons necessitating serious reflection on and consideration of the issues of membership of the Security Council, *viz.* the increase in membership of the UN, the increasing interdependence of present-day peace and development issues and the need to consider them in a comprehensive manner, and the emergence of a more multipolar balance of interests, including greater involvement of regional arrangements. It then continues, *inter alia*:
"(6) The structure of the Security Council ... does not seem to have been affected by the developments mentioned above. ... It remains the least representative and democratic of all the formal United Nations bodies, due principally to its unequal geographic representation and the exercise ... of the veto privilege.
(7) The Philippines would thus welcome a comprehensive exchange of views on Security Council membership...
(8) ... [T]he Philippines recognizes that a thorough review would inevitably have substantive implications on other United Nations activities ... The Philippines therefore believes that ... the review of the Council's membership should be undertaken in the context of a wider Charter review under Article 109."

Vietnam considers an increase of the Security Council's membership "a natural must with a view to bringing about a more equitable representation" while "redressing the imbalance in regional representation in the Council's permanent membership constitutes an objective demand". "The re-examination and reform of the composition of the Security Council should "ensure respect for the principles of equal sovereignty, of democracy and transparency in its decision-making, and bringing about a more balanced and rational relationship between the Security Council and the General Assembly." (UN doc. A/48/264 of 20-07-93)

Indonesia emphasized that, even though the membership of the Security Council was increased in 1965, it was felt that the Council was lacking representative character, and that despite the more than a quarter century that had elapsed and the increase in UN membership during that time there had been no comparable increase of Council membership. An expansion "... would strengthen the Council by making it more responsive and relevant to prevailing realities ...

(3) *Indonesia* is also firmly of the view that an increase in the membership of the Security Council should accomodate new members which, if they are not to be given veto powers, should at least serve as permanent members. They should join the Council on the basis of ... criteria that would adequately reflect the political, economic and demographic realities of the world today, including in Asia, Africa and Latin America. The Council should include countries which were on the losing side of the Second World War but which subsequently have begun to play an increasing important role in the global economy. They are not less important in the context of the changing concept of security which now emphasizes the economic and social aspects as much as the military. It is also axiomatic that international security and prosperity can be promoted effectively and equitably by according recognition to the political and economic weight of the developing countries, particularly those with the largest populations. ...
(4) ... The veto powers, which ensure an exclusive and dominant role for the permanent members of the Council, are incompatible with the ongoing endeavours aimed at reforming and improving certain structures and procedures of the United Nations ...
(5) Finally, the procedures and practices of the Security Council also call for an urgent review. ... The General Assembly should be kept informed at regular intervals of the outcome of informal consultations ..." (UN doc. A/48/264/Add.1)

The reply from *Singapore* read, *inter alia*:
"(4) There are a few basic problems which need to be addressed. The first is to decide the current configuration of international power and how that should be reflected in the distribution of permanent seats. ...
(5) The second problem relates to the international as opposed to the supranational nature of the United Nations. The United Nations was created by sovereign states and can do nothing without their assent. At the same time the permanent members have a more than proportionate say through their veto. ...
(6) The Government of Singapore is of the view that to progress, there is no alternative but to shape a consensus gradually ... At this preliminary stage ... we deem it most useful to try to identify and build consensus on objective general criteria for a general review of the Security Council ...
(7) In this regard, the Government of Singapore believes that the following considerations need to be borne in mind:
(a) There should be a level playing-field with regard to all present and future members of a possibly expanded Security Council;
(b) Anachronistic reference to "enemy States" in Articles 53, 77 and 107 of the Charter should be removed;

(c) Suggestions that there could be different classes of permanent members without the veto are also impractical;
(d) It is not practical or even desirable to do away with the veto. ... It is a safety-valve that prevents the United Nations from undertaking commitments that it lacks the power to fulfil. However, to minimize the misuse of the veto, if permanent membership is expanded, there should be at least two vetoes to block a draft resolution;
(e) Privilege must be paid for. ... A permanent member should therefore carry a larger portion of the financial burden of the United Nations. Each permanent member should pay at least 9 per cent of the operating expenses of the United Nations, as well as 11 per cent of the United Nations peace-keeping operations, which are the average percentages of the premanent five's current collective percentage of these budgets. ...
(f) ... All permanent members should be prepared to give effect to Article 43 of the Charter and be ready to place their military forces at the disposal of the United Nations ...
(g) ... [P]ermanent members must also have the requisite moral authority to assume their exclusive positions. They must have a good record of adhering to the purposes and principles contained in the Charter, and have been consistent and active in their efforts to maintain international peace and security. ..." (UN doc. A/48/264/Add.7 of 09-02-94)

Response to Muslim offer for UN force

Seven Islamic countries, among which Iran, on 13 July 1993 pledged more than 17,000 troops to the UN peacekeeping forces in Bosnia but said the soldiers would not take part in any plan to partition the country. The countries were among 16 states attending a special two-day session of the Organization of Islamic Conference. According to a US State Department official the US would oppose the sending of Iranian troops into Bosnia, but the US would defer on the issue to the UN Secretary General. The other countries offering troops were Pakistan, Bangladesh, Malaysia, Tunisia, Palestine and Turkey. (IHT 14 and 15-07-93) France also expressed reservations about Muslim troops from certain countries, implicitly Iran, but stressed that its reservations were only preferences for countries that already have experience of the kind of missions led by the UN. (IHT 16-07-93) When in Singapore in July 1993 to attend the post-ASEAN ministerial conference, the Russian foreign minister said that both the US and Russia supported the offer from Malaysia which he described as a moderate Muslim country that "sticks to the peacekeeping concept rather than jihad." (IHT 28-07-93)

Most of the 9,000 UN troops in Bosnia were from Western countries, although there was an Egyptian and a Jordanian battalion in Croatia. (IHT 16-07-93)

Malaysian participation in peace-keeping

1,400 Malaysian troops would serve in the UN peace-keeping force in Bosnia. The first detachment left to take up duties at the end of September 1993. (FEER 14-10-93 p. 15)

UNRECOGNIZED ENTITIES

South Korea-Taiwan relations

It was announced on 27 July 1993 that the two countries would establish some sort of unofficial relations. Under the agreement which was negotiated in Japan the two sides would open missions in their respective capitals to coordinate trade and cultural relations. The missions would be "unofficial, civilian" but their officials would be accorded privileges which resemble diplomatic privileges to a great extent. Visas would be issued in the names of consulates outside Taiwan or Korea. The agreement enabled Taiwan to have an additional, pseudo-consular presence in the city of Pusan.

The validity of agreements and treaties dating from the time that the Taipei government was still recognized by South Korea was reaffirmed, enabling the resumption of air and shipping links between the two countries.

The negotiations leading to the agreement included the Taiwanese claim to non-diplomatic property in Korea. Since Korean law restricts foreign ownership of land some of the Taiwanese property had been registered under the embassy's name in the past although in fact being owned by the overseas Chinese community in Korea. The issue was not settled by the agreement. The Korean attitude was that it was to be settled between the governments of Beijing and Taipei and that South Korea would respect whatever conclusion was reached. (FEER 12-08-93 p. 26)

WEAPONS

Japan's attitude toward extension of the NPT

During the G-7 meeting in Tokyo in early July 1993 Japan opposed an immediate and indefinite extension of the Non-Proliferation Treaty. The Japanese foreign ministry said Japan would like to extend the treaty as long as possible but "need further argument to have a consensus" before 1995 when the treaty expires and a formal extension will be necessary. Later in the month the Japanese foreign minister said that Japan was inclined toward supporting an indefinite extension. (IHT 13 and 29-07-93) But at the same time he said that Japan must have the will to build nuclear weapons if necessary in the event of a North Korean nuclear threat: "If North Korea develops nuclear weapons and that becomes a threat to Japan, first, there is the nuclear umbrella of the US upon which we can rely. But if it comes down to a crunch, possessing the

will that "we can do it" is important." He reminded that opposition to the NPT existed in Japan because of sentiment that the accord favours nuclear powers and discriminates against non-nuclear states. (IHT 30-07-93)

ASEAN nuclear-free zone

During the post-ASEAN ministerial conference in July 1993 the US under-secretary of defence said that the US was reviewing a longstanding US policy of refusing to endorse regional agreements banning the possession or storage of nuclear weapons. Under this policy the US had refused to sign the protocol to a 1985 treaty establishing a nuclear weapons-free zone covering the South Pacific. The argument was that such a treaty could weaken global nuclear deterrence and, in particular, impede the freedom of navigation for the US navy [carrying nuclear weapons]. Accordingly the US had opposed a plan among ASEAN countries to create a nuclear-free zone that would cover sea and air lanes used by US military forces in the Pacific to reach the Indian Ocean and the Gulf. (IHT 29-07-93)

Legitimacy of nuclear weapons

The Japanese government proposed a formal statement declaring the use of nuclear weapons lawful but felt compelled to retreat under strong public criticism. The minister for foreign affairs and his ministry officials insisted, however, that Japan believed the use of such weapons not to be violative of international law. The affair stemmed from the invitation from the International Court of Justice for state opinions in the context of a request by the WHO for an advisory opinion on the matter. The draft of the Japanese reply read: "The use of nuclear weapons does not necessarily constitute a violation of international law, but their use must never be allowed." (IHT 10-06-94)

Chinese H-bomb test

Up to 1993 China had conducted 38 tests, the last one on 25 September 1992. This compares with 942 tests conducted by the US and 969 tests by Russia, France and Britain combined.

When US reconnaissance satellite photographs indicated that China was about to conduct an underground nuclear test, the US president expressed the hope that China would not go ahead with the test as "[t]here is no reasonable threat to China", but he had said previously that in case of a test being conducted by another state "I will direct the Department of Energy to conduct additional tests..." [and thereby canceling the 18-month extension of the unilateral US suspension of nuclear testing as announced in July 1993]. (IHT 18/19-09-93) China reacted by saying that it had taken note of the president's remarks and that "[i]t is known to all that China has all along exercised great restraint on nuclear testing." (IHT 21-09-93)

On 5 October 1993 China conducted an underground nuclear test. On that occasion the Chinese government issued a statement which reads, *inter alia*:

"... On the very day it became a nuclear-weapon state in 1964, the Chinese government solemnly declared that at no time and under no circumstances would China be the first to use nuclear weapons. It has also undertaken not to use or threaten to use nuclear weapons against non-nuclear-weapon states or nuclear-free zones....[I]t has signed and ratified the relevant Additional Protocols of the Treaty for the Prohibition of Nuclear Weapons in Latin America and the South Pacific Nuclear-Free Zone Treaty.

China has all along stood for the complete prohibition and thorough destruction of nuclear weapons and a comprehensive nuclear test ban... China has always exercised utmost restraint on nuclear testing and the number of the nuclear tests it has conducted is extremely limited.

...

China will ... work together with other states to conclude [a comprehensive test-ban treaty] no later than 1996. At the same time, China believes that a pledge by all nuclear-weapon states not to use nuclear weapons at all is of even greater significance as it is a more effective step towards the non-proliferation goal .... To this end, China strongly calls for a parallel negotiation by all nuclear-weapon states aimed at concluding an international convention on unconditional non-first-use of nuclear weapons and non-use and non-threat of use of nuclear weapons against non-nuclear-weapon states and nuclear-free zones.

After a comprehensive test ban treaty is concluded and comes into effect, China will ... carry out no more nuclear tests ...."(UN doc.A/C.1/48/3)

China carried out another underground nuclear test on 10 June 1994 as part of a series designed to modernize its nuclear capability before current negotiations would result in a comprehensive ban in 1996. Its previous underground tests took place in 1990 (two), 1992 (two) and on 5 October 1993. It was China's 40th test since it first exploded a fission bomb on 16 October 1964. China's modernization program was based on a retaliatory doctrine and the upgrading was called logical and predictable by Western analysts. (IHT 11/12-06-94; FEER 23-06-94 p. 13) In a meeting in Beijing with his Chinese counterpart the Japanese minister of foreign affairs urged China to refrain from nuclear tests, suggesting that failure to do so could affect Japan's aid program. Japan is the biggest donor of long-term aid to China (IHT 14-06-94).

WORLD WAR II

"Comfort women"

(*see* 2 AsYIL 383, 3 AsYIL 453)

The Japanese government acknowledged on 4 August 1993 that after a one-and-a-half year study it had determined that the Japanese military had forced Asian and European women into serving as prostitutes for its soldiers during World War II, and it offered its first full apologies. However, officials refused to say whether compensa-

tion would be offered. The statement read, *inter alia*, "We shall face squarely the historical facts... instead of evading them, and take them to heart as lessons of history. We hereby reiterate our firm determination never to make the same mistake by forever engraving such issues in our memories through the study and teaching of history." (IHT 05-08-93)

Japanese apologies

The new Japanese prime minister MORIHIRO HOSOKAWA made his first policy speech on 23 August 1993. He went further than any other Japanese leader since the end of the War in expressing his government's "profound remorse and apologies" for brutal Japanese behaviour in neighbouring Asian countries between 1910 and 1945, "including aggression and colonial rule". Asian analysts said that the remarks appeared to mark a turning point in Japan's efforts to forge closer political, cultural and security ties with other Asian countries. (IHT 24-08-93) However, the Japanese prime minister ruled out any further compensation for war victims, arguing that Japan had fulfilled all the requirements for reparation under the 1951 Peace Treaty and bilateral agreements (IHT 26-08-93).

Denial of the "Rape of Nanking"

A newly appointed Japanese Justice Minister denied the occurrance of the 1937 massacre of Chinese by Japanese troops in Nanjing. China reacted angrily and filed a protest. It said it took note of a statement by the Japanese prime minister rejecting the remarks of the Justice minister. There were also strong reactions from Taiwan, South Korea and Vietnam. The Japanese minister later resigned after having served a little more than a week and after having made his apologies. (IHT 06 and 09-05-94)

Chinese forced labour

On 22 June 1994 Japan acknowledged for the first time that it had forced tens of thousands of Chinese to work in Japan during the war. The admission followed a foreign ministry investigation begun in 1993. (IHT 23-06-94)

BIBLIOGRAPHY

BIBLIOGRAPHY OF INTERNATIONAL LAW CONCERNING ASIAN AFFAIRS*

EDITORIAL INTRODUCTION

Except for a few minor modifications this bibliography follows last year's format: it provides information on books, articles and other materials dealing with Asian topics and, in exceptional cases, it includes other publications considered of interest. English language publications only are cited.

In the preparation of this bibliography good use has been made of book review sections in established professional journals of international law, Asian studies and international affairs. Special mention should be made of the bibliography on Public International Law published by the Max Planck Institute for Comparative Public Law and International Law at Heidelberg, Germany, and of the regular lists of acquisitions of the Peace Palace Library in The Hague, The Netherlands. For the full names of frequently listed journals, see List of Abbrevations on p. IX of this Yearbook.

The headings used in this year's bibliography are:

1. General
2. States and groups of states
3. Territory and jurisdiction
4. Sea and rivers
5. Air and space
6. Environment
7. International conflicts and disputes
8. War, peace and neutrality, armed conflict and peace-keeping
9. International criminal law
10. Peaceful settlement of international disputes
11. Diplomatic and consular relations
12. Individuals and groups of persons - human rights
13. Decolonization and self-determination
14. International economic relations
15. Development
16. Information and communication
17. United Nations and other international/regional organizations.

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AGREEMENT ON THE ESTABLISHMENT OF THE ASEAN SECRETARIAT
as amended, Manila, 22 July 1992*

PREAMBLE

....

BEING members of the Association of South East Asian Nations, hereinafter referred to as 'ASEAN',

MINDFUL of the rapidly growing activities of ASEAN since its establishment on 8th August, 1967, in Bangkok, Thailand, in the implementation of the aims and purposes of ASEAN embodied in the ASEAN Declaration;

RECOGNIZING that the growth has increased the need in ASEAN for a central administrative organ to provide for greater efficiency in the coordination of ASEAN organs and for more effective implementation of ASEAN projects and activities;

do hereby agree as follows:

ARTICLE 1
THE ASEAN SECRETARIAT

Establishment and Location

1. The Contracting Parties hereby establish a permanent Secretariat for ASEAN which shall be called the ASEAN Secretariat, hereinafter referred to as 'the Secretariat'.
2. The Secretariat shall have its seat in Jakarta, Indonesia, hereinafter referred to as 'the Host Country'.

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* The Agreement on the Establishment of the ASEAN Secretariat was concluded on 24 February 1976. (1331 UNTS 243) The Agreement was amended three times, by Protocols of 27 January 1983, 9 July 1985 and 22 July 1992 (*ASEAN Documents Series 1967-1988* Nos.47 and 48, id. *1992-1994* p.16) The present text incorporates all amendments.

Asian Yearbook of International Law, Volume 4 (Ko Swan Sik *et al.*, eds.; 90-411-0872-6 © 1995 Kluwer Law International; printed in Great Britain), pp. 549-565

ARTICLE 2

Composition
The Secretariat shall comprise the Head of the Secretariat, who shall be known as the Secretary-General of ASEAN, hereinfafter referred to as the 'Secretary-General', Openly Recruited Professional Staff and Locally Recruited Staff.'

ARTICLE 3
SECRETARY-GENERAL

Appointment
1. The Secretary-General, who shall be accorded Ministerial status, shall be selected by the ASEAN Ministerial Meeting and appointed by the Heads of Government on the basis of merit. The tenure of office shall be 5 years, provided that the Heads of Government, upon recommendation of the ASEAN Ministerial Meeting, may extend the term of the appointment.

Functions and Powers
2. The Secretary-General shall:

(1) be responsible to the Heads of Government Meeting and to all Meetings of ASEAN Ministers when they are in session and to the Chairman of the Standing Committee at all other times.

(2) take charge of the Secretariat and be responsible for the discharge of all the duties and responsibilities entrusted to the Secretary-General by the Heads of Government Meeting, the ASEAN Ministerial Meeting and the Standing Committee.

(3) have the authority to address communications directly to the Contracting Parties.

(4) initiate, advise, co-ordinate and implement ASEAN activities:
   a) develop and provide the regional perspective on subjects and issues before ASEAN.
   b) prepare the ASEAN 3-year Plan of Co-operation for submission to appropriate ASEAN Bodies and final approval by the Heads of Governments.
   c) monitor the implementation of the approved ASEAN 3-year Plan and submit recommendations as and when necessary to the ASEAN Standing Committee.
   d) conduct, and collaborate in, research activities and convene meetings of officials and experts as required.

e) plan, programme, coordinate, harmonize and manage all approved technical cooperation activities.

(5) a) serve as spokesman and representative of ASEAN on all matters, in the absence of any decision to the contrary in respect of a specific subject by the Chairman of the Standing Committee.
b) conduct consultations with the Contracting Parties, the private sector, the Non-Governmental Organizations and other constituencies of ASEAN.
c) coordinate ASEAN dialogues with international and regional organizations and with any dialogue country that may be assigned to him.

(6) a) be in attendance at all Heads of Government Meetings.
b) be the Secretary to all the Meetings of ASEAN Ministers.
c) address the ASEAN Ministerial meeting on all aspects of regional cooperation and offer assessments and recommendations on ASEAN's external relations.
d) participate in and provide technical support to all Meetings of the Standing Committee and chair, on behalf of the Chairman of the ASEAN Ministerial Meeting, all Meetings of the Standing Committee except the first and last.
e) to participate and provide technical support for the ASEAN Economic Ministers' Meeting.
f) participate and provide the technical support for the Senior Officials Meeting, the Senior Economic Officials Meeting, other ASEAN Committees, and the Chairmen of task forces and working groups set up within the framework of ASEAN as necessary.
g) attend, or designate representatives to attend and participate as a member in the Meetings of all ASEAN Committees and other similar bodies.
h) monitor the implementation of the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), serve as a member of, and provide support to the Ministerial-level Council set up to supervise, coordinate and review the implementation of the ASEAN Free Trade Area.

(7) a) ensure that the ASEAN Committees and other similar bodies are informed of the directives of the Standing Committee and on relevant current developments in the activities of ASEAN.
b) act as the channel for formal communications between:
(i) ASEAN Committees, and other ASEAN bodies and the Standing Committees; and
(ii) the Secretariat and other international organizations and Governments.

(8) administer funds established for ASEAN cooperation.

(9) ensure organizational discipline in the Secretariat and have authority to recruit, terminate or promote staff under the provisions of this Agreement and such other Rules and Regulations as may hereafter come into effect.

(10) exercise the administrative and financial powers vested in the Secretary-General under the provisions of this Agreement and such other Rules and Regulations as may hereafter come into effect.

(11) prepare the Annual Budget Estimates of the Secretariat for the approval of the ASEAN Ministerial meeting.

(12) act as custodian of all ASEAN documents.

(13) be responsible for the Secretariat's security.

(14) prepare an Annual Report for submission to the ASEAN Ministerial Meeting.

3. The Secretary-General shall present drafts of Staff Regulations, Financial Regulations and Security Regulations for the Secretariat to the Standing Committee for its approval and shall apply and carry out the same from such date as it may specify.

4. The Secretary-General may propose amendments to such Regulations for the approval of the Standing Committee and such amendments shall come into force from such date as it may specify.

ARTICLE 4
STAFF OF SECRETARIAT

Composition and Appointment

1. The Openly Recruited Professional Staff of the Secretariat shall comprise of:
   a) a Deputy Secretary-General;
   b) four Bureau Directors;
   c) eleven Assistant Directors;
   d) eight Senior officers;
   e) any additional Openly Recruited Professional Staff as the ASEAN Ministerial Meeting may deem necessary.

2. The Deputy Secretary-General shall be appointed by the Secretary-General, following open recruitment and selection by a panel, comprising of representatives of the Contracting Parties, under the Chairmanship of the Secretary-General. The tenure of office shall be three years provided that the Secretary-General may extend the term of the appointment for a period not exceeding three years. The Deputy Secretary-General shall be accorded a rank which will be equivalent to Minister or Minister-Counsellor or equivalent rank.

3. The Bureau Directors shall be accorded a rank which will be equivalent to the rank of Counsellor, the Assistant Directors shall be accorded a rank equivalent to the rank of First Secretary and the Senior Officers shall be accorded a rank equivalent to the rank of Second Secretary. They shall be appointed by the Secretary-General through open recruitment. The tenure of office shall be for an initial period of up to three years. The Secretary-General can approve an extension not exceeding three years on the basis of efficient and effective performance as well as the provisions of this Agreement and such other Rules and Regulations as may hereafter come into effect.

4. The principal considerations in such appointments, through open recruitment, shall be the highest standards of professional efficiency, competence, integrity and equitable distribution of posts among nationals of the Contracting Parties.

5. The Deputy Secretary-General, Bureau Directors and Assistant Directors who have acted in the capacities nominated by their respective Governments and approved by the Standing Committee prior to the entry into force of this Protocol shall continue to carry their respective post designations for the remaining tenure of their current appointments, provided that they also be subjected to such other Rules and Regulations as may hereafter come into effect following the restructuring as envisaged in this Protocol.

6. The functions and duties of all the Staff of the Secretariat shall be set out in the Position Descriptions to be prepared by the Secretary-General and approved by the Standing Committee.

ARTICLE 5
DEPUTY SECRETARY-GENERAL AND BUREAU DIRECTORS

1. The Deputy Secretary-General shall:
   a) assist the Secretary-General in the performance of the Secretary-General's duties;
   b) identify strategies on issues requiring attention by the appropriate ASEAN bodies;
   c) assume the functions of the Secretary-General in his absence, subject to the prior authorization by the Chairman of the Standing Committee;
   d) attend meetings upon the instruction of the Secretary-General;
   e) coordinate the research activities of the ASEAN Secretariat;
   f) handle matters pertaining to affiliated ASEAN Non-Governmental Organizations; and
   g) perform such other duties as directed by the Secretary-General.

2. The Bureau Directors shall within the purview of their respective responsibilities:
   a) manage and coordinate the activities of their respective Bureaus;

b) monitor developments on ASEAN cooperation and activities within their respective purviews and keep the Office of the Secretary-General informed of the developments thereof to facilitate their respective areas of work;
c) prepare briefs, papers and various reports on matters within their respective purviews for purposes of information, discussions and making recommendations;
d) participate in ASEAN and other meetings and act as resource persons at relevant ASEAN meetings as decided by the Secretary-General;
e) supervise and direct the work of the Assistant Directors and other staff of their respective Bureaus; and
f) perform any other functions as directed by the Secretary-General.

3. The activities of ASEAN committees, and other ASEAN bodies in so far as they relate to the activities of the Bureaus referred to in paragraph 2 above shall also come within the purview of the respective Bureaus.

4. If for any reason the Secretary-General is unable temporarily to perform his functions, the Chairman of the Standing Committee shall appoint the Deputy Secretary-General as Acting Secretary-General. If for any reason the Deputy Secretary-General could not act as Secretary-General, the Chairman of the Standing Committee shall appoint the most senior Bureau Director as Officer-in-Charge.

5. If for any reason the Deputy Secretary-General is unable temporarily to perform his functions, the Secretary-General shall appoint the most senior bureau Director to act as Deputy Secretary-General.

ARTICLE 6
LOCALLY RECRUITED STAFF

1. The Secretary-General shall employ such Locally Recruited Staff for clerical and other office duties as are necessary to the normal functioning of the Secretariat.

2. The Locally Recruited Staff shall be nationals of the member States, recruited locally in the Host Country, and shall be appointed by the Secretary-General.

3. At the end of the first year, the Secretary-General shall make an overall recommendation to the Standing committee on the actual requirements regarding the size, composition and emoluments of the Locally Recruited Staff.

4. The financial provision for the employment of the Locally Recruited Staff shall be incorporated in the Annual Budget of the Secretariat.

5. The Standing Committee may approve increases of personnel during an ASEAN financial year.

ARTICLE 7
SALARIES AND ALLOWANCES

The salaries and allowances of the Secretary-General, the Deputy Secretary-General, the Bureau Directors, the Assistant Directors, Senior Officers and such other Officers as the Standing Committee may deem necessary shall be determined by the ASEAN Ministerial Meeting which shall, from time to time, on the recommendation of the Secretary-General, review such salaries and allowances.

ARTICLE 8
STAFF REGULATIONS

Subject to the other provisions of this Agreement, the terms and conditions of employment of the members of the Openly Recruited Professional Staff and of the Locally Recruited Staff of the Secretariat shall be set out in the Staff Regulations.

ARTICLE 9
BUDGET AND FUNDING

1. An Annual Budget for the Secretariat shall be submitted to the ASEAN Ministerial Meeting for approval.

2. The Annual Budget shall also include the numbers and the grades of staff personnel to be employed.

3. The budget of the Secretariat shall be categorized into:
   1) Capital outlay; and
   2) Recurrent expenditure.

4. Capital outlay shall include all costs related to the acquisition of land, building construction, provision of basic utilities and services, initial decoration and office furniture and equipment and installation of air conditioning plants, major maintenance and such other items as the Host Country may offer.

5. Recurrent expenditure shall include all other expenses including payment of salaries and allowances of all ASEAN Secretariat personnel, utility charges, travelling expenses, office requisites and stationery, minor and annual maintenance and all other administrative expenses.

6. Capital outlay expenditure shall be borne by the Host Country. Recurrent expenditure shall be shared on a basis to be determined by the ASEAN Foreign Ministers.

ARTICLE 10
AUDITING OF THE ACCOUNTS

1. The accounts of the Secretariat shall be audited annually by the Audit Committee consisting of three qualified members nominated by three of the Contracting Parties in rotation and appointed for a period of two years by the Standing Committee.

2. The annual accounts together with the Report of the Audit Committee thereon shall be submitted to the Standing Committee which shall cause the same to be laid before the next Ministerial Meeting together with its comments.

ARTICLE 11
PRIVILEGES AND IMMUNITIES

The Host Country shall grant to the Secretariat, the Secretary-General and the Staff such privileges and immunities as may be necessary for the performance of their duties and functions.

ARTICLE 12
AMENDMENTS

Any Contracting Party may propose amendments to this Agreement. When approved by the Contracting Parties or by the ASEAN Ministerial Meeting, such amendments shall come into force from such date as may be specified.

ARTICLE 13
RATIFICATION

1. This Agreement is subject to ratification by the Contracting Parties.

2. The Instruments of Ratification shall be deposited with the Department of Foreign Affairs of the Republic of Indonesia.

ARTICLE 14
ENTRY INFO FORCE

This Agreement shall enter into force on the date on which the fifth Instrument of Ratification is deposited.

ARTICLE 15
ACCESSION

1. This Agreement is open for accession by any Government which is accepted as a new member of ASEAN.

2. The Instrument of Accession shall be deposited with the Department of Foreign Affairs of the Republic of Indonesia.

3. With respect to any such new member Government acceding to this Agreement after it has come into force, this Agreement shall become effective in relation to that new member Government on the date of deposit of this Instrument of Accession.

4. If such an Instrument of Accession is deposited before this Agreement comes into force, it shall become effective in relation to that new member Government on the date this Agreement comes into force.

TERMS OF REFERENCE OF THE ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC*

The Economic and Social Council,

Having considered General Assembly resolution 46 (I) of 11 December 1946, in which the General Assembly "recommends that, in order to give effective aid to the countries devastated by war, the Economic and Social Council, at its next session, give prompt and favourable consideration to the establishment of an Economic Commission for Asia and the Far East",

Having noted the report of the Working Group for Asia and the Far East of the Temporary Subcommission on Economic Reconstruction of Devastated Areas,

Establishes an Economic and Social Commission for Asia and the Pacific with terms of reference as follows:

1. The Economic and Social Commission for Asia and the Pacific, acting within the framework of the policies of the United Nations and subject to the general supervision of the Council, shall, provided that the Commission takes no action in respect of any country without the agreement of the Government of that country:

(a) Initiate and participate in measures for facilitating concerted action for the economic reconstruction and development of Asia and the Pacific, for raising the level of economic activity in Asia and the Pacific and for maintaining and strengthening the economic relations of these areas both among themselves and with other countries of the world;

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* The present text includes all revisions and amendments as referred to in the Note of the UN Secretary-General of 23 June 1994, and is reproduced from the annex of that document (E/1994/81).

(b) Make or sponsor such investigations and studies of economic and technological problems and developments within territories of Asia and the Pacific as the Commission deems appropriate;

(c) Undertake or sponsor the collection, evaluation and dissemination of such economic, technological and statistical information as the Commission deems appropriate;

(d) Perform such advisory services, within the available resources of its secretariat, as the countries of the region may desire, provided that such services do not overlap with those rendered by the specialized agencies or the relevant United Nations bodies;

(e) Assist the Economic and Social Council, at its request, in discharging its functions within the region in connection with any economic problems, including problems in the field of technical assistance;

(f) In carrying out the above functions, deal, as appropriate, with the social aspects of economic development and the interrelationship of the economic and social factors.

2. The territories of Asia and the Pacific referred to in paragraph 1 shall include Afghanistan, Australia, Azerbaijan, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, the Cook Islands, Fiji, French Polynesia, Guam, Hong Kong, India, Indonesia, Iran (Islamic Republic of), Japan, Kazakhstan, Kiribati, Korea, Kyrgyzstan, the Lao People's Democratic Republic, Macau, Malaysia, Maldives, Marshall Islands, Micronesia (Federated States of), Mongolia, Myanmar, Nauru, Nepal, New Caledonia, New Zealand, Niue, Northern Mariana Islands (Commonwealth of), Pakistan, Papua New Guinea, the Philippines, Samoa, Singapore, Solomon Islands, Sri Lanka, Tajikistan, Thailand, Tonga, the Trust Territory of the Pacific Islands, Turkmenistan, Tuvalu, Uzbekistan, Vanuatu and Viet Nam.

3. The members of the Commission shall consist of Afghanistan, Australia, Azerbaijan, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, Democratic People's Republic of Korea, Fiji, France, India, Indonesia, Iran (Islamic Republic of), Japan, Kazakhstan, Kiribati, Kyrgyzstan, the Lao People's Democratic Republic, Malaysia, Maldives, Marshall Islands, Micronesia (Federated States of), Mongolia, Myanmar, Nauru, Nepal, the Netherlands, New Zealand, Pakistan, Papua New Guinea, the Philippines, the Republic of Korea, the Russian Federation, Samoa, Singapore, Solomon Islands, Sri Lanka, Tajikistan, Thailand, Tonga, Turkmenistan, Tuvalu, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Uzbekistan, Vanuatu and Viet Nam, provided that any State in the area which may hereafter become a Member of the United Nations shall be thereupon admitted as a member of the Commission.

4. The associate members shall include the Commonwealth of the Northern Mariana Islands, the Cook Islands, French Polynesia, Guam, Hong Kong, Macau, New Caledonia, Niue, the Republic of Palau and the Territory of American Samoa.

5. Any territory, part or group of territories within the geographical scope of the Commission as defined in paragraph 2 may, on presentation of its application to the

Commission by the member responsible for the international relations of such territory, part or group of territories, be admitted by the Commission as an associate member of the Commission. If it has become responsible for its own international relations, such territory, part or group of territories may be admitted as an associate member of the Commission on itself presenting its application to the Commission.

6. Representatives of associate members shall be entitled to participate without vote in all meetings of the Commission, whether sitting as Commission or as Committee of the Whole.

7. Representatives of associate members shall be eligible to be appointed as members of any committee, or other subordinate body, which may be set up by the Commission and shall be eligible to vote and hold office in such body.

8. The Commission is empowered to make recommendations on any matters within its competence directly to the Governments of members or associate members concerned, Governments admitted in consultative capacity, and the specialized agencies concerned. The Commission shall submit for the Council's prior consideration any of its proposals of activities that would have important effects on the economy of the world as a whole.

9. The Commission shall invite any Member of the United Nations not a member of the Commission to participate in a consultative capacity in its consideration of any matter of particular concern to that non-member.

10. The Commission shall invite representatives of specialized agencies and may invite representatives of any intergovernmental organizations to participate in a consultative capacity in its consideration of any matter of particular concern to that agency or organization following the practice of the Economic and Social Council.

11. The Commission shall make arrangements for consultation with non-governmental organizations which have been granted consultative status by the Economic and Social Council, in accordance with the principles approved by the Council for this purpose and contained in Council resolution 1296 (XLIV).

12. The Commission shall take measures to ensure that the necessary liaison is maintained with other organs of the United Nations and with the specialized agencies. The Commission shall establish appropriate liaison and cooperation with other regional economic commissions in accordance with the resolutions and directives of the Economic and Social Council and the General Assembly.

13. The Commission may, after discussion with any specialized agency functioning in the same general field, and with the approval of the Council, establish such

subsidiary bodies as it deems appropriate, for facilitating the carrying out of its responsibilities.

14. The Commission shall adopt its own rules of procedure, including the method of selecting its Chairman.

15. The Commission shall submit to the Council a full report on its activities and plans, including those of any subsidiary bodies, once a year.

16. The administrative budget of the Commission shall be financed from the funds of the United Nations.

17. The Secretary-General of the United Nations shall appoint the staff of the Commission, which shall form part of the Secretariat of the United Nations.

18. The headquarters of the Commission shall be located at Bangkok, Thailand.

19. The Council shall, from time to time, make special reviews of the work of the Commission.

JAPAN'S OFFICIAL DEVELOPMENT ASSISTANCE CHARTER*

30 June 1992

In order to garner broader support for Japan's Official Development Assistance (ODA) through better understanding both at home and abroad and to implement it more effectively and efficiently, the Government of Japan has established the following Charter for its ODA.

1. BASIC PHILOSOPHY

Many people are still suffering from famine and poverty in the developing countries, which constitute a great majority among countries in the world. From a humanitarian viewpoint, the international community can ill afford to ignore this fact.

The world is now striving to build a society where freedom, human rights, democracy and other values are ensured in peace and prosperity. We must recognize

* Text from the Japanese Ministry of Foreign Affairs.

the fact of interdependence among nations of the international community that stability and further development of the developing world is indispensable to the peace and prosperity of the entire world.

Environmental conservation is also a task for all humankind, which all countries, developed and developing alike, must work together to tackle.

It is an important mission for Japan, as a peace-loving nation, to play a role commensurate with its position in the world to maintain world peace and ensure global prosperity.

Bearing these points in mind, Japan attaches central importance to the support for the self-help efforts of developing countries towards economic take-off. It will therefore implement its ODA to help ensure the efficient and fair distribution of resources and 'good governance' in the developing countries through developing a wide range of human resources and socio-economic infrastructure, including domestic systems, and through meeting the basic human needs (BHN), thereby promoting the sound economic development of the recipient countries. In so doing, Japan will work for globally sustainable development while meeting the requirements of environmental conservation.

Such assistance is expected to further promote the existing friendly relations between Japan and all other countries, especially those in the developing world.

2. PRINCIPLES

Taking into account comprehensively each recipient country's requests, its socio-economic conditions, and Japan's bilateral relations with the recipient country, Japan's ODA will be provided in accordance with the principles of the United Nations Charter (especially sovereign equality and non-intervention in domestic matters), as well as the following four principles:

(1) Environmental conservation and development should be pursued in tandem.

(2) Any use of ODA for military purposes or for aggravation of international conflicts should be avoided.

(3) Full attention should be paid to trends in recipient countries' military expenditures, their development and production of mass destruction weapons and missiles, their export and import of arms, etc., so as to maintain and strengthen international peace and stability, and from the viewpoint that developing countries should place appropriate priorities in the allocation of their resources on their own economic and social development.

(4) Full attention should be paid to efforts for promoting democratization and introduction of a market-oriented economy, and the situation regarding the securing of basic human rights and freedoms in the recipient country.

3. PRIORITY

(1) Regions

Historically, geographically, politically and economically, Asia is a region close to Japan. East Asian countries, especially, member countries of the Association of South East Asian Nations (ASEAN) constitute one of the most economically dynamic regions in the world, and it is important for the world economy as a whole to sustain and promote the economic development of these countries. There are, however, some Asian countries where large segments of the population still suffer from poverty. Asia, therefore, will continue to be a priority region for Japan's ODA.

It is also necessary to be mindful of the poverty and the economic difficulties in the world as whole. Japan will therefore extend cooperation, befitting its position in the world, to Africa, the Middle East, Central and South America, Eastern Europe, and Oceania. Due consideration will be paid in particular to Least Developed Countries (LLDC).

(2) Issues

(A) Approach to Global Problems

Recognizing that it is important for developed and developing countries to cooperate in tackling global problems such as the environment and population, Japan will support efforts being made by developing countries to overcome these problems.

(B) Basic Human Needs

To help people suffering from famine and poverty, refugees and others, Japan will provide assistance to the basic human needs (BHN) sector and emergency humanitarian aid.

(C) Human Resources Development and Research and Other Cooperation for Improvement and Dissemination of Technologies

A priority of Japan's ODA will be placed on assistance to human resources development which, in the long-term, is the most significant element of self help efforts towards socio-economic development and is a basic factor for the nation-building of developing countries. Japan will also promote cooperation for the improvement and dissemination of technologies, such as research cooperation which will raise the research and development as well as adaptive capabilities of developing countries.

(D) Infrastructure Improvement

Priority will be placed on assisting infrastructure improvement, which is a prerequisite to socio-economic development.

(E) Structural Adjustment

Japan will provide support to structural adjustment, so that the entrepreneurship and the vitality of the private sector in recipient countries can be fully exerted in the market mechanisms, and to their efforts for the solution of the accumulated debt problem.

4. MEASURES FOR THE EFFECTIVE IMPLEMENTATION OF OFFICIAL DEVELOPMENT ASSISTANCE

(1) Japan will promote intensive policy dialogues with recipient countries, with a view to collecting and analyzing relevant information on these countries, and sharing with them basic perceptions on their development policies, taking into account their request and ideas.

(2) To respond to the various needs of developing countries in different stages of development, Japan's ODA will take advantage, to the maximum extent possible, of the merits of loans, grants, technical cooperation and other forms of assistance. All of these forms of assistance will be organically linked together and coordinated.

(3) When called for, there will be appropriate communication and cooperation with aid agencies of other donor countries, United Nations agencies and international financial institutions, as well as Japanese local governments and private organizations such as labour and business organizations. In particular efforts will be made to ensure that Japan's perspective on ODA is adequately reflected in the cooperation through international organizations, while taking full advantage of the expertise and political neutrality of these organizations. There will also be cooperation with and appropriate support to non-governmental organizations (NGOs), while respecting their independence.

(4) Japan's own development policies and experiences, as well as those of countries in East and Southeast Asia which have succeeded in economic take-off, will be put to practical use.

(5) In implementing environmental ODA, Japan will make the best use of its technology and know-how, which it has acquired in the process of successfully making environmental conservation and economic development compatible.

(6) In order to contribute to the transfer of technology suitable for the level of development of the recipient countries, Japan will promote the development of relevant technologies and will provide such assistance as will enable the adequate utilization of the knowledge and technologies possessed by other developing countries.

(7) In transferring technology and know-how, Japan will make use of those possessed by the Japanese private sector as well as by the government, and provide support for technical cooperation by the private sector.

(8) In order to cope with transnational regional problems, Japan will cooperate more closely with international organizations and other frameworks for regional cooperation such as the Asia-Pacific Economic Cooperation (APEC).

(9) A close relationship will be maintained between ODA, direct investment and trade, so that those three can promote the development of developing countries organically. For this purpose, ODA will be more closely linked to and be supportive of economic cooperation in the private sector through trade insurance and such organizations as the Export-Import Bank of Japan.

(10) Cooperation and research to find and formulate adequate development projects will be enhanced. For the future improvement of its ODA, projects evaluations, including third party evaluations and joint evaluations with recipients and other donors and organizations will also be strengthened.

(11) Regional studies of developing countries, studies of development policy, and conprehensive evaluation of ODA will be further promoted.

(12) Full consideration will be given to the active participation of women in development, and to their obtaining benefits from development.

(13) Full consideration will be given to the socially weak, such as the disadvantaged, children and the elderly.

(14) Consideration will be given to redressing the gap between the rich and the poor and the gap among various regions in developing countries.

(15) Japan's ODA activities will be conducted with full care to see that they do not lead to injustice or corruption in the recipient countries.

5. MEASURES TO PROMOTE UNDERSTANDING AND SUPPORT AT HOME AND ABROAD

The following measures will be adopted to ensure that Official Development Assistance is implemented with public understanding both at home and abroad and to secure the participation of the Japanese people.

(1) Making ODA Information Public

While taking into account such matters as diplomatic relations with recipient countries, more information regarding the ODA activities will be made open to the Diet and to the public.

(2) Enhancement of Public Relations and Development Education

Organized public relations activities and educational programs on development assistance will be promoted.

6. ODA IMPLEMENTATION SYSTEM

(1) Recruitment, Training and Utilization of Competent Aid Personnel

In order to recruit, train and utilize fully the talents of competent ODA personnel, training institutes of aid experts will be enhanced to foster more development specialists, private enterprise consultants and others.

(2) Ensuring Effective and Efficient Mechanisns to Implement ODA

Communication and consultation between relevant ministries and agencies will be promoted for the effective and efficient implementation of ODA. In addition, cooperation between the two aid implementing organizations, the Japan International Cooperation Agency (JICA) and the Overseas Economic Cooperation Fund (OECF) will be intensified. At the same time, the ODA implementation functions of these two organizations will be improved. In order to obtain further cooperation from the private sector, efforts will be made to extend such support to this sector as will appropriately cover the related operating expenses.

(3) Ensuring the Safety of ODA Personnel Dispatched Overseas

Continued efforts will be made to safeguard the lives and personal safety of ODA personnel dispatched to developing areas, and to provide necessary assistance in the event of unexpected incidents.

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ERRATA TO VOLUME 3

1. On p. iv: The affiliations of Professor Mochtar Kusuma-Atmadja should read: Mochtar, Karuwin & Komar, Jakarta; Professor of International Law, Pajajaran University, Bandung; member of the International Law Commission of the United Nations.

2. On p. 3: The first (editorial) footnote to "The International Court of Justice – Retrospective and Prospects" referred to the presence of Judge Shigeru Oda at the Kampala session of the Asian African Legal Consultative Committee "as an observer representing the International Court of Justice". Judge Oda in fact attended the Kampala session by invitation as an observer, but did not represent the International Court of Justice.

3. On p. 523: The acknowledgement of the subvention received from the Netherlands Ministry of Development Cooperation for the production and distribution of Volume One of the *Yearbook,* which was included in that Volume, was erroneously reproduced in Volume Three.

The Editors and Publishers wish to apologize for the above errors.

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The *Yearbook* invites contributions in the form of:

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- (shorter) notes and comments;
- translated versions of articles originally written in a language other than English;
- materials in the field of municipal or international state practice of Asian states and organizations, with relevance to international law;
- data on events and incidents relating to Asia and Asian countries and with relevance to international law and relations;
- information on literature and documents (in any language) either concerning international law in Asia or concerning international law in general and published or issued in Asia.

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