PL ISSN 0554—498X

POLISH YEARBOOK OF INTERNATIONAL LAW

XVIII

1989—1990

POLISH YEARBOOK
OF INTERNATIONAL LAW

XVIII

ACADEMIE POLONAISE DES SCIENCES
INSTITUT DES SCIENCES JURIDIQUES

ANNUAIRE POLONAIS DE DROIT INTERNATIONAL

XVIII

1989—1990

OSSOLINEUM

MAISON D'EDITION DE L'ACADEMIE POLONAISE DES SCIENCES

Dr. Władysław Czapliński
ul. Widawska 7/36
01-494 Warszawa

POLISH ACADEMY OF SCIENCES
INSTITUTE OF LAW STUDIES

POLISH YEARBOOK OF INTERNATIONAL LAW

XVIII

1989—1990

WROCŁAW–WARSZAWA–KRAKÓW
ZAKŁAD NARODOWY IMIENIA OSSOLIŃSKICH
WYDAWNICTWO POLSKIEJ AKADEMII NAUK
1992

Address of the Editorial Board • Adresse de la Rédaction
Institute of Law Studies, Polish Academy of Sciences,
Nowy Świat 72, 00-330 Warszawa

The typescript of the current issue was handed
to the Publisher in December 1989.

Contents * Table des matières

Articles

Materials of Polish-Dutch Conference on International Law

Jurisprudence

Book Reviews * Comptes rendus

Treaties • Traités

Bibliography « Bibliographie

A R T I C L £ S

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVin, 1989-1990
PL ISSN 0554-498X

The Polish-East German Dispute on the Delimitation of Maritime Areas in the Bay of Pomerania — an Appraisal

by WŁADYSŁAW CZAPLIŃSKI

The agreement between Poland and the GDR concerning the delimitation of maritime areas in the Bay of Pomerania, concluded in Berlin on 22 May, 1989, has finished a long-lasting dispute between the parties. The agreement constitutes a part of the boundary settlement between Poland and Germany, it will remain in force also after the reunification of Germany what has been confirmed by the Chancellor Helmut Kohl in his speech on 22 June, 1990. For a long time any comment dealing with the dispute has been forbidden by the censorship and no materials have been available; it seems necessary to present the issues connected with it to the readers of the *Yearbook*.

The Bay of Pomerania is an open bay formed in the South-Western part of the Baltic Sea, the depth of its largest part does not exceed 4 mtrs; through three straits it is connected with the Bay of Szczecin (Stettin). Because of the influence of the Oder River and sea streams it is subject to intensive silting and sanding up processes. Important navigable waterways cross through the Bay of Pomerania, connecting the Polish harbours of Szczecin (Stettin) and Świnoujście (Swinemünde) with the high sea. The most important waterway leads through the natural deep sea channel additionally adjusted by Poland in 1967—1969.

The boundary between Poland and Germany has been established in the Potsdam agreement of 2 August, 1945[1] and subsequently delimited by the agreement of Görlitz between Poland and the GDR of 6 July, 1950.[2] According to the later one, the frontier between Poland and Germany ranges in its northern section west of the Polish town Świnoujście and reaches the Baltic coast (Art 1); the land boundary delimits also the air space and maritime areas of Poland and the GDR (Art. 2). The frontier has been finally delimited by the

[1] *Foreign Relations of the United States. Diplomatic Papers. The Conference of Berlin 1945*, vol 2, p. 1509. See below.

[2] UNTS 319, p. 95.

Act of Frankfurt/Oder of 27 January, 1951[3] which precised also the general course of the maritime frontier through establishing the angle of the contact of the boundary with the sea. This premise has been adopted in the agreement of 29 October, 1968 on the delimitation of the continental shelf in the Baltic Sea between Poland and the GDR. The next step towards the delimitation of the maritime areas was the adoption by the Polish Parliament on 17 December, 1977 of two laws: on the territorial sea and on the Polish fisheries zone.[4] The territorial sea has been enlarged to 12 nautical miles; the Western limit of the territorial sea has not been defined and the law refers in this respect to an international agreement (Art 2).[5] To the contrary, the Western limit of the fisheries zone has been precisely defined. To sum up, the Western maritime boundary of Poland has been defined by three different lines, two of them because of unknown reasons[6] being established in favour of the GDR (continental shelf, fishery zone) and the third one not being precised at all.

On 25 March, 1982 the East German Parliament passed a law on the state boundaries of the GDR[7] which entered into force on 1 May, 1982. According to this law, the Council of Ministers has been empowered to conform the limits of the territorial sea to international law. The law guarantees the right of foreign merchant ships to the innocent passage through the East German territorial waters according to respective international legal norms but sets important restrictions on the right of passage of foreign war and other non-merchant ships, the salvage by foreign ships, *etc.* East German authorities have been granted with important competence in respect of ships violating the right of peaceful passage and the laws of the GDR.

The provisions of the law of 1982 have been crystallized by two regulations enacted by the East German Council of Ministers on 20 December, 1984 and on 3 April, 1986. The breadth of the territorial sea of the GDR has been enlarged to 12 nautical miles; according to the points indicated in the regulations, the main navigable waterway to the Polish ports of Szczecin and Świnoujście as well as the only deep mooring built and maintained by Poland have been unilaterally included into the territorial sea of the GDR. The executive regulations have stated that the navigation to the ports should be operated exclusively through the waterways indicated by the GDR[8] and

[1] *Dziennik Ustaw [Journal of Laws],* further quoted DBU., 1952. No. 53, item 347.

[4] DBU., 1977, No. 37, items 162 and 163 respectively.

[5] Such an agreement has been concluded with the USSR on 18 March, 1958, Dz.U., 1958, No. 76, item 386.

[6] So correctly J. GILAS, "Prawne problemy delimitacji wód terytorialnych w Zatoce Pomorskiej" [Legal Problems of the Delimitation of Territorial Waters in the Bay of Pomerania], *Przegląd Zachodni,* 1990, No. 1, p. 53.

[7] GB1. 1982 I, No. 11, p. 197.

[1] Such a possibility has been accepted in Art. 22 of the UN Convention on the Law of the

imposed restrictions on the passage of Polish warships and non-merchant state vessels between the high sea and the Polish ports mentioned above. It means in practice that the GDR has been able to control the passage of foreign (Polish and other) ships going to the ports and in this way to cut off the access. *E.g.* the only deep water mooring in the road of Szczecin-Świnoujście has been included into the territorial sea of the GDR. A part of vessels coming to these port are discharged in the road — in the light of the East German regulation (based in this respect on the general rules of the law of the sea dealing with the innocent passage) such an unloading would be illegal. Furthermore, in the case of any conflict Polish warships would not be able to pass through the territorial waters of the GDR without the prior notification which would made their action impossible. Certain practical steps undertaken by the East German authorities like *e.g.* the strict injunctions not to dredge the navigable waterways leading to Szczecin and Świnoujście testify that in fact that in the particular political situation the intention of the GDR has been.

We would like to appreciate the position of the GDR from the point of view of general international law, as well as from the point of view of bilateral relations between the two interested States. The way of delimitation of territorial sea between two adjacent States has been provided in the Geneva Convention of 29 April, 1958 on the Territorial Sea and Contiguous Zone, and in the UN Convention on the Law of the Sea of 10 December, 1982. Neither Poland nor the GDR is party to these Conventions; however, it is universally adopted that both instruments constitute to a large extent the codification of existing customary law. In respect of the delimitation of territorial sea in the time before the conclusion of the Geneva Convention, different methods of delimitation of maritime areas between adjacent States have been applied: the prolongation of land boundaries, overall direction of land boundaries, geographical coordinates, an equidistant line (sometimes modified in order to remove distoring effect of small islands or coastal projections). In his exhaustive study S. P. Jagota [9] after having analyzed the state practice declares authoritatively that there was no reason to adopt the equidistance principle as general rule of delimitation before the codification of the law of the sea by the ILC. The Commission, however, discussed thoroughly all possible solutions in this respect and decided to adopt the rule of median line as principle of delimitation of territorial sea between opposite States and that of equidistance between adjacent States, even if it stated in the comment that these rule often

Sea; however, the coastal State is not allowed to impede the passage of vessels through its territorial waters.

[9] S. P. JAGOTA, *Maritime Boundary*, Dordrecht 1985, p. 49. However, another author, S. M. RHEE, "Sea Boundary Delimitation Between States before World War II." AJIL, 76 (1982), No. 3, p. 588, admits that the rule of a median line was the more common way of delimitation, and in certain situations only it was replaced by some other convenient line.

required corrections.[10] Finally, according to Art. 12 of the 1958 Convention, if the States concerned have not concluded any agreement regulating their maritime frontier, such a frontier should be established according to a median line, every point of which is equidistant from the nearest points on the base lines from which the breadth of the territorial sea of each of the two States is measured.[11] This regulation has been subsequently repeated in Art. 15 of the 1982 UN Convention. It seems to us therefore, that the principles of delimitation of territorial sea between adjacent States are firmly established.[12] The problem should be regulated by the agreement between the States concerned; if not, the median (equidistant) line should be traced as a frontier. However, both conventions on the law of the sea introduce a possibility of modifying the median line if special circumstances so require. Such special circumstances have not been defined in the Conventions, however, there exists the agreement among authors that geographical elements (special configuration of the coast, existence of islands) and the existence of navigable channels should be taken into account.[13] The international practice shows the trend to adjust the limits of territorial waters to these requirements. The analysis of the agreements concluded[14] shows that of some 100 agreements dealing with the delimitation of maritime areas all over the world, 64% are based on the equidistance/median line, 18% on the modified median line, 14% on the negotiated line, and 4% (mostly in Asia) adopt the concept of a joint/common zone. In the areas of Baltic and North Seas the delimitation of maritime boundaries have been established in the way of agreements, major part of which being based upon the equidistance/modified equidistance principle[15] in

[10] YBILC, 1956, vol. II, p. 271.

[11] *Cf* the judgment of the ICJ in the North Sea Continental Shelf Cases, *ICJ Reports*, 1969 p. 17; as to technical problems, see R. D. HODGSON, E. J. COOPER, "The Technical Delimitation of a Modem Equidistant Boundary", ODILA, 3 (1976), p. 361#

[12] Some authors deny that this regulation has acquired the character of a customary rule, referring in this respect to the judgment of the ICI in the North Sea Continental Shelf Cases — so *e.g.* L. CAFLISH, "Les zones maritimes sous juridiction nationale, leurs limites et leur délimitation," RGDIP, 84 (1980), No. 1, p. 89.

[13] YBILC, 1956, vol. II, p. 300 — the text refers also to the opinion of the Committee of Technical Experts consulted by the ILC indicating "the interests of navigation and fishery" as reason of adopting solution other than the median line; L. CAFLISCH, in: R. J. DUPUY, D. VIGNES, *Traité du nouveau droit de la mer*, Paris-Bruxelles 1985, p. 390; W. GÓRALCZYK, *Szerokość morza terytorialnego i jego delimitacja [The Width of the Territorial Sea and Its Delimitation]*, Warszawa 1964, p. 376. Geographical and geological circumstances have been indicated by the ICJ in the Gulf of Maine and Malta/Libya cases, *ICJ Reports*, 1984, p. 313, and 1985, p. 39—40.

[14] S. P. JAGOTA, *op. cit.*, p. 69#; J. R. V. PRESCOTT, *The Maritime Political Boundaries of the World*, London-New York 1985, p. 155# (in part 279#; U.-D. KLEMM, "Allgemeine Abgrenzugsprobleme verschiedener seerechtlich definierter Räume," ZaöRV, 38 (1978), No. 3—4, p. 539.

[15] See *e.g.* B. JOHNSON, "The Baltic Conventions," ICLQ, 25 (1976), No. 1, p. 1#

order to constitute a basis for cooperation between the coastal States. The FRG *e.g.* has decided to limit its territorial sea in the area west of Memmert in order to avoid territorial dispute with the Netherlands concerning the access to the estuary of Ems. It has been also emphasized that the GDR itself has modified its territorial sea limiting it to 8 nautical miles in the Bay of Lübeck and north of the island of Rügen in order to enable the access to the West German ports of Travemünde and Lübeck, and to Danish Gedser;[16] it is interesting to notice that the delimitation in the Bay of Lübeck has been effectuated according to the agreement of 29 June, 1974 between the two German States taking into account the course of the navigable channel established by the British occupation authorities in 1945.[17]

Finally we would like to refer briefly to the element of equity aimed towards the justification of modifying strict solutions (in particular making the median line rule more flexible). It has been introduced[18] by international judicial decisions: the judgments of the ICJ concerning the continental shelf in the North Sea,[19] Tunisia/Libya,[20] the Gulf of Maine,[21] and Malta/Libya,[22] and the arbitral awards: on the delimitation of the shelf between Great Britain and France,[23] and on the delimitation of maritime boundary between Guinea and Guinea-Bissau,[24] and subsequently widely commented.[25]

The ICJ has expressed the view that the solutions adopted in Art. 6 of the Geneva Convention on the Continental Shelf as to the delimitation of the shelf between the adjacent States (these rules are similar to those established for the

---

L. GELBERG, *Rechtsprobleme der Ostsee*, Hamburg 1979, p. *50ff.*

[16] J. GILAS, *op. cit.*, p. 58; Z. KNYPL, Prawo nieszkodliwego przepływu dla statków bander innych niż polska w aspekcie statusu Zatoki Pomorskiej [The Right to Free Navigation for Vessels Sailing under a Flag Other than Polish in View of the Bay of Pomerania Status), manuscript prepared for the Polish Institute of International Affairs, Warszawa 1989, p. 11; R. WOLFRUM, "Die Küstenmeergrenzen der Bundesrepublik Deutschland in Nord- und Ostsee," AVR, 24 (1986), p. 270—272.

[17] J. R. V. PRESCOTT, *op. cit.*, p. 283.

[18] Equitable principles as a criterion of delimitation of maritime areas between neighbouring States are referred to in the famous proclamation by US President H. Truman of 28 September, 1945.

[19] *ICJ Reports*, 1969, p. 3.

[20] *ICJ Reports*, 1982, p. 18.

[21] ICJ Reports, 1984, p. 3.

[22] *ICJ Reports*, 1985, p. 13.

[23] ILR, 54 (1979), p. 123.

[24] RGDIP, 1985, No. 2, p. 484.

[25] We indicate here *e.g.* studies published in: *International Law at the Time of Its Codification. Essays in Honour of R. Ago*, vol. II, Milano 1987, by V-D. DEGAN, E. JIMENEZ de ARECHAGA, S. ODA, M. VIRALLY, and P. WEIL. See also a general study by S. P. SHARMA, "Delimitation of Maritime Boundaries Between Adjacent and Opposite States — Classification of Basic Community Policies," in: *New Directions in International Law. Essays in Honour of* IK *Abendroth*, Frankfurt/M.-New York 1982, p. 316ff.

delimitation of territorial waters: agreement between States concerned—equidistant/median line—special circumstances) constitute customary law insofar as their application leads towards the equitable result. Such a result should also be the aim of any delimitation agreement: the duty to conclude such an agreement derives from the customary rules. In neither case the ICJ has referred to a particular method of delimitation indicating that no universal method exists; however, the effect of delimitation must be equitable. The equitable methods have been applied by the Court mostly for the delimitation of the continental shelf but it has been stated *expressis verbis* that the same principles are to be applied also in respect of delimitation of other areas.[26] In the opinion of the Court, the concept of equity plays the same role as the notion of special circumstances introduced by the Geneva Conventions. We must emphasize, however, that notwithstanding very firm position of the Court as to the customary character of equitable principles and methods of delimitation, their international legal status is not clear. It has been suggested during the UN Law of the Sea Conference that the element of equity should replace the traditional concept of the median/equidistant line as a rule of delimitation of maritime areas between the opposite/adjacent States, however, this view has not been generally accepted.[27] It can be argued, therefore, that there is not universal *opinio juris* in this respect.

Another argument based on international legal regulations can be quoted in favour of the Polish position. There has been a strong tendency in the international practice and legal writing towards the unification of the status of ports, road and similar areas;[28] it has been accepted during the UN Conference on the Law of the Sea that the roads should be treated as a part of territorial sea even if they are situated outside of it.[29] In the particular case of the Bay of Pomerania, Poland would be entitled according to international law to enlarge its territorial sea to cover the roads and access to the ports of Szczecin and Świnoujście.

It is very hard to justify the legality of the acts enacted by the GDR and their opposability from the point of view of the law of the sea, in particular in the light of the passage of the judgment of the ICJ in the Norwegian Fisheries Case. The Court declared as follows:

---

[26] *ICJ Reports*, 1984, pp. 293—294.

[27] *Cf.* statements by the representatives of Turkey, the Netherlands and Romania, UN Doc. A/Conf. 62/C.2/L.9, 14 and 18 respectively. Compare also A. P. MOVCHAN, A. YANKOV, *Mirovoy okean i mezhdunarodnoye pravo: pravovoy rezhim morskikh pribrezhnikh prostranstu*, Moskva 1987, p. 184.

[28] R. ZAORSKI, "Z zagadnień wyznaczania początkowej granicy wód terytorialnych (granica przy morskich portach handlowych)" [The Problems of Delimitation of Basic Lines of the Territorial Waters (Boundaries of Merchant Sea-Ports), *Prace Instytutu Morskiego*, 1956, No. 5, p. 67].

[29] J. SYMONIDES, *Nowe prawo morza [The New Law of the Sea]*, Warszawa 1986, p. 81.

"The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law." [30]

The Hague Court has reformulated this statement in the Delimitation of Maritime Boundary in the Gulf of Maine Area (Canada/US) Case; the general principle expressed in the judgment and dealing with the rule of delimitation reads as follows:

"1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation much be sought and effected by means of an agreement, following negotiations conducted in good faith with the genuine intention of achieving a positive result Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence. 2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result" [31]

We have considered the problem of legality and opposability of the East German acts and claims from the point of view of general international law of the sea. Now we would like to approach this question from the perspective of the Potsdam and Görlitz agreements as bases of the relations between Poland and the GDR.

The decision concerning the Western boundary of Poland was undertaken during the last meeting of the Berlin conference on 31 July, 1945.32 It has been agreed directly by Truman, Stalin, and Bevin that Szczecin will be situated in the territory belonging to Poland; a controversy dealing with the status of Świnoujście has been after a short discussion resolved and the formula has been accepted according to which the Western frontier of Poland will follow the line directly west from Świnoujście. In the first period after the 2nd World War political parties in the Soviet zone did not accept the final character of the frontier and transfer of the former German Eastern territories to Poland. This

[30] *ICJ Reports*, 1951, p. 132. In our opinion, the delimitation of territorial sea is not strictly a unilateral act but rather the implementation of the right to act within the limits and under competences granted by conventional or customary law.

[31] *ICJ Reports*, 1984, p. 299—300. We would like to refer here to the statement made by American writer J. I. CHARNEY, "Ocean Boundaries Between Nations: A Theory for Progress," AJIL, 78 (1984), No. 3, p. 585 and 602, who states that ocean boundaries create different problems than the classic land boundary disputes where the historical analysis can provide a correct solution. However, "prior government activities may provide evidence to support the location of the boundary line [...] Conduct of the parties that has created an estoppel or a tacit agreement would carry significant weight On the other hand, unilateral claims by one party never accepted or acquiesced in by the other would not be relevant"

[32] *Cf.* K. SKUBISZEWSKI, *Zachodnia granica Polski w świetle traktatów [Poland's Western Frontiers in the Light of Treaties]*, Poznań 1975, p. 48.

situation changed in the late 1940s and lead towards the conclusion of the Polish-East German treaty of Görlitz of 1950 mentioned above. The further treaties and agreements should be treated as executive acts to the agreement of Potsdam. The reference to the Potsdam agreement in resolving the Polish-East German dispute on the delimitation of maritime areas has been emphasized correctly by T. Jasudowicz.[33] The author states that the boundary regulation constitutes exclusively one of the elements of the Potsdam agreement and it should be interpreted taking into account the aim and spirit of the decision of the Great Powers. Their intention has been to create and assure to the Polish State the condition for economic development. One of the most important elements of such a development is the free access to the high sea. It is hard to presume that the four Powers have conferred the port of Szczecin to Poland and simultaneously accepted the German right to control the access to it. In this sense one can speak about the infringement of the Potsdam and Görlitz agreements by the GDR.

The relations between Poland and the GDR at the time of the origin of the dispute on the delimitation of territorial waters in the Bay of Pomerania have been governed by the Treaty on Friendship, Cooperation and Mutual Assistance of 15 March, 1967.[34] This treaty provides that the relations between the Parties would develop on the basis of good neghbourhood, friendship and mutual cooperation, in the spirit of the "socialist internationalism". It should be reminded here that the latter principle, according to the official East German doctrine, should constitute the fundamental norm of "socialist international law" and most important guiding rule in the relations between the East European States, allowing them to avoid any concflicts.[35] In Art. 6 of the Treaty, the Parties to it repeated the clause on the good neighbourhood as general principle of relations between them, and according to Art. 12 of the Treaty, the Parties to it obliged themselves to consult in the most important matters dealing with their interests in international relations. The interpretation of this provision can be disputable; however, if a State is obliged under a treaty to consult aspects of its foreign policy if they can concern the other party to this treaty, the more it is obliged to consult its unilateral acts if they can influence the international position of the other party. In our opinion,

[35] T. JASUDOWICZ, *W obronie dostępu do morza [In Defence of the Access to the Sea]*, Warszawa 1989, p. 21*ff*.

[34] Dz.U., 1967, No. 25, item 104. The treaty has been concluded for the period of 25 years and is still in force.

[33] *Cf Völkerrecht Grundriß*, ed. W. Poeggel, E. Oeser, Berlin 1983, p. 45; on the development of relations between the GDR and Poland see *PRL–NRD. Sojusz i współpraca [PPR–GDR. Alliance and Cooperation]*, J. Sułek *at al.* (ed.), Warszawa 1974, *passim*. However, West German analysts show that the mutual relations between socialist States have never been deprived of conflicts — F. SIKORA, *Sozialistische Solidarität und nationale Interessen. Polen, Uchechoslowakei, DDR*, Köln 1977, *passis*.

the GDR was obliged to enter into negotiations with Poland and to conclude in good faith an agreement concerning the delimitation of maritime areas; this obligation has been double-founded: on the treaty on friendship of 1967, and on customary rules of the international law of the sea.

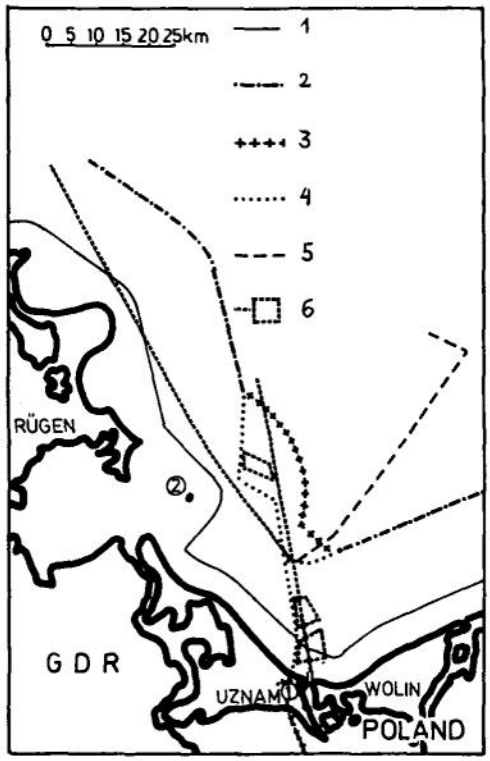
After long and difficult negotiations, the agreement on delimitation has been concluded on 22 May, 1989. It has been highly appreciated by Polish officials [36] and criticized by the part of public opinion. [37] The agreement defines precisely the geographic coordinates of the territorial waters of the States--parties, as well as the delimitation of their territorial waters; furthermore, it delimits also the fisheries zones and continental shelf between the States concerned. The most important navigable waterways and the deep-sea mooring are situated either in the Polish territorial sea or in the high sea. It has been expressly agreed that the part of the navigable channel and deep-sea mooring situated outside the territorial sea of the GDR will not constitute part of the continental shelf, fishery zone and exclusive economic zone of the GDR if established. This provision is extremely important because it enables Polish authorities to undertake measures directed towards assuring safe navigation, in particular dredging necessary waterways without any special permission by the GDR authorities. One can suggest that this part of the Bay of Pomerania could be declared Polish territorial sea if necessary. The GDR abrogated limitations as to the passage of Polish warships through this sections of navigable channels connecting the ports of Szczecin and Świnoujście with the high sea which still are situated within the territorial waters of the GDR. According to the provisions of the agreement, the traffic of vessels through the territorial sea of the GDR should be regulated by the rules of general international law. It has been emphasized, however, that the agreement is more advantageous for the GDR because this State has exclusively conformed its legislation to international legal standards; simultaneously the limits of Polish continental shelf and fisheries zones have been shifted eastwards while already the former ones were unfavourable for Poland. This argument is disputable: in the consequence of the agreement of 1989 Poland has lost (quantitatevely) certain fisheries areas but preserved very rich fisheries in the area of so-called "wedge" of the Bay of Pomerania, *i.e.* the area situated at the intersection of territorial seas of Poland and the GDR formerly claimed by the GDR; Poland obtained also the general gain of 75 sq km of territorial sea and 26 sq km of the continental shelf. The

[36] *Cf.* statements by the representatives of the Ministry of Foreign Affairs published in *Rzeczpospolita* of 24—25 May, 1989, pp. 1, 6.

[37] T. JASUDOWICZ, "Umowa między Polską a NRD w sprawie rozgraniczenia obszarów morskich w Zatoce Pomorskiej z 22 maja 1989 — próba oceny" [Agreement between Poland and the GDR on the Delimitation of the Sea Territories in the Bay of Pomerania of 22 May, 1989 — An Attempt at Evaluation], *Technika i Gospodarka Morska*, 1989, No. 11—12, pp. 489—491; W. WIŁA, "Sprawy Zatoki Pomorskiej ciąg dalszy" [The Problem of the Bay of Pomerania Continued], *Pomerania*, 1990, No. 5—6, p. 11.

GDR withdrew its claims, and the Polish Foreign Office succeeded therefore in avoiding errors committed by earlier delimitations of the boundary to the GDR. Finally, we should appreciate the agreement of 1989 from the point of view of the future Polish-German relations. Every negotiation with sovereign Germany would be much more difficult and there are a lot of problems which should be regulated in order to establish the mutual relations in the spirit of understanding and good neighbourhood. The agreement of 22 May, 1989 eliminates one of the obstacles in this process.

On 19 July, 1990 the Polish maritime authorities announced the decision to trace out a new access waterway to the ports of Świnoujście and Szczecin, situated outside the territorial sea of the GDR.



The Delimitation of Maritime Areas in the Bay of Pomerania

Explanation of Signs (Legend)

1 — the external boundary of the territorial sea of Poland before 1977 and the GDR before 1984 (based on the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone);
2 — the external boundary of the territorial sea of Poland since 1977 and the GDR since 1984;
3 — the external boundary of the territorial sea of the GDR claimed unilaterally 1984—1989;
4 — the delimitation of the territorial sea between Poland and the GDR as agreed in the Berlin Agreement of 1989;
5 — the delimitation of the continental shelf and fisheries zones;
6 — navigable waterways to the ports of Szczecin and Świnoujście, moorings;

① ■ Świnoujście;

② ■ Greifswalder Ole Island (uninhabited).

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVIII, 1989-1990
PL ISSN 0554-498X

Les avis consultatifs de la Cour Internationale de Justice

par GENOWEFA M. GRABOWSKA

Les origines

La détermination des origines d'une institution donnée est importante pour son futur caractère. Jusqu'aux débuts de la Société des Nations (S.N.), l'histoire de la justice internationale n'avait pas connu d'exemples d'activité consultative. Le premier dans le rang fut l'art 14 du Pacte de la S.N. qui a cité parmi les compétences de la Cour Permanente de Justice Internationale (C.P.J.I.) « la prononciation des avis consultatifs sur tout différend ou tout point dont saisirait le Conseil ou l'Assemblée de la S.N. ». Cette compétence n'a pas été transcrite dans le premier Statut de la Cour (1920) mais uniquement dans son Règlement (1922), trois fois par la suite révisé (1926, 1927, 1936). L'incorporation de la compétence consultative dans le Statut de la Cour a eu lieu finalement en 1929 (Chapitre IV: « Avis consultatifs ») et fut le résultat d'une pratique consultative en voie de développement Les modifications consécutives des Règlements visaient le rapprochement mutuel de la procédure consultative et contentieuse. D'une façon appropriée furent formulées les dispositions de l'art. 82 du Règlement permettant l'application dans la procédure consultative des dispositions relatives à la procédure contentieuse dans la mesure estimée nécessaire par la Cour. Il était évident que le caractère homogène des règles régissant ces deux types de procédure ne pouvait être ni entier ni complet. Ceci résultait des traits spécifiques de la procédure consultative et surtout du fait que dans cette procédure il n'y avait pas de parties et que ses effets (avis consultatifs) n'avaient pas un caractère obligatoire.

L'analyse de la pratique consultative de la C.P.J.I. permet de distinguer deux types d'avis: dans le domaine des « différends » et dans celui des « points ». La différence entre un « différend » et un « point » consistait dans l'existence ou l'inexistence d'un conflit dans l'affaire donnée. Dans le cas d'un différend subsistait la négation de certains droits et la tâche de l'avis consultatif était de trancher ce différend, tandis qu'un avis consultatif prononcé

au sujet d'un point exposait l'activité de prévention de la Cour (prévention de la naissance d'un différend)[1]. Parmi les 27 avis consultatifs prononcés par la Cour, une grosse majorité de 17 (dont presque deux-tiers) concernait des différends et seulement 10 portaient sur des points.

Il semble que le caractère juridique des avis consultatifs a été défini le mieux par le juge M. D. Hudson qui a constaté que « *the opinions are, therefore, precisely what they purport to be; they are advisory. They are not binding in the sense of „res iudicata" as the judgements are; nor in the sense of the decision which even the Court's judgements are not. But their moral weight and influence, therefore is great* »[2]. La Cour elle-même a également apprécié son rôle lors de la procédure consultative en constatant dans l'avis consultatif prononcé dans l'affaire de la Carélie orientale (1923): « *The Court, being a court of justice, cannot, even in giving advisory opinions, depart from essential rules guiding its activity as a Court* »[3]. Tel était donc le bagage des divergences, imprécisions et expériences de la C.P.J.I. hérité par la Cour Internationale de Justice (C.I.J.) pour son activité consultative.

La compétence consultative de la C.I.J.

La notion de la « compétence » est entendue ici en tant qu'un ensemble des droits confiés à la Cour en vertu des dispositions légales lui permettant de poursuivre son activité consultative[4]. Les fondements juridiques de l'exercice de cette activité ont été formulés à l'art. 96 de la Charte des Nations Unies et à l'art 65 du Statut de la C.I.J. L'art. 96 de la Charte définit les organes de l'O.N.U. et toutes les autres organisations habilitées à demander des avis consultatifs[5], tandis que l'art 65 du Statut précise l'étendue et les conditions de l'exercice de la compétence consultative de la Cour. La procédure consultative était également réglée par quatre articles (82-85) du premier Règlement de la Cour de 1946. Dans le Règlement révisé en 1972, cette matière était déjà réglée

[1] Z. IZDEBSKI, *Funkcja opiniodawcza STSM [La fonction consultative de la C.P.J.I.]*, Poznań 1936, p. 50.

[1] M. O. HUDSON, *The Permanent Court of International Justice (1920-1942)*, New York 1943, p. 511.

[3] *Publications P.C.I.J.*, Series B, n° 5, pp. 27-29.

[4] Certaines difficultés peuvent apparaître lors de l'interprétation des notions: « juridiction » et « compétence » souvent utilisées d'une façon imprécise par la Cour elle-même. Parfois on exprime l'opinion que la notion de la « juridiction » se rapporte à l'activité de la Cour en affaires contentieuses, tandis que celle de la « compétence » concerne son activité consultative. Le caractère de plus en plus homogène de ces deux procédures : contentieuse et consultative, implique qu'un emploi variable de ces deux notions ne doit pas être considéré comme fautif (voir D. PRATAP, *The Advisory Jurisdiction of the International Court*, Oxford 1972, p. 114).

[5] Pour la liste détaillée des organes de l'O.N.U. et organisations spécialisées habilitées à adresser les demandes d'avis consultatifs voir les Annexes I et II ci-joints.

par cinq articles (87-91) et le Règlement actuel de 1978 lui a consacré huit articles (art 102-109)[6].

La C.I.J. décide elle-même en matière de sa compétence consultative (art. 68 du Statut). C'est non seulement son droit mais aussi son obligation. Cela fut expressément constaté par le juge J. Cordova dans son avis séparé annexé à l'avis consultatif prononcé dans l'affaire du Tribunal Administratif de l'O.I.T. (1956): « *The first obligation of the Court as of any judicial body is to ascertain its own competence* » [1].

La charge d'incompétence de la Cour peut être soulevée surtout par les Etats, mais il semble que ce droit appartient également aux « organes intéressés de l'O.N.U. et organisations spécialisées ». Les Etats formulent leurs réserves dans la procédure écrite et soulèvent rarement d'une manière directe la violation de l'art. 68 du Statut ou de l'art. 102 du Règlement de la C.I.J. Une exception à cette règle fut la note du Gouvernement de la Tchécoslovaquie adressée au Greffier de la C.I.J. exprimant des doutes quant au droit de la C.I.J. à appliquer les règles de la procédure contentieuse lors de la prononciation de l'avis consultatif dans l'affaire des Traités de paix[8]. La Cour examine toutes les charges portant sur son éventuelle incompétence et se prononce à leur sujet dans la partie introductive de l'avis consultatif précédant la partie spéciale.

En décidant de sa compétence, la Cour doit surtout vérifier si: 1° la demande d'avis consultatif a été adressée par l'organe ou l'organisation habilitée (art. 65 al. 1 du Statut), et 2° si la question formulée dans la requête est une question juridique (art. 96 de la Charte des Nations Unies). La non-réalisation de l'une de ces conditions rend impossible l'initiation d'une procédure consultative.

Ad 1° La Cour doit vérifier non seulement si la requête a été adressée par l'organe (organisation) habilité(e) mais également si la question juridique y formulée est liée à l'activité de cet organe (organisation). Lors de la prononciation de l'avis consultatif dans l'affaire des Traités de paix, on a p. ex. reproché que la question juridique formulée par l'Assemblée générale des Nations Unies allait au-delà des compétences de cet organe et ne pouvait pas être examinée par la Cour en tant qu'incompatible avec l'art. 2 al. 7 de la Charte des Nations Unies. La Cour a décliné cette charge en constatant qu'il s'agissait seulement d'une « incompétence prétendue » (« *alleged incompetence* »), car la question juridique ne concernait pas les affaires internes de la Bulgarie, de la Roumanie et de la Hongrie mais l'interprétation de leurs obligations internationales résultant des traités de paix[9].

---

[6] *Documents on the International Court of Justice*, comp. by S. Rosenne, Leiden 1979, pp. 199-203 et 269-273.

[7] *ICJ Reports*, 1956, p. 163.

* Voir D. PRATAP, *op. cit.*, p. 121.

' I'' phase de la procédure consultative, *ICJ Reports*, 1950, p. 72.

Dans le cas de la requête adressée par l'organisation spécialisée, la Cour vérifie en plus si la « question juridique » ne se rapporte pas aux relations mutuelles de cette organisation avec l'O.N.U. ou les autres organisations spécialisées (condition formulée dans les conventions sur la coopération conclues par l'O.N.U. avec les organisations spécialisées — p. ex. art. IX de la Convention avec FO.I.T., art. XI de la Convention avec l'UNESCO, art. X de la Convention avec l'O.M.S.). Une réponse affirmative à cette question rend impossible l'initiation de la procédure consultative.

Ad 2° Dans la procédure consultative, la Cour doit examiner « toute question juridique » (art. 96 de la Charte des Nations Unies et l'art. 65 du Statut). Par conséquent, la Cour s'efforce de séparer d'une façon expresse les notions de la « question juridique » et « question politique », ce qui est en pratique souvent assez difficile, car il est évident que chaque problème international a aussi bien son aspect juridique que politique. La demande d'un avis consultatif dans une affaire qui est déjà un différend ou qui est une affaire politique provoque l'incompétence de la Cour. Une telle opinion a déjà été exprimée par la C.P.J.I. dans l'affaire de la Carélie orientale (1923), car la question formulée dans la demande concernait directement un différend existant déjà entre Etats.

Dans l'affaire des Conditions de l'admission (1948), la Cour a répondu à la charge que la question à trancher a un caractère politique et non juridique de la façon suivante: « *The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision* »[10]. Une réponse identique à la charge d'incompétence a été donnée par la Cour dans l'affaire de la Compétence de l'Assemblée générale (1950). La Cour n'a pas non plus jugé comme « questions politiques » les questions contenues dans les demandes d'avis consultatifs dans les affaires de l'O.M.C.I. (1960) et de Certaines dépenses (1962), en constatant: « *The Court as a judicial body is however bound in the exercise of its advisory function to remain faithful to the requirements of its judicial character* »[11].

La réponse à une question juridique nécessite souvent de la Cour une interprétation des conventions internationales en vigueur et parfois même une interprétation de ses propres constatations contenues dans les avis consultatifs précédemment prononcés. Il n'y a pas de doute qu'une telle activité est très étroitement liée à l'exercice de sa compétence consultative. Le Cour a donné entre autres une interprétation de l'art. 4 de la Charte des Nations Unies à l'occasion des avis consultatifs prononcés dans les affaires des Conditions de l'admission ainsi que de la Compétence de l'Assemblée, de l'art. 17 al. 2 de la

[10] *ICJ Reports*, 1947-1948, p. 61 ; une motivation semblable de sa compétence a été donnée par la Cour dans l'affaire de Certaines dépenses (voir *ICJ Reports*, 1962, p. 155).

[11] *ICJ Reports*, 1960, p. 153.

Charte des Nations Unies dans l'affaire de Certaines dépenses, des Traités de paix avec la Bulgarie, la Roumanie et la Hongrie de 1947, de la Convention sur la prévention et la répression du crime du génocide, de la Constitution de **rO.M.C.I**. et de la convention entre l'O.M.S. et l'Egypte.

Reste à considérer la question si la Cour peut refuser de donner un avis consultatif dans le cas où toutes les conditions formelles de sa prononciation ont été réunies. L'art. 65 du Statut de la C.I.J. statue que la Cour « peut donner un avis consultatif ». Il en résulte que la Cour est libre de choisir, c'est-à-dire qu'elle est compétente mais non tenue à donner son avis. Il semble qu'un refus éventuel dans une affaire donnée pourrait être justifié par des faits constituant des motifs graves. D'autre part, la C.I.J. en tant qu'organe des Nations Unies devrait coopérer avec les autres organes de l'Organisation et malgré sa non-soumission à l'Assemblé générale et le Conseil de Sécurité elle devrait réaliser les fonctions transcrites dans son Statut dans l'intérêt de l'Organisation toute entière.

Les autorités habilitées à demander des avis consultatifs

Le droit d'adresser des requêtes demandant des avis consultatifs appartient à : 1° l'Assemblée générale et le Conseil de Sécurité de l'O.N.U., 2° d'autres organes de l'O.N.U. autorisés par l'Assemblée générale des Nations Unies, 3° les organisations spécialisées autorisées par l'Assemblée générale de l'O.N.U.[12]

Ad 1° L'Assemblée générale et le Conseil de Sécurité peuvent demander des vis consultatifs « sur toute question juridique ». Ce droit a été formulé à l'art. 96 al. 1 de la Charte des Nations Unies d'une manière très générale et tous les doutes pouvant apparaître ainsi que l'interprétation des questions détaillées ont été laissés à la doctrine et à la pratique de la Cour. Les droits de l'Assemblée générale et du Conseil de Sécurité ne sont pas illimités malgré l'envergure mondiale de l'activité de l'Organisation. Le droit de demander un avis consultatif est donc étroitement lié aux compétences de ces organes. Ceux-ci ne peuvent donc pas comparaître dans les affaires relevent de la compétence interne des Etats ni dans les affaires relevant de la compétence d'autres organes de l'O.N.U. Cette distinction des compétences est traitée par l'art. 12 de la Charte des Nations Unies qui doit être pris en considération lors de l'exercice de droit de demander un avis consultatif.

[12] En vertu de l'art 14 du Pacte de la S.N., le droit de demander un avis consultatif à la C.P.J.I. appartenait uniquement à l'Assemblée et au Conseil de la Société. En pratique, ces demandes étaient formulées exclusivement par le Conseil qui étant un organe politique transmettait souvent une question juridique à la Cour pour qu'elle décide à sa place (voir J. L. BRIERLY, *The Law of Nations*, Oxford 1963, p. 362).

Jusque-là il n'y a pas eu en pratique de conflits de compétence entre l'Assemblée générale et le Conseil de Sécurité en ce qui concerne le droit de demander un avis consultatif. Le plus souvent, une telle demande était adressée par l'Assemblée générale de l'O.N.U. (11 fois) et il n'y a eu qu'un cas où ce fut le Conseil de Sécurité qui adressa la demande d'avis consultatif (affaire des Conséquences juridiques — 1970).

Ad 2° Les autres organes de l'O.N.U. peuvent s'adresser à la C.I.J. avec des demandes d'avis consultatifs uniquement lorsq'ils y avaient été autorisés par l'Assemblée générale de l'O.N.U. et uniquement avec des questions juridiques se posant dans le cadre de leur activité (art. 96 al. 2 de la Charte des Nations Unies). Cette disposition s'applique aussi bien aux organes principaux de l'Organisation (art. 7 al. 1 de la Charte) qu'à ses organes auxiliaires dans le sens des art. 22 et 29 de la Charte des Nations Unies. Jusqu'à présent l'Assemblée générale a donné une telle autorisation à quatre de ses organes dont deux principaux: le Conseil économique et social (1946) et le Conseil de Tutelle (1947), et deux auxiliaires : Commission intérimaire de l'Assemblée générale (1949) et le Comité des demandes de réformation de jugements du Tribunal Administratif des Nations Unies (1955) (Annexe I). Jusqu'à présent, en pratique il n'y a que le Comité des demandes qui trois fois a initié l'activité consultative de la Cour (avis consultatifs dans les affaires de révision des jugements : 1) n° 158; 2) n° 273, et 3) n° 333).

Ad 3° Les organisations spécialisées (art. 57 de la Charte des Nations Unies) sont reliées à l'O.N.U. par l'intermédiaire (en général) du Conseil économique et social (art. 63 de la Charte). Quinze parmi elles ont été autorisées par l'Assemblée générale de l'O.N.U. à demander des avis consultatifs « sur les questions juridiques se posant dans leur activité » (Annexe U). Une telle autorisation n'a pas cependant été donnée ni à FU.P.U. ni au GATT. L'autorisation est bien sûr accordée en vertu d'une résolution pertinente de l'Assemblée. Les statuts de certaines organisations évoquent également ce droit (p. ex. les art. 76 et 77 de la Constitution de l'O.M.S.), tandis que les autres statuts gardent le silence en cette matière (p. ex. les statuts de l'O.A.C.I. et de l'U.I.T.). Il faut exposer le fait que le droit de demander un avis consultatif résulte directement de l'autorisation accordée par l'Assemblée générale de l'O.N.U. dans sa résolution et que les dispositions des statuts des organisations ont un caractère de répétition et d'information et non constitutif.

Les conditions détaillées de l'autorisation sont précisées dans les conventions sur la coopération conclues par l'O.N.U. avec les organisations spécialisées particulières. On peut admettre qu'un caractère modèle a ici l'art. IX de la convention entre l'O.N.U. et l'O.I.T. qui à l'ai. 2 concrétise la clause autorisant l'O.I.T. à demander l'avis consultatif « sur toute question juridique se posant dans les affaires relevant du cadre de son activité à l'exception des affaires concernant les relations mutuelles entre l'O.I.T. et l'O.N.U. ou autres

organisations spécialisées » . Les demandes d'avis consultatifs peuvent être adressées à la Cour par la Conférence ou sur autorisation de celle-ci, par le Conseil administratif de l'O.I.T. (art. IX al. 3) avec notification de ce fait au Conseil économique et social (art. IX al. 4). Des dispositions semblables ont été prévues dans toutes les conventions conclues par l'O.N.U. avec les organisations spécialisées autorisées à demander des avis consultatifs (p. ex. art. IX des conventions avec la FAO, l'O.M.C.I. et l'UNESCO; art. X des conventions avec l'A.I.E.A., FO.A.C.I. et l'O.M.S.; art. VII des conventions avec rU.LT. et l'O.M.M.). Malgré ce nombre considérable des organisations autorisées, jusqu'à présent seulement trois parmi elles ont fait usage de leur droit de demander un avis consultatif à la C.I.J.: l'UNESCO — 1956, l'O.M.C.I. — 1960 et l'O.M.S. — 1980.

Les organes (organisations) adressant des demandes d'avis consultatifs décident en cette matière par voie du vote. Il n'y a cependant pas dans les dispositions en vigueur de formule indiquant quelle procédure du vote devrait être alors adoptée.[13] La demanded avis consultatif n'a pas p. ex. été citée parmi les questions importantes dans lesquelles l'Assemblée générale de 1'O.N.U. décide par majorité de deux-tiers des membres présents et votant (art. 18 al. 2 de la Charte des Nations Unies). Il n'y a pas non plus de consensus si le vote sur une telle demande au Conseil de Sécurité est une affaire de fond ou procédurale (art. 27 al. 2 et 3 de la Charte des Nations Unies). En pratique aussi bien l'Assemblée générale que le Conseil de Sécurité décident à l'instant eux-mêmes sur l'importance de la question juridique formulée dans la demande et ce ne qu'ensuite qu'ils décident sur l'application à une telle demande d'une procédure spéciale du vote ou d'une procédure ordinaire avec simple majorité des voix.

La procédure

La procédure consultative devant la C.I.J. est régie par les dispositions du Chapitre IV du Statut (art. 66-68) et des art. 102-109 de son Règlement. Elles permettent à la Cour d'appliquer dans la procédure consultative des règles relatives à la procédure contentieuse dans la mesure où elle les reconnaît applicables. La requête (demande) d'avis consultatif est adressée à la Cour toujurs par l'intermédiaire du Secrétaire général de l'O.N.U. (art. 104 du Règlement). Le Greffier de la Cour notifie ce fait à tous les Etats et organisations intéressés, enregistre la requête et en fait mention sur la liste générale des affaires introduites devant la C.I.J.

[13] **Au temps de la S.N., la demande d'avis consultatif devait être votée par le consensus qui était la régie en vigueur au sein de cette organisation (voir Z. IZDEBSKI, *op. cit*, p. 63).**

Dans la procédure consultative il n'y a pas de parties comme dans un procès. Il n'y a que des sujets (Etats, organisations) admis par la Cour pour lui fournir des informations nécessaires. Les particuliers ne peuvent pas participer à la procédure consultative, ce qui fut critiqué notamment à l'occasion de l'affaire du Tribunal Administratif de l'OJ.T.[M] Le Secrétaire général de l'O.N.U., représenté dans la procédure consultative par le Directeur du Bureau juridique, communique à la Cour aussi bien les constatations de l'organe demandant un avis consultatif que les informations sur la pratique de l'Organisation et les autres faits relatifs à l'affaire donnée.

La composition de la Cour dans une procédure consultative peut être complète, c'est-à-dire la même que dans une procédure contentieuse. Les Etats intéressés directement dans le déroulement de l'affaire peuvent désigner des juges *ad hoc* (art. 102 al. 3 du Règlement en rapport avec l'art. 31 du Statut). Cela survient uniquement aux cas où la Cour décide que la question juridique formulée dans la requête comporte déjà un différend.

En acceptant la demande du requérant, la Cour peut prendre toutes les mesures utiles pour accélérer la procédure consultative (art. 103 du Règlement). Une réponse rapide a été p. ex. sollicitée par le Conseil de Sécurité dans sa résolution n° 284 (1970) du 29 juillet 1970 transmettant à la Cour sa requête d'avis consultatif dans l'affaire de la Namibie. Les tentatives d'accélérer la procédure entreprises par la Cour n'ont cependant pas réussi. L'avis consultatif fut prononcé seulement le 21 juin 1971 après une procédure consultative la plus longue dans l'histoire de la Cour[15]. La requête d'avis consultatif doit être accompagnée des documents pertinents (art. 104 du Règlement) et le retard dans leur transmission fait retarder toute la procédure. Ce fut notamment le cas d'avis consultatif dans l'affaire de FO.M.C.I. La demande d'avis consultatif fut votée par l'Assemblée de l'O.M.C.I. le 19 janvier 1959 et le document approprié fut transmis à la Cour le 27 juillet 1959. Ce délai a provoqué que l'avis consultatif fut prononcé seulement le 8 juin 1960.

La procédure consultative comporte une procédure écrite (art. 66 al. 2-4 du Statut) et une procédure orale (art. 45-49 du Statut) à moins que la Cour ne décide que cette dernière n'aura pas lieu comme elle l'a fait dans l'affaire du Tribunal Administratif de l'O.I.T.

Après la clôture de la procédure, la Cour prononce, par voie de vote, son avis consultatif. Sa prononciation a lieu à une séance publique de manière prévue par l'art. 108 du Règlement.

[14] **La Cour a cependant refusé d'entendre quatre fonctionnaires de l'UNESCO en motivant cette décision non par les dispositions du Statut du Tribunal Administratif de l'O.I.T. mais par celles du Statut de la CU. et plus précisément de son art 34 (voir *ICJ Reports*, 1956, p. 86); I. BROWNLIE, *The Individual before Tribunals Exercising International Jurisdiction*, ICLQ, n° II, p. 715.**

[15] **Voir S. ROSENNE, *Procedure in the International Court. A Commentary on the 1978 Rules of ICJ*, The Hague 1983, p. 216.**

Le caractère juridique des avis consultatifs

Les avis consultatifs prononcés par la C.I.J. n'ont pas de caractère obligatoire comme l'ont ses jugements. Cela signifie que l'organe (organisation) requérant(e) n'est pas tenu(e) d'accepter la solution proposée par la Cour. Un tel point de vue a été exprimé aussi bien par la Cour elle-même [16] que par la doctrine [17]. Une exception à cette règle générale prévoit l'arL VIII pt 30 (intitulé « Le règlement des différends ») de la Convention concernant les privilèges et les immunités des Nations Unies de 1946. Tous les différends relatifs à l'interprétation ou à l'application de cette Convention ont été soumis à la juridiction obligatoire de la C.I.J. à moins que dans une affaire donnée les parties ont agréé une autre procédure. Dans le cas d'un différend opposant l'O.N.U. à l'un de ses membres il faut s'adresser à la C.I.J. avec une demande d'avis consultatif concernant « toutes les questions juridiques soulevées ». L'avis consultatif acquiert son caractère obligatoire en vertu de la dernière phrase de cette disposition statuant expressément que « les parties vont traiter l'avis de la Cour comme définitif ». Il faut cependent mentionner que dans une pratique de l'O.N.U. comptant plus de 40 ans cette disposition n'a pas été utilisée. Une autre exception à caractère non obligatoire des avis consultatifs constituent les avis prononcés en cas de recours contre les jugements des tribunaux administratifs examinant les litiges entre les organisations et leurs fonctionnaires. Conformément au Statut du Tribunal Administratif de l'O.I.T. (art. XII), un avis consultatif prononcé a un caractère obligatoire pour ce Tribunal, tandis que le Statut du Tribunal Administratif de l'O.N.U. (art. 11 al. 3) prévoit une obligation du Secrétaire général de l'O.N.U. de se plier à l'avis consultatif de la C.I.J. [18] On peut donc conclure que dans de tels cas la fonction consultative de la CJJ. change son caractère et devient une fonction d'appel et que la Cour en examinant le différend agit en qualité de l'instance d'appel suprême. Il y a cependant à craindre que, vu le développement rapide de la fonction publique internationale et de l'administration internationale résultant dans un plus grand nombre de litiges opposant les fonctionnaires à « leurs » organisations, le temps et l'attention de la Cour ne soient concentrés sur ce domaine de façon que le rang de sa fonction consultative traditionnelle diminue.

Bien qu'en principe non obligatoires, les avis consultatifs jouent un rôle très important, vu leur caractère persuasif et l'autorité authentique de l'organe qui

[16] **P. ex. dans l'avis consultatif dans l'aflaire des Traités de paix, la Cour a constaté: « La réponse de la Cour a un caractère uniquement consultatif et en tant que telle elle n'est pas obligatoire » (*ICJ Reports*, 1950, p. 65).**

[17] **M. O. HUDSON, *The Effect of Advisory Opinions of the World Court*, AJIL, 1948, n° 3, p. 630; et les autres, p. ex. E. Hambro.**

[18] **Jusqu'à présent, la C.I.J. a rendu trois avis de ce type en examinant les appels contre les jugements du TANU: n° 158 (cas de Fasl) en 1973, n° 273 (cas de Mortished) en 1982, et n° 333 (cas de Yakimetz) en 1987.**

les prononce. Malgré l'absence de l'obligation juridique de leur acceptation il n'y a pas eu, en pratique, de cas où l'organe adressant la demande a ensuite agi contre l'avis. La discussion sur l'acceptation de l'avis consultatif au sein de ces organes est parfois très animée [19] (le plus souvent pour des raisons plutôt politiques que juridiques), mais se termine toujours par une résolution acceptant la réponse de la Cour. Cela ne signifie cependant pas que les constatations contenues dans l'avis sont réalisées d'une façon authomatique. Ce sont les Etats et les organisations qui décident eux-mêmes s'ils voudront régler le différend sur la voie juridique, c'est-à-dire au moyen des mécanismes suggérés par l'avis consultatif, ou s'ils choisiront une autre voie, p. ex. la voie politique allant le plus souvent en dehors des limites du droit en vigueur. Dans ce dernier cas, l'effet de l'avis consultatif sera minimal ou nul. Par exemple, les propositions de la Cour exprimées dans les avis consultatifs dans les affaires des Conditions de l'admission (1948), des Traités de paix (1950) ou de l'Afrique du Sud-Ouest (1950) sont restées sans aucune influence sur le règlement du différend demeurant à leur base. De même, la Commission du droit international n'a pas non plus accepté le caractère obligatoire de l'avis consultatif prononcé par la Cour dans l'affaire des réserves à la Convention pour la prévention et la répression du crime de génocide (1951) en prétendant que les constatations de la C.I.J. n'ont pas de caractère si général pour qu'elles puissent être appliquées à toutes les conventions internationales. Néanmoins, l'Assemblée générale de l'O.N.U. (le destinataire de l'avis) l'a accepté en admettant qu'il se rapporte uniquement à une convention. D'autre part, l'Assemblée de rO.M.C.I. a accepté l'avis consultatif dans l'affaire de la Constitution de l'O.M.C.I. (1960) en procédant à une modification de la composition controverse du Comité de Sécurité des Mers conformément à la suggestion de la C.I.J. L'avis consultatif prononcé dans l'affaire de Certaines dépenses de l'O.N.U. (1962) n'a pas beaucoup aidé dans la solution du conflit financier au sein de l'O.N.U., car celui-ci avait son fondement dans le domaine politique et non dans l'activité financière et juridique de l'Organisation.

Le caractère non obligatoire des avis consultatifs n'implique pas l'élimination du principe de la chose jugée en matière déjà traitée par la Cour. Dans son avis, la Cour établit et interprète le droit et il semble évident que ce droit ne peut pas être appliqué d'une autre façon par la Cour dans la même affaire sans distinction si celle-ci est retransmise à l'examen de la Cour dans une procédure consultative ou contentieuse. Ainsi donc, les avis consultatifs peuvent avoir un caractère de précédent, surtout dans les cas où leurs conséquences vont au-delà du contexte particulier de la question juridique soumise à l'examen de la Cour.

[11] Voir K. J. KEITH, *The Extent of the Advisory Jurisdiction of the International Court of Justice*, Leiden 1971, pp. 205-221; voir aussi A. BASAK, *Decisions of the United Nations Organs in the Judgements and Opinion of the ICJ*, Wroclaw 1969.

Les constatations juridiques prononcées par la Cour dans ses avis consultatifs constituent à côté des jugements une spécifique « codification judiciaire du droit ». Cette activité de la Cour est souvent caractérisée comme « *a tangible contribution to the development and clarification of the rules and principles of international law* » [M]. Cette fonction est appréciée également par l'Assemblée générale de l'O.N.U., surtout quand elle invite ses organes et organisations spécialisées à adresser plus souvent des demandes d'avis consultatifs et quand elle expose l'importance et le rôle de la Cour dans le processus du développement progressif du droit international (p. ex. la résolution de l'Assemblée générale de l'O.N.U. n° 3232/XXIX/ du 12 novembre 1974).

Les effets de l'activité consultative de la Cour peuvent être perçus, semble-t-il, dans quelques domaines de la vie internationale. Ces effets sont visibles non seulement sur le plan juridique mais également sur le plan politique et même sur le plan moral.

Sur le plan juridique, les avis consultatifs étant l'effet de travail d'un groupe de juristes les plus hautement qualifiés, constituent une contribution irréfutable dans l'oeuvre de développement et de la codification du droit international. Us réalisent cette tâche au moyen de la clarification et interprétation du droit en vigueur (conventions internationales, droit coutumier et même jugements et avis consultatifs de la Cour elle-même) ainsi qu'au moyen des tentatives de formulation de nouvelles solutions juridiques. Les divergences d'opinions entre les juges lors de la prononciation des avis consultatifs, exposés en forme d'avis individuels ou séparés, constituent une source supplémentaire d'inspiration des discussions juridiques.

Sur le plan politique, l'avis consultatif a un effet tranquillisant percevable sur les parties du différend qu'il traite. Pendant la procédure en cours devant la C.I.J., le différend « s'apaise » d'une certaine façon, car les parties attendent avec espoir le verdict de la Cour. Si la réponse est pleinement acceptée, le règlement du différend a lieu par les moyens juridiques suggérés dans l'avis, dans le cas contraire, les parties vont procéder à une solution politique. De cette façon, l'avis consultatif (bien que non intentionnellement) contribue à l'enrichissement du catalogue des moyens politiques de règlement des différends internationaux.

Sur le plan moral, l'avis consultatif en tant qu'effet d'activité d'un corps judiciaire doté de la plus grande autorité fixe dans la communauté internationale le sentiment d'un certain ordre et d'une sécurité ainsi que d'un ordre moral (surtout si la Cour applique la règle *ex aequo et bono).* Il semble que les avis consultatifs soutiennent également la conviction que la notion de la « justice internationale » n'est pas dans les relations internationales contemporaines un terme sans signification.

[20] H. LAUTERPACHT, *The Development of International law by the International Court*, London 1958, p. 5.

Annexe I

Les organes de PO.N.U. habilités *à* adresser les requêtes demandant des avis consultatifs

Organe	*Portée d'autorisation*	*Fondement Juridique (Résolution de iAssemblée générale de l'OJt.U.)*
Conseil économique et social	toutes les questions juridiques se posant dans le cadre de l'activité du Conseil (y compris les questions juridiques concernant les relations mutuelles entre l'O.N.U. et les organisations spécialisées)	89/1/ 11 décembre 1946
Conseil de Tutelle	questions juridiques se posant dans le cadre de son activité	171 B/ü/ 14 décembre 1947
Comité intérimaire de l'Assemblée générale	questions juridiques se posant dans le cadre de l'activité du Comité	**196/m/** 3 décembre 1948 295/IV/ 21 novembre 1949
Comité des demandes de révision des jugements du Tribunal Administratif	aux fins définies à l'art 11 du Statut du Tribunal Administratif de l'O.N.U. (appels contre les jugements de ce Tribunal)	957/X/ 9 novembre 1955

Annexe II

Les organisations spécialisées habilitées à adresser les requêtes demandant des avis consultatifs

Organisation	*Organe autorisé*	*Article de la Convention sur la coopération avec VO.N.U.*	*Fondement juridique (Résolution de l'Assemblée générale de VO.N.U.*
O.I.T.	la Conférence ou, sur son autorisation, le Conseil administratif	IX	50/1/ 14 décembre 1946
FAO	la Conférence ou, sur son autorisation, le Comité exécutif	IX	50/1/ 14 décembre 1946
UNESCO	la Conférence géné-	IX	*50/1/*

	rale ou, sur son autorisation, le Conseil exécutif		14 décembre 1946
O.M.S.	l'Assemblée de la Santé ou, sur son autorisation, le Conseil exécutif	X	**124/n/** 15 novembre 1947
BIRD	la Banque	**VUI**	**124/n/** 15 novembre 1947
SFI	la Société	I	**1116/XI/** 20 février 1957
AID	l'Association	I	1594/XV/ 27 mars 1961
FMI	le Fonds	VUI	124/U/ 15 novembre 1947
O.A.C.L	l'Assemblée ou le Conseil	X	50/1/ 14 décembre 1946
U.I.T.	la Conférence des Plénipotentiaires ou le Conseil administratif	VU	**124/n/** 15 novembre 1947
O.M.M.	le Congrès ou le Comité exécutif	VU	124/U/ 15 novembre 1947
O.M.C.L	l'Assemblée ou le Conseil	DC	204/UI/ 18 novembre 1948
OMPI	l'Assemblée générale ou le Comité coordinateur	XU	3346/XXIX/ 17 décembre 1974
IFAD	le Conseil administratif	**XUI**	32/107 15 décembre 1977
A.I.E.A.	la Conférence générale ou le Conseil des Gouverneurs	X	1146/XII/ 14 novembre 1957

POLISH YEARBOOK
OF INTERNATIONAL LAW
YOU XVIII, 1989-1990
PL ISSN 0554-498X

The "Mazilu Opinion" of the International Court of Justice and Its Contribution to Clarification of International Law

by RUDOLF OSTRIHANSKY

The advisory opinion of the International Court of Justice (ICJ) on "Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations" (called here "the Mazilu opinion" for convenience), rendered 15 December, 19891 poses, despite its brevity, several interesting questions for international lawyers in general, and for students of the art of jurisprudence of the ICJ in particular. While the various legal implications of this advisory opinion should be discussed in future within a context of appropriate spheres of international law, this initial comment attempts to identify focal points of the opinion and to gloss them.

Therefore, after a short description of the factual background of the case, the following issues will be dealt with: the competence of the Court to deliver the opinion and the implications of the way by which the Court overcame the Romanian reservation to the Convention on the Privileges and Immunities of the United Nations (hereinafter called "the General Convention"), the notion of "an expert on mission," the extent of protection of human rights of international officials and experts, and finally the meaning of the reference to the general principles of law made in one of the separate opinions.

1. Facts of the Case

Mr. Dumitru Mazilu, citizen of Romania, was elected by the Commission on Human Rights as a member of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (called in short "the Sub-Commission") for the three-year term due to expire by the end of 1986, and subsequently extended till the end of 1987, due to the lack of a session of the Sub-Commission in 1986.

As a member of the Sub-Commission, Mr. Mazilu was requested to prepare a report on human rights and youth, to be presented at the 1986 session, rescheduled, as it was mentioned, for 1987. At the thirty ninth session of the Sub-Commission, held in Geneva in August—September 1987, Mr. Mazilu

[1] *ICJ Reports*, 1989, p. 177.

was not present and bis report was not received. Romanian authorities informed the United Nations Office that Mr. Mazilu was unable to participate in work of the Sub-Commission due to serious health problems. In those circumstances the Sub-Commission postponed the discussion of the report to the next session scheduled for 1988. It requested Mr. Mazilu to prepare the report, despite the expiration of his mandate of a member of the Sub-Commission before the date of the next session.

After the session the UN organs were making various attempts to contact Mr. Mazilu in Romania, but without success. Romanian authorities informed that Mr. Mazilu was put on his request on retirement list. In letters sent by informal channels to the United Nations Mr. Mazilu complained on various harassments from the side of Romanian authorities, like exerting the strong pressure on him to resign voluntarily from preparing and presenting the report, following him and his family by police, disconnecting his telephone, forbidding international travels, preventing from contacts with UN officials coming to Bucharest, ***etc***.

At the same time, another Romanian national, Mr. Diaconu, was elected a member of the Sub-Commission, and he offered to replace Mr. Mazilu as a rapporteur. This offer was not accepted by the Sub-Commission, which, after absence of Mr. Mazilu and his report at the fortieth session, requested the Secretary-General to establish personal contacts with him and to facilitate a visit to him by a member of the Sub-Commission and the Secretariat to assist him in completion of the report Romania replied for the request by the Secretary-General that any intervention by the Secretariat would be considered as interference in Romania's internal affairs.

In these circumstances, the Sub-Commission requested the Commission on Human Rights to urge the Economic and Social Council to request the ICJ to render the advisory opinion on the applicability of the General Convention to the present case.[2]

The Court, in the described opinion, found the General Convention (Article VI, Section 22) applicable in the case of Mr. Mazilu.

As a factual epilogue it may be reminded that after the overthrowing of the Ceausescu regime in December 1989, Mr. Mazilu became for a certain time one of the leading politicians of the Romanian democratic movement and acted even as a Vice-President of the National Salvation Front.

2. Competence of the Court to Deliver the Opinion

The discussed opinion is for the first time delivered at the request made by the Economic and Social Council (ECOSOC). To determine the competence of

[2] *Ibid*., pp. 180—185.

the Court it is necessary to look closer at the legal basis of the request The ECOSOC has been authorized to request advisory opinions by the General Assembly resolution 89 (I) of 11 December, 1946. This authorization has been made in accordance with provisions of Article 96 para. 2 of the Charter of the United Nations and Article 65 para. 1 of the Statute of the IGJ. Article 96 para. 2 provides that such advisory opinions may be requested on legal questions arising within the scope of activities of the requesting body.

Accordingly, it is necessary to establish, whether the request concerned legal questions arising within the scope of the ECOSOC. The request, in its pertinent part, states as follows:

"Requests [...] an advisory opinion [...] on the legal question of the applicability of Article VI, Section 22 of (the General Convention) in the case of Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission." [3]

The Court stated in the opinion that the formal requirement was fulfilled, because Mr. Mazilu's assignment had been pertinent to a function and programme of the Council. [4] This way the Court implicitly confirmed the principle that the organ appointing an agent of the organization acquires by this very fact a competence to protect the agent and its international status. This specifies the implied power of the organization to protect its agents, established earlier by the Court, [5] by assigning it to a particular organ. In opposition to the opinions on "Reparations" and "Effect of Awards" [6] the Court did not expressly deal with this issue in the "Mazilu opinion," treating the matter as self-evident.

Articles 96 para. 2 of the Charter and 65 para. 1 of the Statute are not the only grounds for the jurisdiction discussed by the Court. The ECOSOC resolution 1989/75 formulating the request to the Court expressly stated that a difference had arisen between the United Nations and Romania as to applicability of the General Convention to Mr. Mazilu. Accordingly it was necessary to look closer at the dispute settlement provisions contained in the General Convention.

Section 30 of the Convention provides that all differences arising out of the interpretation or application of the Convention shall be referred to the ICJ, unless otherwise agreed by the parties to the dispute. If such difference arises between the United Nations and a member state, a request shall be made for advisory opinion of the Court. That opinion shall be accepted as decisive by the parties. [7]

[3] *Ibid.*, p. 178.

[4] *Ibid.*, p. 187.

[5] The "Reparations for Injuries" opinion; *ICJ Reports, 1949*, pp. 182—184.

[6] *ICJ Reports*, 1949, p. 182; *ICJ Reports*, 1954, p. 56.

[7] United Nations Treaty Series (UNTS), voL 1, p. 30, reproduced in *ICJ Reports*, 1989, p. 188.

This provision constitutes a separate ground for the advisory jurisdiction of the Court,[8] provided that provisions of Article 96 para 2 are not violated.

Romania, however, attached the following reservation to the instrument of its accession to the General Convention:

"The Romanian People's Republic does not consider itself bound by the terms of Section 30 of the Convention which provide for the compulsory jurisdiction of the International Court in differences arising out of the interpretation or application of the Convention; with respect to the competence of the International Court in such differences, the Romanian People's Republic takes the view that, for the purpose of the submission of any dispute whatsoever to the Court for the ruling, the consent of all parties to the dispute is required in every individual case. The reservation is equally applicable to the privisions contained in the said section which stipulate that the advisory opinion of the International Court is to be accepted as decisive."[9]

Existence of the Romanian reservation poses at least three questions to be resolved: does the difference over the applicability of the General Convention constitute a difference arising out of the interpretation or application of that Convention, is the Romanian declaration valid under customary international law, *i.e.* is it compatible with the purpose and object of the Convention, and finally, what is the exact scope and meaning of the reservation.

Section 30 of the General Convention was not, however, invoked in the request made by the ECOSOC. It should have been therefore decided, as a preliminary question, whether this provision was relevant to the discussed case. Before the Court decided that the request was not brought under the terms of the Section 30,[10] it had dwelt upon the scope and purpose of the request and of the reservation. This confirms that the mere lack of reference to the Section 30 in the request does not determine the inapplicability of that basis.

Having that established, one should look, whether the difference between the United Nations and the Government of Romania constituted the difference mentioned in the Section 30. The Court drew an important distinction between both differences. It stated as follows:

"[T]he nature and purpose of the present proceedings are [...] that of a request for advice on the applicability of a part of the General Convention, and not the bringing of a dispute before the Court for determination"[11]

and went further on:

"Certainly the Council, in its resolution requesting the opinion, did conclude that a difference had arisen between the United Nations and the Government of Romania as to the *applicability* of the Convention to Mr. Dumitru Mazilu. But this difference, and the question put to the Court in the light of it, are not to be confused with the dispute between the United Nations and Romania with respect to the *application* of the General Convention in the case of Mr. Mazilu."[12]

[1] *Cf. Cour Internationale de Justice, Annuaire*, 1988—1989, p. 58.
[9] *ICJ Reports*, 1989, p. 188.
[10] *Ibid.*, p. 190.
[11] *Ibid.*, p. 190.
[12] *Ibid.*, p. 191.

The reasoning of the Court is far from being convincing. If the United Nations (the ECOSOC in this case) presents the opinion that the Convention should be applied, and the government rejects this view, this constitutes the fundamental difference as to the application of the Convention, and drawing the distinction between disputes over application and over applicability, with these last avoiding constraints of the Section 30, may amount to the circumvention of the law.

Moreover, the acceptance of the Court's doubtful reasoning produced some unwelcomed results. The Court, answering the question of applicability, formulated the opinion in very general terms, by stating simply that the Article VI, Section 22 is applicable in the case of Mr. Mazilu.[13] The self-imposed restraint prevented the Court from elaborating on the applicability of the General Convention to Mr. Mazilu, in circumstances in which he had been placed by Romanian authorities. This self-restraint has been criticized by Judge Oda,[14] and a dose of similar criticism may be drawn from the separate opinions of Judges Evensen and Shahabuddeen,[15] who discuss the concrete situation of Mr. Mazilu. It should be, however, stressed that this understandable criticism should have been rather applied to the distinction discussed above, than to the final scope of the opinion, because it should have identified reasons, and not mere effects.

Abandoning, as a hypothesis, the construction of "applicability" as distinct from the "application," one may, as a consequence, accept the relevance of the Section 30 to the present case. This poses the next question of a possible impact of the Section 30 on the scope of Articles 96 para. 2 and 65 para. 1, and of the way of reconciling the both grounds for jurisdiction. Judge Shahabuddeen dwells in his separate opinion upon the exact meaning of the Section 30 against the background of Article 96 para. 2 of the Charter and comes to the following conclusion:

"Ail that Section 30 of the Convention does is to make it compulsory for the body vested with appropriate competence by or under Article 96 of the Charter to exercise that competence in relation to certain differences, and incumbent on the parties to such differences to accept the resulting advisory opinion as 'decisive'. The action of the reservation is exerted on these two additional features and not on the Court's jurisdiction under Article 96 of the Charter."[16]

This is one of the possible interpretations of the scope and meaning of the Section 30. Another one relates to the original difference between the contentious jurisdiction as the way of adjudging disputes and the advisory jurisdiction enlightening international legal questions. Section 30 relates to the disputes between states and between a state and the United Nations. In 1946,

[13] *Ibid.*, **p. 198.**
[14] *Ibid.*, **p. 208.**
[13] *Ibid.*, **pp. 210 and 215—219.**
[16] *Ibid.*, **pp. 214—215.**

when the General Convention was drafted, it was not certain whether the general competence to request advisory opinions would be sufficient in a case of a dispute involving a sovereign state. The principle of the consent to the adjudication, confirmed by the Permanent Court of International Justice in the famous "Eastern Carelia" opinion,[17] was reverted to a large extent in 1950, *i.e.* four years *after* the General Convention was signed, in the "Peace Treaties" (First Phase) opinion,[18] which was followed by a few other advisory opinions of the Court.[19]

Accordingly, it might be legitimately assumed that the original purpose of providing the special basis for advisory jurisdiction in the Section 30 was to secure the competence of the Court by giving the consent of all interested states in advance of the possible dispute.

In consequence, the issue of necessity of the Romanian consent to the proceedings appears on the two conflicting plans. First is the evolving practice of the Court, which has led to the identification of what Paul C. Szasz has called the "quasi-institutional cases," involving disputes between an organization and one or more states, with the purpose to instruct the organization as to its legal posture in respect of the matter in question.[20] The second one is the *ut valeat* principle of interpretation, which orders to treat all provisions of the General Convention as legally valid, and moreover as legally meaningful, unless it led to an unreasonable and absurd result. The proper place to reconcile these two plans was the area of propriety of the Court to give an opinion. The Court rightly identified this ground, but it took the position of non-existence of the dispute covered by the Section 30,[21] which resulted in the limitation of the "Mazilu opinion" described above.

There is still another possibility to explore, namely to check, whether the statement of Romania presented to the Court that it had not consented to the jurisdiction was well founded. Firstly the admissibility of the Romanian reservation should be examined. The General Convention is silent on the question of reservations. Therefore, according to the Vienna Convention on the Law of Treaties (Article 19) and the ICJ opinion on "Reservations to the Genocide Convention"[22] the reservation is admissible when is compatible with object and purpose of the treaty. Dispute settlement provisions are not directly related to the purpose and object of the General Convention. Accordingly, the

[17] **Publications of the PCIJ, Series B, No. 5, pp. 27—29.**

[18] ***ICJ Reports*, 1950, pp. 71—72.**

[19] ***Cf.* M. POMERANCE, *The Advisory Function of the International Court in the League and U. N. Eras*, Baltimore, London 1973, pp. 287—296.**

[20] **P. C. SZASZ, "Enhancing the Advisory Competence of the World Court," in: L. Gross (ed.), *The Future of the International Court of Justice*, vol. 2, Dobbs Ferry, New York 1976, p. 507.**

[21] ***ICJ Reports*, 1989, pp. 190—192.**

[22] ***ICJ Reports*, 1951, p. 24.**

Romanian reservation to the Section 30 is admissible and its validity cannot be questioned.

The next issue relates to the exact meaning and scope of the Romanian reservation. Its part relevant to the discussed dispute states that "This reservation is equally applicable to the provision contained in the said section which stipulate that the advisory opinion of the International Court is to be accepted as decisive."

From the text of the reservation it appears clearly that Romania requires its consent (as well as that of the UN) to accept the advisory opinion as decisive. Nothing in the reservation concerns the special consent to request the advisory opinion as such. The principles of interpretation of treaties support this contention.[23] A reservation by its very nature is the proviso of exceptional nature. Therefore, the principle of restrictive interpretation of exceptions should be applied as to the scope of reservations. The classic statement of this principle (as regards exceptions, and not specilicly reservations) was made by the Permanent Court of International Justice in the "German Interests in Polish Upper Silesia" (Merits) case.[24]

An application of the principle of good faith also supports the restrictive interpretation. Romania (as any other state-party to the Convention) cannot by the reservation affect the operation of the General Convention as such, but it can only restrict some effects of it on Romania. Consequently, it excluded the most important legal effect of the last part of the Section 30, namely the binding force of the advisory opinion. It is doubtful, whether the existence of a non-binding advisory jurisdiction may affect the legal standing of a state, but even if, the exclusion of such jurisdiction should definitely be expressly stated in the reservation.

It should be stressed that the Court initially suggested the possibility of such interpretation of the Romanian reservation. This way was not, however, pursued by the Court, in favour of interpretation on the non-applicability of the Section 30 to the debated case.[23]

Overcoming of the Romanian objection by way of an anylysis of the content of the reservation would allow the Court to address the issues of applicability of the relevant parts of the General Convention to the concrete situation of Mr. Mazilu in a greater detail. At the same time, an express acceptance of a non-decisive character of the opinion for Romania would not change the situation, because none of the grounds accepted by the Court (Article 96 para. 2 of the Charter and Article 65 para. 1 of the Statute) provides for the binding effect of advisory opinions.

---

[23] **On the principles of interpretation see S. E. NAHLIK, *Kodeks prawa traktatów [Code of the Law of TYeaties]*, Warszawa 1976, pp. 197—201.**

[24] **Publications of the PCIJ, Series A, No. 7, p. 27.**

[15] ***ICJ Reports*, 1989, p. 190.**

The alternative legal reasoning described above has not been developed on the premise that the Court misconstrued the opinion, although it should be repeated that, in the author's opinion, drawing the distinction between "application" and "applicability" is dangerously close to circumventing the law. But it comes clear to the reader of the "Mazilu opinion" that the way of dealing with the question of competence determined to a large extent the shape of the answer given for the request. The main purpose of the alternative reasoning is showing that some restraints were self-imposed by the Court unnecessarily. And the main value of the acceptance of the relevance of the Romanian reservation lies not in its greater legal consistence (which is always subject to everyone's individual assessment), but in allowing the Court to respond more adequately to the request posed to it.

3. Status of an "Expert on Mission"

The opinion of the Court puts some light on the notion of experts of international organizations. Those people have been hitherto given much less attention than the other group performing functions for the international organizations, namely international civil servants. The reason for this disproportion lies probably in the existence, on one hand, of a detailed set of provisions regulating the status of international officials, consisting mainly (but not solely) of staff rules and regulations, supplemented by judgments of several administrative tribunals,[26] and, on the other hand, the lack of such regulations regarding the experts. From this point of view, the opinion serves as a good reminder for students of law of international organizations about the subject deserving a proper attention.

The definition of an expert is far from being commonly accepted, except for stressing the non-permanent character of his duties.[27] In fact, the scope of this term is still marked to a large extent by intuition, and not by precise legal regulations.The Court was obviously aware of this difficulty and therefore its comment bear the particular value as first statements coming from such an authoritative source.

The opinion of the Court is formally confined to the notion of an expert on mission as understood by the General Convention, Section 22. Practically however, the statements of the Court retain broader relevance:

"The experts thus appointed or elected may or may not be remunerated, may or may not have a contract, may be given a task requiring work over a lenghty period or a short time. The essence

[26] For example see the extensive two-volume work of C. F. AMERASINGHE, *The Law of International Civil Service*, Oxford 1988.

[27] Z M. KLEPACKI, *The Organs of International Organizations*, Warszawa, Alphen aan den Rijn 1978, pp. 49—52.

of the matter lies not in their administrative position but in the nature of their mission. [...] Such persons have been entrusted with mediation, with preparing reports, preparing studies, conducting investigations or finding and establishing facts. They have participated in certain peace-keeping forces, technical assistance work, and a multitude of other activities. In addition, many committees, commissions or similar bodies whose members serve, not as representatives of States, but in a personal capacity, have been set up within the Organization [...]" [28]

This lengthy quotation reproduces the most general comments of the Court on the nature and task of the experts. The statement that experts always serve in their personal capacity, and not as representatives of states, should be particularly underlined as showing the crucial feature of an expert

Interesting may be to compare this quotation with the Court's opinion on the status of an agent of the organization, proclaimed in the "Reparations" opinion:

"The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions — in short, any person through whom it acts." [29]

As it is easily seen, these definitions differ only in one respect: experts do not have the status of officials of the organization, while agent may have that status. From the strict comparison an interesting inference may be drawn: agents comprise of officials and experts. This corresponds very well with the distinction between officials and experts appearing in Articles V and VI of the General Convention, which might lead to the conclusion that any individual engaged on a task in the name of the United Nations would be classified as an official or an expert, and that special missions functioning under mandate of the organization may be composed of either type of agents or be a combination of the two.[30]

The sole reliance on such interpretation produces sometimes, however, misleading results, as it happens in case. Members of the UN peace-keeping forces have undoubtedly a status of the agents of the United Nations. In fact the opinion on "Reparations" dealt with a situation of Mediator and members of the United Nations Truce Supervision Organization in Palestina, one of the first peace-keeping missions. At the same time a status of the personnel of UN peace-keeping missions is not covered by the General Convention. Privileges and immunities of the "blue helmets" have been regulated in special agreements concluded between the United Nations and the host state (so called Status of Forces Agreements — SOFA). Several of these agreements have provided the recourse to the General Convention,[31] what proves that the Convention has

[28] *ICJ Reports*, 1989, p. 194.

[29] *ICJ Reports*, 1949, p. 177.

[30] J. K. KING, *The Privileges and Immunities of the Personnel of International Organizations*, Odense 1949, p. 202.

[31] Agreements between the United Nations and Egypt, UNTS, vol. 260, p. 61; the UN and

bad not the application *ex lege* in these situations, even against the host states being parties to it. Since the early 1970s SOFA are no longer concluded, but the reasons for it have nothing to do with changing of the status of the personnel.[32] The non-application of the status of experts to the personnel of the UN military forces has been also confirmed by the jurisprudence of the United Nations Administrative Tribunal.[33]

This shows that the notion of experts is not as clear as it might appear from the discussed here opinion of the Court. Thus it seems worthwhile to recall an old resolution of the UN Committee on Budgetary Questions, recommending that

"each organ, within its capacity, should define the character of any new commission or committee; that is, whether composed of members serving in an individual capacity or of representatives designated by member governments."[34]

It recognized the following bodies as composed of experts: the Staff Budget Commission, the International Civil Service Advisory Board, the Committee of Library Experts.[35]

The Court in the "Mazilu opinion" applied the same line of reasoning in respect of the status of members of the Sub-Commission. It stressed that the Sub-Commission was composed of a number of eminent persons, designated by name, and that the members were acting in their individual capacity.[36] It should be noted that the status of members of the Sub-Commission differs in this respect from that of members of the Commission on Human Rights, which are states, acting through their representatives. It is up to the state concern whether to appoint a governmental official or an independent person.[37] So the difference between state representatives and international experts is to be found less in the way of their election or appointment than in the exclusively international character of their tasks, and in the obligation of the governments to recognize this international character and to refrain from any pressure on the experts as regards their duties.

Mr. Mazilu ceased to be a member of the Sub-Commission at the end of 1987. He retained, however, the status of a special rapporteur of the

---

Congo, UNTS, vol. 414, p. 229; the UN and Cyprus, UNTS, voL 492, p. 58, *etc.* For general analysis of the SOFA see the respective parts of R. HIGGINS, *United Nations Peace-keeping. Documents and Commentary*, vol 1—4, London, New York, Toronto 1969—1981.

[32] For the description of the reasons see J. RZYMANEK, "Funkcje doraźnych sił zbrojnych ONZ a władza terytorialna państwa przyjmującego" [Functions of the United Nations Emergency Forces and Territorial Authority of the Host State], *Wojskowy Przegląd Prawniczy*, 1979, No. 2, p. 161.

[13] A. PLANTEY, *The International Civil Service, Law and Management*, New York, Paris, Barcelona 1981, p. 32.

[34] Doc. A/534 (April 1948), p. 13, reproduced in KING, *op. cit.*, p. 203.

[35] KING, *op. cit.*, p. 203.

[36] *ICJ Reports*, 1989, p. 196.

[37] A. H. ROBERTSON, *Human Rights in the Wbrld*, 2nd ed., New York 1982, p. 26.

Sub-Commission after that date, and was requested to prepare and present its report on human rights and youth. The Court confirmed the position of Mr. Mazilu as an expert of the United Nations also for that period of his activities. It recognized as pertinent in determination of a status of the special rapporteurs the fact that they carry out their research independently for the United Nations.[38] Obviously Mr. Mazilu retained the status of an expert only in connection with his activities related to preparation and presentation of the report.

In that context it would be interesting to dwell upon an impact of the "functional approach" taken by the Court on the legal position of rapporteurs not assigned to international bodies consisting of experts. What is the status of a person appointed as a rapporteur by the commission composed of representatives of states? Or members of drafting committees preparing various resolutions for international bodies? The answer cannot be definite at the moment, but the approach taken by the Court allows to consider seriously granting them the privileges and immunities of international experts. The same may be applied to members of various conciliation commissions, and in particular to members of panels established under GATT regulations, composed traditionally of governmental representatives but acting in their personal capacity.[39]

The problem of status of persons performing a double function in international organizations is still not sufficiently resolved in the doctrine of international law. These are such persons as the President of the General Assembly or Chairmen of the Main Committees, or the President of the Security Council. They all serve in the double capacity: in national, as a state representative, and in international, as a chairman of an organ of the organization. A proposal to treat them as international officials (despite that their functions are not *exclusively* international)[40] seems to be perfectly in line with a reasoning of the Court, which may be drawn from its laconic statements in the "Mazilu opinion."

4. Extent of International Protection of Human Rights of Officials and Experts of Organizations

The very short separate opinion of Judge Evensen[41] should be particularly welcomed as containing a valuable contribution to a clarification and

[38] *ICJ Reports*, 1989, p. 197.

[39] R. PLANK, "An Unofficial Description of How a GATT Panel Works and Does Not," *Journal of International Arbitration*, vol. 4, 1987, No. 4, pp. 65—66.

[40] G. GRABOWSKA, *Funkcjonariusze międzynarodowi [International Civil Servants]*, Katowice 1988, p. 20.

[41] *ICJ Reports*, 1989, pp. 210—211.

development of international law of human rights. Judge Evensen discusses the unlawfulness of various harassments exerted by Romanian authorities on the family of Mr. Mazilu.

Protection of family life of the UN experts is not expressly included in the provisions of Article VI of the General Convention, in contrast to Article V, Section 18 (d), applying to the officials of the United Nations, where one particular immunity for spouses and dependant relatives is mentioned. Judge Evensen does not draw from this fact the conclusion of a non-existence of protection of family of an expert, but conversely he develops a convincing argumentation that such protection is secured by relevant norms of international law. To this end, provisions of the Universal Declaration of Human Rights and of the European Convention on Human Rights are quoted.

The most signilicant passage of Judge Evensen's argumentation states as follows:

"The integrity of a person's family and family life is a basic human right protected by prevailing principles of international law which derive not only from conventional international law or customary international law but from general principles of law recognized by civilized nations'."

and

"The respect for a person's family and family life must be considered as integral parts of the 'privileges and immunities' that are necessary for 'the independent exercise of their functions' under Article VI, Section 22, of the 1946 Convention on the Privileges and Immunities of the United Nations."

Judge Evensen quotes the Rome Convention, to which Romania is not a party, and the Universal Declaration of Human Rights, adopted in 1948, when Romania was not a member of the United Nations. Despite this, he finds the treaty obligation binding Romania to respect integrity of Mr. Mazilu's family, contained in the General Convention. This allows to develop his reasoning further and to state that observance of basic human rights constitutes a part of privileges of international officials and experts necessary for the proper performance of their function, irrespectively of the attitude towards human rights of the governments in case. This amounts even to the recognition of another conventional system of protection of human rights, concerning international officials and experts, and contained in agreements on privileges and immunities.

This conclusion seems at the first glance surprising, and it is quite possible that the Judge Evensen's motivation to attach the separate opinion did not reach so far. Still, in the desirability of widespreading of the protection of human rights, this broad interpretation of the content of the General Convention (and other conventions alike) is fully justified, especially because it concerns persons performing international functions and possessing an international status in that respect, which should prevent any state, independently

of its attitude towards human rights, from claiming the matter being essentially within its domestic jurisdictiqn.

Another important aspect of the separate opinion relates to the sentence quoted above, in which the basic human rights (or one such a right discussed by the author of the opinion) are protected by customary international law. In fact, the existence and extent of customary protection of human rights is not unanimously accepted. The moderate view stresses that a long-standing practice of international organization, anterior to the creation of the respective treaty rules on protection of human rights, may be recognized as a source of international law, taking the principle preventing racial discrimination as an example.[42]

An essential element of a customary rule is the established practice. At this place, the well-known concept of a state's practice developed by A. D'Amato, should be recalled, according to which the actual behaviour of states, and not their oflicial statements, is relevant.[43] Applying this concept to the discussed issue would mean that firstly the universal respect for a person's family life should be established, and only afterwards the protection can be claimed. No doubt that the room for this protection would be considerably reduced this way.

The statement of Judge Evensen reveals his critical attitude to the D'Amato theory. On the other hand, it fits very well to the concept of customary rules developed by the Court in the judgement in the *Nicaragua v. United States* case.[44]

As it has been stated before, the Judge Evensen's pronouncement, although confined only to one human right, may be legitimately extended to all basic human rights. The Universal Declaration of Human Rights seems to be the proper list of such basic rights. Ascribing the customary character to those rights, over forty years after the unanimous adoption of the Declaration, should be welcomed as a step towards progressive development of international law.

5. General Principles of Law

The fragment of the Judge Evensen's separate opinion quoted above contains another statement of importance exceeding the discussed question, namely the reference to the "general principles of law recognized by civilized

[42] A. MICHALSKA, *Prawa człowieka* w *systemie norm międzynarodowych [International Law of Human Rights]*, Warszawa, Poznań 1982, pp. *46*—47.

[41] A. D'AMATO, *The Concept of Custom in International Law*, Ithaca 1971.

[44] F. L. KIRGIS, "Custom on a Sliding Scale," *American Journal of International Law*, voL 81, 1987, No. 1, pp. 146—151.

nations." The meaning and scope of these principles is still subject to debate among international lawyers.[45] Every contribution of the Court (also by way of a separate or dissenting opinion) is therefore particularly valuable to a clarification of that concept.

Judge Evensen writes that the integrity of a person's family and family life is protected by "prevailing principles of international law," which in turn derive from the general principles of law recognized by civilized nations (as well as from conventional and customary international law). This suggests the following structuration of the principles of law: "the general principles" are the principles common for various municipal legal systems, and acquiring this way a creative effect on "prevailing principles of international law." "The prevailing principles" in turn may become a source of a norm of international law, a norm which even may be incorporated implied way in an international treaty.

This reasoning comes close to one of the hitherto most significant judicial pronouncements on the general principles, namely to the dissenting opinion of Judge Tanaka in the *South West Africa (Second Phase)* case,[46] and similarly reflects the element of natural law in creation of rules of international law. The implied natural law reference is counterbalanced by the recourse to conventional and customary international law, being positive sources of law. Still the "natural law approach" seems to prevail, because it is not the existence of the basic human right which is under discussion, but only the international protection of it, which according to Judge Evensen, is secured by the "prevailing principles of international law." This implies that the existence of basic human rights is not conditional upon positive norms of international law. This conclusion is quite consistent with the basic philosophical premises of the concept of human rights.[47]

Similarly to the preceding section of this paper, the short remark of Judge Evensen is here commented in an extensive manner, which may be only one of possible interpretations of this statement. The reason for this is the mentioned scarcity of truly authoritative pronouncemennts on the extent of Article 38 para. 1 (c) of the Statute of the Court. Taking a more moderate approach, the two conclusions may be drawn in that respect from the Judge Evensen's opinion: the general principles are not the principles of international law (at least not exclusively), and their extent exceeds the fundamental principles of

[45] J. GILAS, "Zasady ogólne prawa w pracach Międzynarodowego Trybunału Sprawiedliwości" [General Principles of Law in Work of the International Court of Justice], *Zeszyty Naukowe Uniwersytetu Mikołaja Kopernika, Prawo VI,* Toruń 1966, pp. 29—48; S. E. NAHLIK, *Wstęp do nauki prawa międzynarodowego [Introduction to the Study of International Law],* Warszawa 1967, pp. 372—386; I. BROWNLIE, *Principles of Public International Law,* 3rd ed., Oxford 1979, pp. 15—19.

[44] *ICJ Reports,* 1966, pp. 294—299.

[47] *Ibid.,* pp. 296—298.

procedural justice, discussed previously by the Court in the context of general principles of law.[48]

6. Conclusions

The main conclusion that the importance of the "Mazilu opinion" goes far beyond the scope of the question put to the Court by the ECOSOC is hardly surprising. If fact, this effect may be ascribed to all judgments and advisory opinions of the Court. Nevertheless, the main points of interest for international lawyers should be repeated at the end of this commentary.

Jurisdictional issues once more determined to a large extent the shape of the decision of the Court, and they made it, in the opinion of three judges (with whom the author concurrs), in the undesirable direction. The longest part of the present article was devoted to prove that the restraint presented by the Court was not absolutely necessary and that the Court could uphold its jurisdiction by way of another interpretation.

Meaning of experts of international organizations is still unclear. The value of the opinion lies mainly in stressing the individual capacity of persons acting as the experts and in underlying an international character of their tasks.

Finally, the separate opinion of Judge Evensen is a manifestation of art of progressive interpretation of international law, with a clear purpose of enhancing the applicability of rules protecting the basic human rights in various situations.

[48] "**Application for Review of Judgment No. 158 of the UNAT,**" *ICJ Reports,* **1973, p. 181.**

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVIII, 1989-1990
PL ISSN 0554-498X

Les notions des « biens culturels » et du « patrimoine culturel mondial » dans le droit international

par ANNA PRZYBOROWSKA-KLIMCZAK

Le problème de la protection des biens culturels les plus précieux par le droit international a apparu tout au début en temps de guerre, vu la pratique de la destruction du pays de l'ennemi, de droit de prise ainsi que de la dévastation et pillage des oeuvres d'art. Les nouvelles menaces apportées par la civilisation contemporaine impliquèrent que la question de la protection des biens culturels en temps de paix a pris la forme des traités internationaux. L'ancienne littérature du droit international et les anciens documents accordaient la protection aux « oeuvres d'art », « monuments » et « monuments d'histoire ». La Convention de La Haye de 1954 pour la protection des biens culturels en cas de conflit armé [1] a initié la reconnaissance universelle de la notion du « bien culturel », tandis que la Convention de Paris de 1972 pour la protection du patrimoine mondial, culturel et naturel [2] introduisit dans la pratique internationale la notion du « patrimoine culturel ». Les différences entre les notions particulières n'ont pas un caractère purement linquistique mais également substantiel, ce qui implique que de différents groupes et catégories d'objets se sont vus accorder une protection.

1. « L'oeuvre d'art » et « monument » en tant qu'objet de la protection internationale

En démontrant la différence entre la signification des notions : « oeuvre d'art », « monument » et « monument d'histoire » on cite souvent la signification courante de ces notions, car celles-ci n'ont pas de significations précisées par la littérature scientifique et les documents ne donnent pas leurs définitions. La notion de l'« oeuvre d'art » se rapporte le plus souvent à un tableau de peinture ou à une sculpture, objet d'un certain intérêt artistique représentant un artiste, une école ou une orientation et recevable dans le

[1] Dziennik Ustaw [Journal des Lois, par abrév. J. des LJ, 1957, n° 46, texte 212, annexe.
[2] J. des L., 1976, n° 32, texte 109, annexe.

domaine spirituel[3]. La notion du « monument » (conformément à sa provenance linguistique, un monument est une chose conservée de l'ancien temps[4]) signifie un symbole du passé, un message d'une époque échue étant le plus souvent une oeuvre d'architecture ou d'art mais pas toujours d'un intérêt artistique d'un très haut niveau, un objet de culture matérielle ayant souvent en pratique des fonctions utilitaires[5]. La notion du « monument d'historié » Figurant dans les textes des documents traduits en langue polonaise provient parfois d'une certaine libéralité de traduction et pourrait être remplacée par la notion du « monument » mais une certaine influence sur l'adoption universelle de cette notion a eu le développement au XIXe siècle des sciences historiques qui voyaient dans les monuments avant tout leur valeur de souvenir historique et des symboles du passé[6].

Une signification imprécise et variable des notions et l'existence des notions similaires impliquent une certaine prudence lors de la détermination de l'objet de la protection dans les anciens documents et postulats avancés par la littérature de droit international.

A l'époque de la Renaissance et de l'admiration de l'art, l'un des premiers auteurs à lancer un appel à préserver en temps de guerre « des objets de culte, des monuments de littérature et de nobles artistes » fut Jakub Przyluski[7]. Un siècle plus tard, dans le traité de paix d'Oliwa, en tant qu'objets devant être restitués à la Pologne furent cités « les archives, les actes publics, administratifs, judiciaires, ecclésiastiques ainsi que la bibliothèque royale »[8].

Conformément à l'attitude rationnelle du Siècle des Lumières, Emeric de Vatell cite parmi les règles de guerre l'obligation de préserver les biens appartenant à l'ennemi et en particulier « des édifices constituant le patrimoine de l'humanité et non destinés à renforcer l'ennemi, tels que : églises, tombes, bâtiments publics et toutes oeuvres d'une beauté remarquable »[9], car

---

[3] J. Z. ŁOZIŃSKI, *Zabytek – pomnik historyczny, pamiątka narodowa, dzieło sztuki* [*Mottument – monument historique, souvenir national, objet d'art*], dans : *Dzieło sztuki i zabytek* [*L'objet d'art et le monument*], Warszawa 1976, pp. 13-26. Biblioteka Muzealnictwa i Ochrony Zabytków, série B, vol XLIIL

[4] *Słownik języka polskiego [Dictionnaire de la langue polonaise]*, red. M. S. B. Linde, Lwów 1860, vol. VI, p. 714.

[5] H. PIEŃKOWSKA, *Próba rozszerzenia pojęcia « zabytek » w powiązaniu z rozwojem nauki o ochronie środowiska i architekturze krajobrazu [Essai d'extension de la notion du « monument » dans le contexte du développement de la science concernant la protection du milieu naturel et l'architecture du paysage]*, dans : *Dzieło sztuki...*, pp. 36-37.

[6] J. Z. ŁOZIŃSKI, *op. cit.*, pp. 17-19.

[7] J. PRZYLUSKI, *Leges seu Statuta on Privilégia Regni Poloniae omnia*, Kraków 1551, cité après S. E. NAHLIK, *Międzynarodowa ochrona dóbr kulturalnych. Zbiór tekstów [La protection internationale des biens cultureb. Recueil de textes]*, Warszawa 1962, p. 93. Biblioteka Muzealnictwa i Ochrony Zabytków, série B, vol IV.

[8] *Ibid.*, p. 95.

[9] E. de VATELL, *Prawo narodów [Droit des nations]*, Warszawa 1958, p. 170.

toute leur « destruction délibérée sera condamnée par le droit des nations généralement reconnu en tant que sans intérêt pour la réalisation des fins de guerre » [10]. Trente années plus tard, une opinion semblable fut exprimée par Georg F. von Martens qui prétendit en plus que dans la guerre terrestre le droit de prise ne s'applique pas aux « monuments d'art et de travail professionnel » [11].

Le XIXe siècle qui débuta sous le signe des guerres napoléoniennes, a apporté une régression considérable en ce qui concerne l'apaisement de la pratique de guerre à l'égard des oeuvres d'art. Il semble donc important de rappeler la constatation de Johann L. Klüber que les exceptions au droit de prise concernent « les monuments publics, les objets du domaine de la littérature et des beaux-arts, l'équipement des châteaux, bâtiments et jardins appartenant au souverain ou à sa famille ainsi que des objets faisant partie des activités religieuses » [n].

Des opinions semblables furent formulées également sur le continent américain, car l'activité de collection intensive se rapportant également aux oeuvres d'art provoqua qu'on s'intéressa à leur protection en cas de conflit armé. On en peut trouver la preuve dans la constatation de Henry Wheaton sur l'existence d'une règle coutumière éliminant du cadre des opérations de guerre les temples religieux, les bâtiments publics destinés uniquement aux fins pacifiques, les monuments d'art et les édifices de la science [13]. Dans l'Instruction pour le Commandement de l'Armée des Etats-Unis sur le champ de bataille, on parle également de la nécessité de la préservation lors de l'assaut ou du siège des « oeuvres d'art classiques, bibliothèques, collections scientifiques ou instruments précis » et de l'introduction en temps de guerre d'une identification spéciale des « édifices contenant des collections des oeuvres d'art, musées scientifiques, observatoires astronomiques ou bibliothèques précieuses pour qu'ils puissent, dans la mesure du possible, être épargnés de la destruction » [14].

Une opinion similaire a été exprimée en cette matière par Johann K. Bluntschli qui dans l'art 650 de son code de droit international a formulé une disposition selon laquelle « l'action visant un pillage et un vol des collections scientifiques et artistiques (bibliothèques, galeries, tableaux de peinture, instruments) est à présent prohibée, car ces collections sont destinées à satisfaire les besoins intellectuels d'une contrée » [15].

[10] *Ibid.*, p. 174.

[11] G. F. von MARTENS, *Précis du droit des gens moderne de VEurope fondé sur les traités et Vusage*, Gottinge 1788, cité après S. E. NAHLIK, *op. cit.*, p. 100.

[12] J. L. KLÜBER, *Droit des gens moderne de PEurope*, Stuttgart 1819, cité après S. E. NAHLIK, *op. cit.*, p. 106.

[13] H. WHEATON, *Elements of International Law*, Philadelphia 1836, cité après *Classic of International Law*, Oxford - London 1936, pp. 362 - 363.

[14] Cité après S. E. NAHLIK, *op. cit.*, pp. 107 - 108.

Le transfèrement dans la pratique conventionnelle des postulats des juristes et la transformation de l'obligation de la protection des monuments en temps de guerre d'une norme coutumière dans une norme conventionnelle, ont eu lieu lors de la codification de La Haye de 1907. Lors de la Conférence de codification, on s'est servi du texte d'un Projet non ratifié de déclaration internationale des droits et coutumes de la guerre — Déclaration de Bruxelles de 1874 — selon laquelle en tant qu'objets jouissant d'une protection particulière furent cités « les monuments d'histoire, les oeuvres d'art et de la science » ainsi que « les établissements destinés aux manifestations religieuses, arts, sciences et charité » [16]. Dans le Règlement concernant les droits et les coutumes de la guerre terrestre constituant l'annexe à la IVe Convention de La Haye de 1907, les États contractants se sont engagés d'appliquer toute mesure possible afin de présever lors des sièges et bombardements « les temples, les bâtiments dédiés à la science, aux arts et à la charité ainsi que les monuments d'histoire » [17] si ceux-ci ne servent pas aux fins de guerre. Une définition semblable de l'objet de la protection a été incluse à l'art. 56 prohibant l'occupation, la destruction et la profanation intentionnelle. Outre « les monuments d'histoire », on a également cité « les oeuvres d'art et de la science » et on a postulé de traiter « le patrimoine [...] des institutions dédiées [...] aux beaux-arts et à la science » comme une propriété privée.

Le principe de la préservation des bâtiments à importance culturelle et des monuments ainsi qu'une identification identique à celle définie à l'art 27 du Règlement, ont été contenus dans le texte de la Convention concernant le bombardement par les forces navales en temps de guerre (IXe Convention de La Haye de 1907) [18].

Dans les dispositions des Conventions de La Haye de 1907 lors de la détermination de l'objet de la protection, on s'est servi de trois critères : la destination de l'objet, son appartenance à une institution déterminée et enfin ses propres qualités, ce qui pouvait en pratique rendre difficile l'application de ces dispositions et constituer un prétexte pour le rétrécissement des catégories des biens protégés.

Dans les premiers documents internationaux, on employait les notions: « oeuvre d'art », « monument » et « monument d'histoire », mais on ne précisait pas à quelles catégories d'objets ces notions s'appliquent, en acceptant une interprétation conforme à leur signification courante et généralement en

[15] J. K. BLUNTSCHLI, *Le droit international codifié*, Paris 1895, p. 365.

[18] Art 8 et 17, le texte dans, l' « Annuaire de l'Institut de droit international » (Gand), 1877, pp. 291-302.

[17] J. des L., 1927, n° 1, texte 161, art. 27.

[11] Art 5, le texte dans le recueil de S. E. NAHLIK, *op. cit.*, pp. 69-71.

vigueur. Les Conventions de La Haye ne donnaient pas leur définition, car c'étaient des conventions portant sur une très large multitude des questions liées à la guerre.

Ce n'est qu'en 1935 que furent conclues deux conventions internationales consacrées uniquement aux problèmes de la protection des monuments : le Traité sur la protection des institutions artistiques et scientifiques et monuments d'histoire appelé de nom de l'auteur de l'initiative le Pacte de Roerich [19], et le Traité sur la protection des biens meubles à valeur historique [20]. Ces conventions signées par les Etats américains à Washington le 15 avril 1935 accordaient, pour la première fois en forme d'une traité, la protection aux biens culturels également en temps de paix.

Conformément à l'art I du Pacte de Roerich, les biens jouissant d'un respect et d'une protection en temps de guerre et de paix étaient « les monuments d'histoire, les musées ainsi que les institutions scientifiques, artistiques, éducatives et culturelles » auxquels s'appliquait en temps de guerre la clause de neutralité. Des informations supplémentaires à ce sujet étaient contenues dans le préambule au Pacte, conformément aux dispositions duquel les parties doivent « préserver à tout moment du danger tous monuments immeubles étant la propriété aussi bien publique que privée qui constituent le patrimoine culturel des peuples ». Par comparaison aux documents précédents il y a eu un progrès considérable à noter dans la précision des dispositions : la protection était accordée aux biens immeubles sans distinction de forme de propriété dont le trait caractéristique constituait leur valeur pour le patrimoine culturel d'un pays [21]. Ce critère sera répété dans les définitions consécutives contenues dans les traités et sera développé dans le concept du patrimoine culturel de l'humanité.

Une définition différente de l'objet de la protection a été donnée par le second traité de 1935 appelé le Traité de Washington. A l'art. 1 du Traité on a cité quatre catégories des biens protégés. Aux trois groupes on a appliqué le critère initial du temps de leur création. Le premier groupe comprenait les biens de l'époque d'avant Christophe Colomb tels que : armes, outils de travail, manuscrits, tissus et bijoux ; le second, les mêmes groupes d'objets datant de l'époque coloniale ; et le troisième, les biens datant de l'époque de la guerre pour l'indépendance et de la période républicaine. Le quatrième groupe

[19] *International Protection of the Environment. Treaties and Related Documents*, ed. by B. Rüster, B. Simma, voL XIV, New York 1977, pp. 7126-7128.

[20] DEA, Documentes Officiales, Ser. A (53a); SEPF, Union Panamericana, Washington DC 1961

[21] M. M. BOGUSLAVSKIJ, *Pakt Roericha i zaščita kul'turnyh cennostej*, « Sovetskoe Gosudarstvo i Pravo », 1974, n° 10, pp. 111-115; E. ALEXANDROV, *La protection du patrimoine culturel en droit international public*, Solia 1978, pp. 96-112; J. KROPIDŁOWSKI, *Wybrane zagadnienia z zakresu ochrony dóbr kultury [Problèmes choisis de la protection des biens culturels]*, Warszawa 1972, pp. 9-10.

comprenait les biens datant des époques différentes et appartenant à l'un des sous-groupes, tels que : les bibliothèques, les archives, les collections des manuscrits ou les biens meubles naturels parmi lesquels les beaux spécimens zoologiques ou espèces rares menacées par la destruction ou l'anéantissement. Il semble donc que le critère temporel introduit par le Traité fut superflu, car les catégories particulières des biens se plaçaient dans toutes les limites temporelles. Cependant l'introduction de la notion du « monument de la nature » mérite un intérêt particulier (on a accordé à celui-là pour la première fois une protection internationale). De cette façon on a exprimé la conviction que les biens culturels comprennent non seulement les oeuvres de l'homme mais également celles de la nature et qu'il était donc opportun de réaliser l'idée de leur traitement semblable en matière de protection [22].

La convention suivante concernant la protection des biens culturels a été signée vingt ans plus tard sous l'influence de l'expérience tragique de la Seconde Guerre mondiale qui apporta d'énormes pertes dans le patrimoine culturel des pays. Beaucoup de précieux monuments se sont trouvés en ruine, des milliers d'oeuvres d'art ont été anéantis et des trésors de la culture nationale de multiples pays ont été pillés par les occupants. Pour cette raison, la Convention signée à La Haye le 14 mai 1954 concernait la protection des biens culturels en cas de conflit armé.

2. La notion des « biens culturels » dans les conventions et les recommandations de l'UNESCO

Dans la Convention de 1954, on employa pour la première fois la notion des « biens culturels » et la définition donnée à l'art 1 devait constituer un obstacle aux différences et libéralités d'interprétation [23]. La définition est fondée sur le principe statuant que, du point de vue de la protection accordée, n'est pas essentielle la provenance de l'objet ou son propriétaire mais ses traits individuels décidant de son appartenance à l'une de trois catégories précisées. Le premier groupe fondamental comprend tous les biens meubles ou immeubles à grande importance pour le patrimoine culturel des peuples où dans l'énumération qui suit on cita les monuments d'architecture, d'art ou d'histoire, les sites archéologiques, les ensembles de constructions, les oeuvres d'art, les

[22] H. PIEŃKOWSKA, *op. cit.*, pp. 38-41; W. SIEROSZEWSKI, *Ochrona prawna dóbr kultury* w *Polsce [La protection juridique des biens culturels en Pologne]*, Warszawa 1971, pp. 16-18. Biblioteka Muzealnictwa i Ochrony Zabytków, série B, vol. XXX ; H. NIEĆ, *Ojczyzna dzieła sztuki. Międzynarodowa ochrona integralności narodowej spuścizny kulturalnej [La patrie de l'oeuvre d'art. La protection internationale de l'intégrité nationale de l'héritage culturel]*, Warszawa 1980, pp. 53-55.

[22] S. E. NAHLIK, *Grabież dzieł sztuki Rodowód zbrodni międzynarodowej [Le pillage des oeuvres d'art. La généalogie du crime international]*, Wroclaw 1958, pp. 347-349.

manuscrits, les livres, les collections scientifiques, les collections de livres, d'archives ou de reproductions et d'autres objets d'intérêt artistique, historique ou archéologiques. Ainsi donc, en outre des notions précédemment employées tels que « monument » et « oeuvre d'art », ont été utilisées des notions nouvelles comme : « ensemble de constructions » cité à côté des monuments d'architecture, « site archéologique », « reproduction » ainsi que la notion de la « collection » en tant qu'ensemble clos (on estima que la valeur de certaines oeuvres se trouvait multipliée quand ils constituaient un élément d'un ensemble des biens et qu'il était nécessaire de les protéger conjointement et de prévenir leur dispersion). La seconde catégorie des biens protégés comprend les édifices destinés à la conservation ou à l'exposition des biens culturels meubles définis auparavant, et en qualité d'exemples on cite les musées, les bibliothèques, les dépôts d'archives et les refuges utilisés en cas de conflit armé. Le troisième, dernier groupe constituent les « centres monumentaux » comprenant un nombre considérable des biens cités dans le cadre des deux autres groupes (il y peut s'agir des quartiers de villes riches en monuments ou même de villes entières à architecture unique ou valeurs irréfutables de location ou d'aménagement de l'espace naturel).

La définition des « biens culturels » prévue dans la Convention de 1954 constitue la première tentative réussie de la détermination de l'objet de la protection accomodée à son étendue et caractère [24]. Cette définition permet aux Etats particuliers d'identifier les biens couverts par la protection si ceux-ci jouent un rôle important dans leur patrimoine culturel. Bien qu'en cette matière n'aient pas été établis des critères universels, on exprima la conviction que l'établissement des critères identiques pour tous les pays, sans distinction de la grandeur et du rang de leurs patrimoines culturels, serait injuste. En plus, la définition a un caractère ouvert, car, en précisant les catégories particulières, elle donne seulement des exemples ce qui n'exclut pas la possibilité d'appliquer les dispositions de la Convention également à d'autres biens.

Malgré l'évaluation positive de la définition contenue dans la Convention de 1954, elle n'a pas été répétée dans les documents internationaux suivants, même dans ceux qui furent élaborés sur l'initiative de l'UNESCO. A titre d'exemple, on peut citer ici deux Recommandations de l'UNESCO adoptées dans les années soixante.

Dans la Recommandation de 1964 sur les mesures à entreprendre en vue de la prohibition et de la prévention de l'exportation, importation et transfèrement de la propriété des biens culturels et mesures capables de prévenir de telles actions [25], on a agréé que l'objet de la protection constituent « les biens

[24] *Ibid.*, voir aussi S. E. NAHLIK, *International Law and the Protection of Cultural Property in Armed Conflict*, « Hastings Law Journal », vol. 27, 1976, n° 5, pp. 1078-1079; H. NIEĆ, *op. cit.*, pp. 9-10.

[25] *UNESCO, Records of the General Conference, Thirteenth Session*, vol. I, Paris 1964.

meubles et immeubles à grande importance pour le patrimoine culturel de chaque pays ». Le droit d'établissement des critères appliqués lors de la classification des biens précis en tant que biens protégés revient à l'Etat sur le territoire duquel ces biens sont situés. Dans une énumération à titre d'exemple confirmant le caractère ouvert de la définition, on cite : les oeuvres d'art et d'architecture, les manuscrits, les livres et autres objets à intérêt artistique, historique ou archéologique, les documents ethnologiques, les spécimens spécifiques de flore et faune, les collections scientifiques, et les collections importantes de livres et d'archives, y compris les archives de musique. Ainsi donc, à côté des définitions univoques et précises du genre de « documents ethnologiques » ou « archives de musique », on peut trouver des définitions à portée très large comme « les objets d'importance artistique ou historique », ce qui démontre que la classification des biens a été élaborée un peu un hasard et semble être un peu chaotique. De l'attention mérite l'attribution de la catégorie de biens protégés également aux certains spécimens naturels [26].

Dans la Recommandation de 1968 concernant la préservation des biens culturels menacées par les travaux publics et privés [27], la notion des « biens culturels » est étendue sur les biens immeubles et meubles. Les biens immeubles protégés comprennent les sites à importance archéologique ou historique, les constructions et autres éléments à importance scientifique, artistique ou architecturale et les ruines situées à la surface ou leurs restes trouvés sous terre ainsi que leur entourage. L'information au sujet des biens meubles est plus laconique et on les a définis comme biens culturels situés dans les immeubles ou trouvés lors de fouilles archéologiques ou recherches historiques. Conformément à l'interprétation grammaticale, la définition a un caractère fermé, ce qui, vu une énumération peu précise, peut causer des difficultés lors de son application. Une caractéristique plus complète des biens immeubles est liée au fait que ce sont surtout ces biens qui sont exposés à la destruction et à l'anéantissement pendant toutes sortes de travaux, car les biens meubles peuvent être déplacés dans les salles de musées ou dépôts adéquats. La valeur de la définition constitue la constatation que c'est la valeur artistique et historique de l'objet qui décide de sa protection et non son enregistrement dans un inventaire ou un registre. Le temps de la création n'a pas non plus d'importance, car la protection s'étend également sur les centres et bâtiments édifiés plus tard.

Une seconde définition conventionnelle des « biens culturels », après celle de la codification de La Haye de 1954, a été incluse dans la Convention concernant les mesures visant la prohibition et la prévention de l'importation, exportation et transfèrement illégal de la propriété des biens culturels, signée le 17 novembre 1970 à Paris [28].

[26] H. NIEĆ, *op. eit.*, pp. 77 - 82.

[27] *UNESCO, Records of the General Conference, Fifteenth Session,* voL I, Paris 1968.

La protection est accordée aux biens appartenant à l'une d'onze catégories de biens précisées par la Convention et demeurant dans une liaison particulière d'afliliation à un Etat [29]. Ainsi donc, bien que c'est chaque Etat qui décide lui-même quels biens « du point de vue religieux ou laïque sont d'une importance pour l'archéologie, la préhistoire, l'histoire, les arts ou la science », ces biens jouissent de la protection s'ils peuvent être considérés comme appartenant à l'un des groupes suivants : 1° spécimens de science, 2° souvenirs historiques, 3° édifices archéologiques, 4° fragments de monuments, 5° pièces de numismatique, 6° matériaux ethnologiques, 7° oeuvres d'art, 8° manuscrits et anciens livres, 9° exemplaires précieux et collections philatéliques, 10° archives et 11° meubles et instruments de musique (art. I).

L'adoption d'une variante fermée de la définition ne semble pas être correcte, vu une énumération supplémentaire à titre d'exemple des biens dans certaines catégories (dans le cas d'oeuvres d'art et pièces numismatiques). Certains doutes peuvent également être exprimés au sujet de mêmes restrictions prévues pour les ouevres d'art et biens archéologiques ainsi que les spécimens de faune, flore et minerais en cas de passage des frontières durant le voyage.

L'élément positif de la définition est la possibilité d'octroi de la protection à l'art et à la littérature contemporaine, aux oeuvres des auteurs vivants, car jusque-là ces oeuvres quittaient souvent le pays de leur origine avant que leur auteur fût devenu populaire ou dans la période du déclin de l'intérêt pour ses oeuvres [30].

Un second élément important de la définition de l'objet de la protection c'est la liaison entre les biens culturels et le pays dont ils constituent le patrimoine national. Cette liaison survient en cas de création de l'ouvrage (aussi bien par ses citoyens qu'étrangers) sur le territoire de ce pays, de sa découverte sur ce territoire et de l'acquisition du bien par une mission scientifique avec le consentement de l'Etat de son origine, par voie d'échange agréé des biens, de son acceptation en forme de donation ou de son acquisition légale avec le consentement des autorités compétentes de l'Etat de son origine (art. IV). Une considération égale de toutes ces situations peut cependant amener à des difficultés pratiques lorsqu'il s'agit de statuer sur les titres de priorité de quelques pays aux biens particuliers [31]. Malgré certaines lacunes et vices perçus, la définition contenue dans la Convention de 1970 est acceptée par les Etats parties en tant qu'instrument servant à l'identification des biens susceptibles de transfèrement illégal.

---

a J. des L., 1974, n° 20, texte 106.

[29] J. B. GORDON, *The UNESCO Convention on the Illicit Movement of Art Treasures*, « Harvard International Law Journal », 1971, n° 12, p. 542.

[30] W. TATARKIEWICZ, *Vita brevis, ars brevis*, « Poezja », 1969, n° 3, p. 6.

[31] J. B. GORDON, *op. cit.*, p. 543; A. MARCHISOTTO, *The Protection of Art in Transnational Law*, « Vanderbilt Journal of International Law », vol. 7, 1974, n° 3, pp. 721-722.

3. La définition du « patrimoine culturel » en droit international

3.1. La Convention de l'UNESCO de 1972

Une nouvelle notion de l'objet de la protection a été introduite par la Convention de l'UNESCO pour la protection du patrimoine mondial, culturel et naturel, adoptée à Paris le 16 novembre 1972. Bien que la notion du « patrimoine » soit déjà employée par les documents internationaux précédents (le Pacte de Roerich, la Convention de La Haye de 1954, la Convention de Paris de 1970, la Constitution de l'UNESCO [32]), aucun de ces documents n'apporte sa définition. La notion du « patrimoine » se manifesta également dans deux conventions régionales européennes précédant la Convention de 1972 : la Convention européenne culturelle du 19 décembre 195433 et la Convention européenne sur la protection du patrimoine archéologique du 6 mai 196934, mais là non plus la définition de cette notion n'a pas été donnée.

La définition du « patrimoine culturel » est donnée à l'art. I de la Convention de 1972 où l'on distingue trois catégories de biens protégés. Pour la détermination du premier groupe, on a utilisé la notion traditionnelle du « monument » et l'énumération couvre les « oeuvres architecturales, de sculpture ou de peinture monumentales, éléments ou structures de caractère archéologique, inscriptions, grottes et groupes d'éléments qui ont une valeur universelle exceptionnelle du point de vue de l'histoire, de l'art ou de la science ». Le second groupe ce sont les ensembles couvrant les groupes de constructions isolées ou réunies qui, en raison de leur architecture, de leur unité ou de leur intégration dans le paysage, ont une valeur universelle exceptionnelle du point de vue de l'histoire, de l'art ou de la science. La notion de l'ensemble et sa définition sera développée dans la Recommandation de l'UNESCO de 1976 concernant la sauvegarde des ensembles monumentaux et traditionnels et leur rôle contemporain. Le troisième groupe ce sont les « oeuvres de l'homme ou oeuvres conjuguées de l'homme et de la nature ainsi que les zones, y compris les sites archéologiques, qui ont une valeur universelle exceptionnelle du point de vue historique, esthétique, ethnologique ou anthropologique ». On leur a attribué le nom commun des « sites » qui n'a pas de synonyme exact en langue polonaise. La signification la plus rapprochée semble celle du mot « lieux ».

La notion du « patrimoine culturel » adoptée par la Convention constitue une conjonction particulière des définitions contenues dans les documents pécédents de l'UNESCO et surtout de la définition du « bien culturel » de la Recommandation de 1968 et de la Convention de Paris de

[32] Art. I aL 2c, J. des L., 1958, n° 63, texte 311, annexe.

[33] U.N.TS., vol. 218, p. 139.

[34] *International Protection of the Environment...*, vol. XIV, pp. 7203-7211. Dans la déGnition de l'objet de la protection on s'est servi de la notion du « bien archéologique ».

1970 d'une part, et de la notion de la « préservation de la beauté et du caractère du paysage » de la Recommandation de 196235 d'autre part La liaison de ces deux éléments dilférentiés nécessita l'adoption d'une prémisse qualificative synthétisée. Il s'agit ici de cette « valeur universelle exceptionnelle » qui est identique pour les deux premiers groupes quant aux rapports requis (histoire, science, art) et plus détaillée dans le cadre du troisième groupe (p. ex. importance ethnologique et anthropologique).

La classification des biens ainsi que la manière de présentation d'éléments constitutifs de la notion du « patrimoine culturel » furent l'objet de multiples controverses. Déjà dans le projet préliminaire, on a expressément distingué les monuments, les groupes de constructions et les sites (en déterminant le caractère archéologique, scientifique et naturel de ces derniers). On y a également évoqué les biens immeubles du patrimoine culturel et naturel mais sans en préciser les détails [36]. Dans le projet élaboré par le Comité d'Experts Gouvernementaux, après une discussion animée, on a adopté le concept du « patrimoine culturel » et on en a fait l'objet précis de la protection en y distinguant trois groupes cités de biens [37]. On a finalement adopté également la solution de ne pas séparer ces groupes en consacrant à chacun d'eux une partie distincte de la Convention ou même élaborer un document international à part pour chacun d'eux, mais de définir chaque groupe, l'adapter à un système uniforme et le subordonner à un programme commun de la protection [38].

La version en vigueur de la Convention constitue la confirmation de la réalité d'adoption d'une telle solution. La Convention est logique et cohérente malgré une ligne de démarcation expresse entre les différentes catégories de biens. Ainsi donc, bien qu'il n'y ait aucun doute quant à la détermination des groupes basée sur une gradation conséquente des biens protégés, le choix des éléments constitutifs ne semble pas si évident et les formules adoptées ne sont pas suffisamment claires. Ceci concerne surtout l'expression les « groupes d'éléments » et la notion des « oeuvres conjuguées de l'homme et de la nature ». Or, la question d'une classification et compréhension correcte des notions employées est importante, compte tenu du caractère fermé de la définition qui utilise une énumération complète et non à titre d'exemple.

La réponse à la question si la protection concerne uniquement les biens immeubles ou si les dispositions de la Convention s'appliquent aussi aux biens meubles, semble également importante pour la pratique de l'application de la définition [39]. L'analyse du texte suggère que bien qu'il s'agît d'accorder la

[35] H. NIEĆ, *op. cit.*, pp. 125-126.
[34] Doc. SHC/MD/17 du 30 juin 1971, avec deux annexes, art. II et IV b.
[37] Draft Convention, Doc. SHC/72/CONF/37/20 of 20 April 1972.
[33] Doc. 17C/18, Annex, sec. A, § 13, 18 April 1972.
[39] E. ALEXANDROV, *op. cit.*, pp. 74-75; M. M. BOGUSLAVSKIJ, *Mezdunarodnaja ohrana*

protection aux biens immeubles, les biens meubles faisant partie intégrante des monuments, les groupes de constructions et les sites devraient de même jouir de la protection. Au cas où les biens meubles sont traités comme un élément d'un ensemble, leur destruction ou absence fait baisser la valeur scientifique et esthétique des biens protégés. Comme la Convention s'applique aussi bien aux oeuvres de l'homme qu'aux oeuvres conjuguées de l'homme et de la nature, la situation présentée survient dans les deux cas, il est donc opportun, par voie d'une analogie, d'étendre la protection sur tous les biens meubles faisant partie des biens immeubles sans distinction de leur provenance.

L'analyse de la notion de l'objet de la protection contenue dans la Convention de 1972 doit aussi tenir compte des formules comprises dans le préambule où l'on parle des biens constituant « le patrimoine de tous les peuples du monde » et présentant « un intérêt exceptionnel qui nécessite leur préservation en tant qu'élément du patrimoine mondial de l'humanité toute entière » [40]. A cette constatation est lié le postulat d'établissement « d'un système de la protection collective du patrimoine culturel à valeur exceptionnelle pour l'humanité toute entière ».

La question fondamentale qui apparaît ici consiste à la détermination des relations entre les droits et les obligations des Etats à l'égard des biens culturels se trouvant sur leurs territoires et les droits et les obligations de l'humanité en matière de préservation de son patrimoine culturel. A la source du problème repose l'idée qu'il y a des biens culturels dont le rang prévaut sur leur importance non seulement pour l'Etat sur le territoire duquel ils se trouvent ou pour le peuple qui les a créés, mais également pour toute l'humanité et leur destruction constituerait pour elle une perte inévaluable [41]. L'essentiel du problème consiste à la vérification si l'idée du patrimoine mondial de l'humanité n'est pas contraire au principe de la souveraineté de l'Etat exécuté sous la forme de la souveraineté territoriale.

La conséquence positive de cette souveraineté est « la soumission à l'autorité de l'Etat de tout ce qui se trouve sur son territoire et de tout ce qui y survient » [42]. Ainsi donc, tous les éléments faisant partie du patrimoine culturel sont soumis à l'autorité de l'Etat qui peut exclure l'action de toute

kulturnyh cennostej, Moskva 1979, p. 24; R. H. M. GOY, *The International Protection of the Cultural and Natural Heritage*, « Netherlands Yearbook of International Law » (Leiden) vol. IV, 1973, p. 130.

[40] S. E. NAHLIK, *Odpowiedzialność państwa w dziedzinie międzynarodowej dóbr kulturalnych [La responsabilité de l'Etat dans le domaine international des biens* culturels*]*, dans : *Odpowiedzialność państwa w prawie międzynarodowym [La responsabilité de l'Etat en droit international public]*, réd. R. Sonnenfeld, Warszawa 1980, p. 290.

[41] *Ibid.*, p. 289; S. E NAHLIK: *L'intérêt de l'humanité à préserver son patrimoine culturel,* « Annuaire de l'AAA », voL XXXVII-XXXVIII, 1967-1968, pp. 156 et suiv.

[42] R. BIERZANEK, J. SYMONIDES, *Prawo międzynarodowe publiczne [Droit international public]*, Warszawa 1985, p. 201.

autorité étrangère sur son territoire (l'élément essentiel de la souveraineté territoriale dans le sens négatif).

Les droits de l'humanité au patrimoine n'impliquent pas une limitation des droits souverains de l'Etat et peuvent être considérés dans les catégories de la préservation et de la protection de ce patrimoine. De l'autre côté, les droits de l'Etat ne sont pas toujours ceux d'un propriétaire mais l'accomplissement par l'Etat des fonctions d'un titulaire et gardien du patrimoine et l'imposition dans le droit interne de maintes obligations aux propriétaires des biens protégés provoquent une limitation de leurs droits appelée dans la théorie du droit civil « l'appauvrissement du droit de propriété » [41]. Cependant, il n'y a que l'Etat qui peut autoriser un organe ou une organisation internationale et aussi un autre Etat à entreprendre des activités en vue de garantir la protection du patrimoine culturel sur son territoire. Autrement de telles activités peuvent être considérées comme une ingérence dans ses affaires internes.

La Convention de 1972, en exposant l'existence des droits souverains de l'Etat aux biens culturels, indique par la même occasion que l'idée du patrimoine mondial se rapporte aux questions de la protection. Néanmoins, même en acceptant ce point de départ, on peut percevoir un conflit d'intérêts entre les pays riches et pauvres en culture. Les premiers s'efforcent de garder le patrimoine culturel sur leur territoire ; les seconds, disposant des ressources financières appropriées, tentent d'acquérir des biens et prétendent que la localisation de certains biens *in situ* les expose à l'anéantissement, tandis qu'eux, ils peuvent garantir à ces biens une protection adéquate et les mettre à la disposition d'un plus grand nombre des visiteurs, ce qui demeure dans l'intérêt de l'humanité [44]. Aux intérêts des pays importeurs, appelés aussi pays du marché, s'opposent les pays riches en biens culturels, les pays d'origine, en adoptant des dispositions législatives restrictives en matière de contrôle d'exportation. Nous avons donc affaire à deux façons de penser dans le domaine du patrimoine culturel : la première, qui perçoit dans le patrimoine des éléments d'une culture commune de l'humanité, sans distinguer le lieu d'origine des biens, leur localisation présente, le titre de propriété et la juridiction nationale ; et la seconde, traitant ces biens en tant que partie intégrante du patrimoine culturel national d'une valeur particulière pour le pays donné [45]. Dans la première attitude se manifeste une sorte d'inter-

[41] Art 18, 25, 27, 30 et 33 de la loi sur la protection des biens culturels et les musées, J. des L., 1962, n° 10, texte 48; M. KIEREK, *Ograniczenie prawa własności w świetle ustawy o ochronie dóbr kultury i muzeach [La limitation du droit de propriété dans le contexte de la loi sur la protection des biens culturels et les musées]*, « Annales UMCS » (Lublin), Sectio G, vol XII, 1965, pp. 61-85; A. KOPFF, *Własność dóbr kultury [La propriété des biens culturels]*, « Studia Cywilistyczne », voL XIII-XIV, 1969, p. 184.

[44] *The International Protection of Cultural Property*, « ASIL Proceedings », 1977, pp. 196-207.

[45] J. H. MERRYMAN, *Two Ways of Thinking about Cultural Property*, AJIL, vol. 80, 1986,

nationalisme culturel représenté par les Conventions de 1954 et 1972, dans la seconde, le nationalisme culturel reflété dans la Convention de 1970.

Dans une relation étroite avec ces attitudes demeure le problème suivant : est-ce que les droits aux biens culturels sont assujettis uniquement à l'Etat en tant qu'unité géopolitique souveraine ou bien ils peuvent être également attribués à l'humanité qui « sans aucun doute n'est pas jusque-là une individualité juridiquement définie » ?[46]. La notion de l'humanité reste encore une catégorie plutôt sociologique que juridique, bien qu'on puisse percevoir des tentatives à lui attribuer une signification plus précise, vu l'idée du « patrimoine commun de l'humanité ».

Dans le cadre des dispositions de la Convention de 1972, il semble important de considérer les relations entre l'idée du « patrimoine commun de l'humanité » et la notion du « patrimoine culturel mondial ».

3.2. L'idée du « patrimoine commun de l'humanité » et la notion du « patrimoine culturel mondial »

L'idée du « patrimoine commun de l'humanité » a trouvé jusque-là son expression dans deux branches du droit international : le droit de l'espace et le droit de la mer[47].

Dans le droit de l'espace, la notion du « patrimoine commun de l'humanité » a été employée dans le Traité réglant l'activité des Etats sur la Lune et autres corps célestes, ouvert à la signature le 19 décembre 1979[48]. Cette notion se rapporte à la Lune et ses ressources naturelles (art. XI al. 1) ainsi qu'aux autres corps célestes situés dans le système solaire à l'exception de la Terre (art. I al. 1). Les dispositions déterminant leur statut prévoient une prohibition d'appropriation par les Etats, les organisations internationales et nationales ainsi que par les personnes physiques aussi bien de la surface de la Lune et des corps célestes que de leur sous-sol et toutes ressources naturelles (art. XI al. 2 et 3). La recherche et la mise à profit doivent reposer sur les principes de l'égalité et être entreprises uniquement aux fins pacifiques en tenant compte des règles de la protection du milieu naturel et d'harmonie écologique (art. III, VI et VIII).

Un élément important du statut du « patrimoine commun de l'humanité » à l'égard de la Lune et des corps célestes est l'institution d'un régime international en matière de recherche et d'exploitation de leurs ressources

n° 4, pp. 831-853.

[46] S. E. NAHUK, *L'intérêt de Vhumanitê à protéger son patrimoine culturel*, dans : *Rapport du XX' Congrès de l'AAA*, La Haye 1968, p. 78.

[47] J. STAŃCZYK, *Pojęcie wspólnego dziedzictwa ludzkości w prawie międzynarodowym [La notion du patrimoine commun de l'htwtanité en droit international]*, « Państwo i Prawo », 1985, n° 9, pp. 55-65.

[48] A/RES/34/68, Annex, 5 December 1979.

naturelles (art. XI al. 5). Le Traité prévoit l'institution d'un tel régime dès que l'exploitation sera possible et formule ses objectifs : l'aménagement et l'exploitation effective des ressources, leur administration rationnelle, la recherche sur leur mise à profit et une distribution équitable des bénéfices réalisés en résultat de l'exploitation (art. XI al. 7). Dans la distribution des bénéfices doivent participer tous les Etats parties au Traité mais il faudra cependant tenir compte des intérêts et besoins particuliers des pays en voie de développement et de ces Etats qui ont contribué à l'exploitation de la Lune et des corps célestes.

Dans le droit de la mer, la notion du « patrimoine commun de l'humanité » a été utilisée à l'égard des fonds de mers et océans en dehors de la juridiction nationale. Cette notion a été employée dans la Déclaration des principes concernant les fonds des mers et océans et le sous-sol en-dessous de ces fonds se trouvant en dehors des limites de la juridiction nationale, adoptée le 17 décembre 1970 par l'Assemblée générale des Nations Unies[49] ainsi que dans la Convention de droit de la mer, signée le 10 décembre 1982[50].

Conformément à l'art 136 de la Convention, le Territoire et ses ressources constituent le patrimoine commun de l'humanité. Le Territoire est composé de cette partie des fonds de mers et océans, y compris son sous-sol, qui demeure en dehors des limites de la juridiction nationale (art. 1 al. 1). Parmi les principes déterminant le statut juridique du Territoire, une place particulière est occupée par le principe instituant la prohibition de revendication ou d'appropriation d'une partie quelconque du Territoire (art. 137) et attribuant le droit au Territoire à l'humanité au nom de laquelle agira l'Organisation des Fonds des Mers. L'Organisation doit aussi garantir la réalisation du principe d'agir dans le Territoire dans l'intérêt de toute l'humanité et d'assurer une protection effective du milieu maritime. Conformément aux dispositions de la Convention, l'activité de recherche et d'exploitation et la recherche scientifique menée en vertu du principe de pleine liberté peuvent être entreprises uniquement aux fins pacifiques. Le statut juridique du Territoire n'exerce aucune influence sur le statut des eaux maritimes et de l'espace aérien se trouvant au-dessus de ces eaux[51]. D'autre part, conformément à l'art. 149 de la Convention, les monuments archéologiques et historiques trouvés dans le Territoire doivent être conservés dans l'intérêt de l'humanité, avec considération particulière des droits de préférence des Etats d'origine culturelle, historique ou archéologique de ces monuments.

On considère également la possibilité de considération de l'idée du « patrimoine commun de l'humanité » dans d'autres branches du droit

[49] « Zbiór Dokumentów », 1970, n° 12, pp. 1972-1977.

[50] UN. Doc. A/CONF 262/122 et Corr. 1 à 11.

[51] J. SYMONIDES, *Nowe prawo morza* [Le *nouveau droit de la* mer], Warszawa 1986, pp. 380-381.

international. Il s'agit en particulier de transférer cette idée dans le système de la protection juridique du milieu naturel.

Les partisans d'un tel transfèrement indiquent que le problème de la protection du milieu naturel déborde les frontières des Etats particuliers, ainsi donc, vu l'existence d'une menace globale, la protection devrait être assurée également sur le plan international dans l'intérêt de toute l'humanité[52]. Ils n'opposent pas l'existence d'une souveraineté de l'Etat à l'egard de son milieu naturel *(environmental sovereignity)* et de sa responsabilité en matière de protection de ce milieu, mais indiquent qu'il n'y a pas de contradiction entre le principe de la souveraineté et l'idée du « patrimoine commun de l'humanité » qui sert à une coordination des activités des Etats dans le domaine de la prévention de la dévastation et de l'anéantissement du milieu naturel de l'homme[53].

Une certaine difficulté dans le traitement complexe des problèmes liés au milieu naturel constitue le fait de sa différenciation comprenant des éléments divisibles et indivisibles, des éléments restaurables et non restaurables. Ceci permet de formuler des postulats pour attribuer la qualité du « patrimoine commun de l'humanité » uniquement aux certains éléments constitutifs de ce milieu, tels que les espèces d'animaux en voie de disparition, les espaces verts de la Terre, les phénomènes naturels exceptionnels, et de traiter les gouvernements comme représentants de l'humanité dans le domaine de leur protection[54].

Les adversaires d'application de l'idée du « patrimoine commun de l'humanité » aux problèmes de l'environnement estiment qu'une telle tentative serait contraire au principe de la souveraineté proprement dite, souveraineté territoriale, non-intervention et compétence interne[55].

Les règlements internationaux en vigueur concernant la protection du milieu naturel ont souvent un caractère régional et touchent le problème d'une façon partielle et ne s'en réfèrent donc pas à l'idée du « patrimoine commun de l'humanité ».

Il semble dorénavant important d'indiquer la constatation comprise dans la Déclaration de Stockholm de 1972 sur le milieu naturel de l'homme[56] postulant

---

[52] P. de VISSCHER, *Cours général de droit international public*, RCADI, vol. 136, 1972/2, p. 153.

[21] K. KOCOT, *Prawnomiędzynarodowe zasady sozologii [Les principes de sozologie en droit international public]*, Wrocław 1977, p. 88.

[54] S. A. ROBINSON, *Problems of Definition and Scope*, dans : *Law Institution and the Globed Environment*, Leiden 1972, pp. 56-57.

[55] J. SYMONIDES, *Ochrona środowiska człowieka ze stanowiska prawa międzynarodowego [La protection du milieu naturel de l'homme du point de vue du droit international]*, dans : *Prawo a chrona środowiska [Le droit et la protection du milieu naturel]*, red. L. Łustacz, Warszawa, 1975, p. 189.

[54] *Wybór dokumentów do nauki prawa międzynarodowego [Recueil de documents de droit international public]*, réd. K. Kocot, K. Wolfke, Wrocław 1978, pp. 581-588.

l'élaboration « d'une conception commune et des principes communs inspirant et guidant les peuples du monde dans l'oeuvre de la préservation et de l'amélioration du milieu naturel de l'homme ». Cela constitue, conformément à la Déclaration, « un domaine international commun » (« *common international realm* ») donc les Etats doivent coopérer « dans l'intérêt commun ») et « dans l'intérêt de l'humanité ». La forme institutionnelle de cette coopération est le Programme de la Protection de l'Environnement des Nations Unies (UNEP), dont le mécanisme de fonctionnement et les compétences ont été établis dans la résolution de l'Assemblée générale de l'O.N.U. du 15 décembre 1972, n° 2997/XXVII/[57].

Les tentatives d'application du concept du « patrimoine commun de l'humanité » ont également lieu en matière de technologies, d'une partie de l'orbite géostationnaire (au-dessus de la haute mer) et de l'Antarctique[58].

Dans le cadre de soi-disant troisième génération des droits de l'homme appelés droits de solidarité, on cite le droit au patrimoine commun de l'humanité[59]. En plus, on remarque que d'autres droits de cette génération : droit à la paix, droit au développement et droit à l'environnement, demeurent en liaison étroite avec cette idée, car ils visent la protection des valeurs et processus auxquels les législations internes ne s'appliquent pas d'une façon suffisante[60].

L'analyse de l'emploi jusqu'à présent de l'idée du « patrimoine commun de l'humanité » et de son transfèrement dans d'autres branches du droit international nous amène à la conclusion qu'il y a ici certains éléments communs avec la notion du « patrimoine culturel mondial ». Un tel élément est, dans les deux cas, la directive d'agir « dans l'intérêt de l'humanité ». Selon le domaine d'application, il peut s'agir d'un partage équitable des bénéfices, de l'obligation d'une mise à profit aux fins pacifiques ou d'une prévention de la menace de destruction ou d'anéantissement. Un autre élément commun est la détermination de la nécessité d'engagement de toute la communauté internationale dans les activités visant la mise à profit, la protection et la responsabilité sur le plan international pour les actions entreprises. En plus, dans les deux cas, on peut apercevoir la tendance à l'institutionalisation de la protection : dans le cas de la Lune et des corps célestes, on a prévu un régime international spécial ; dans le domaine des fonds des mers et océans, le fondement d'une Organisation des Fonds des Mers ; en matière d'environnement il y a le Programme de la Protection de l'Environ-

[57] « Zbiór Dokumentów », 1972, n° 12, pp. 2059-2068.

[58] J. STAŃCZYK, *op. eit.*, pp. 63-64.

[59] K. DRZEWIECKI, *Idea wspólnego dziedzictwa ludzkości a prawa człowieka [L'idée du patrimoine commun de l'humanité et les droits de l'homme]*, « Przegląd Stosunków Międzynarodowych », 1982, n° 1-3, pp. 47-58.

[60] *Ibid.*, p. 55.

nement des Nations Unies ; et enfin à l'égard du patrimoine culturel, l'activité du Comité du Patrimoine mondial.

En considérant l'utilisation conventionnelle actuelle de la notion du « patrimoine **commun** de l'humanité » il faut cependant exposer le fait qu'elle s'applique aux territoires et ressources en dehors de la juridiction nationale et implique une prohibition formelle de leur appropriation, tandis que les biens du patrimoine culturel ainsi que la majorité des éléments du milieu naturel de l'homme sont subordonnés à la souveraineté territoriale des Etats. Ce fait contribua à l'introduction de la notion du « patrimoine naturel » et de l'octroi à ce patrimoine d'une protection internationale dans la Convention de 1972. La qualité du « patrimoine naturel » a été accordée aux certains éléments du milieu naturel tels que : monuments naturels, formations naturelles, formations géologiques et physiographiques ainsi que sites naturels « d'une valeur universelle exceptionnelle du point de vue scientifique ou esthétique ».

Il serait donc incorrect d'identifier la notion du « patrimoine culturel commun » avec la notion du « patrimoine culturel mondial » et de transférer cette notion dans le domaine du « milieu naturel de l'homme », car toutes ces catégories présentent des différences essentielles[61].

Bien qu'en vertu des documents de droit international semble soulever des doutes l'opinion « que l'idée du patrimoine commun de l'humanité correspond plutôt à l'esprit des encycliques papales qu'au climat rationnel des résolutions de l'Assemblée générale » [62], le processus de la fixation du statut du « patrimoine commun de l'humanité » n'est pas encore décidé[63]. De là, semble trop optimiste la conviction « que le patrimoine commun de l'humanité deviendra pour elle une libération et protégera le monde contre les activités d'un nationalisme extrémiste et les pressions qui dans le passé se transformaient en conflits » [64].

La notion du « patrimoine culturel mondial » utilisée dans la Convention ne définit pas en pratique les biens constitutifs de ce patrimoine. Dans les dispositions suivantes de la Convention, on prévoit un mécanisme spécial servant à l'identification des biens protégés et leur indication par les Etats sur les territoires desquels ils se trouvent et, par la suite, leur placement sur la « liste du patrimoine mondial » en vertu d'une décision du Comité de

[61] K. KOCOT, *op. dt.*, pp. 100-101.

[62] A. S. NARTOWSKI, *Prawa człowieka a ochrona środowbka* [Lei *droits de l'homme et la protection du milieu naturel*], dans : / *Konferencja naukowa w sprawie międzynarodowej ochrony środowbka, Kraków, 13-15 grudnia 1971 r.* [*T^e Conférence scientifique en matière de protection internationale du milieu naturel, Cracovie, les 13-15 décembre 1971*], Kraków 1972, p. 313.

[63] J. STAŃCZYK, *op. cit.*, pp. 65-65.

[64] S. A. WILIAMS, *The International and National Protection of Movable Cultural Property. Comparative Study,* New York 1978, p. 63.

Patrimoine mondial [65]. Cette liste est entretenue depuis 1978, basant sur des critères détaillés établis par le Comité et comprend actuellement 288 biens constituant le patrimoine culturel et naturel (état en décembre 1989).

3J. La Recommandation de l'UNESCO de 1972

En dehors de la Convention, un second document adopté par la Conférence générale de l'UNESCO le 16 novembre 1972 et employant la notion du « patrimoine culturel » fut la Recommandation concernant la protection nationale du patrimoine culturel et naturel [66].

La définition de l'objet de la protection comprise dans la Recommandation est presque identique à celle contenue dans la Convention. Dans le cadre du patrimoine culturel, on distingue également trois groupes de biens : les monuments, les groupes de constructions et les zones monumentales mais le critère de la « valeur universelle exceptionnelle » employé dans la Convention a été remplacé par la notion de la « valeur spéciale ». Le doute apparaît si l'on peut — vu le principe de la qualification sensiblement modifié — employer dans les deux cas le terme du « patrimoine ». Dorénavant, la Recommandation, conformément au titre et à la teneur des dispositions suivantes, vise en premier lieu la protection sur le plan national. On peut donc parler de deux niveaux du patrimoine culturel : « mondial » et « national » et dans le cadre de ce dernier s'en référer à un ensemble des biens beaucoup plus volumineux en raison de leur « valeur spéciale » du point de vue des Etats particuliers [67].

La confirmation d'une telle évaluation constitue la phrase contenue dans la Recommandation statuant que « le patrimoine culturel et naturel doivent être traités comme un ensemble uniforme englobant non seulement les oeuvres d'un grand intérêt mais également des éléments plus modestes qui avec le temps ont acquis une valeur culturelle et naturelle » [68]. Il en résulte expressément que la Recommandation vise la protection sur le plan national également des biens autres que les éléments constitutifs du patrimoine définis dans la Convention.

3A Les conventions régionales

L'introduction, en 1972, de la notion du « patrimoine culturel » dans la pratique internationale ne signifiait pas, comme on pouvait le supposer, que cette notion serait dès lors employée d'une manière conséquente dans les documents internationaux postérieurs en particulier dans ceux élaborés par

[65] Art. 8-11 de la Convention.
[66] *UNESCO, Records of the General Conference, Seventeenth Session,* vol. I, Paris 197Z.
[67] M. M. BOGUSLAVSKIJ, *Mezdunarodnaja ohrana...*, p. 23.
[68] Art. III ai 5 de la Recommandation.

l'UNESCO. On peut cependant remarquer un phénomène particulier consistant en ce que les Recommandations suivantes de l'UNESCO reviennent souvent à la notion des « biens culturels » tandis que la notion du « patrimoine » a été adoptée dans certaines conventions régionales. A titre d'exemple, on peut citer la Convention de l'Organisation des Pays Américains sur la protection archéologique, historique et artistique du patrimoine des peuples américains, signée le 16 juin 1976 à San Salvador[69] et la Convention du Conseil de l'Europe sur la protection architecturale du patrimoine européen, signée le 3 octobre 1985 à Grenade[70].

Dans la Convention de TO.P.A., la définition de l'objet de la protection est prévue à l'art. 2 concernant les biens culturels et dans l'art 5 employant la notion du patrimoine culturel, supérieure dans la hiérarchie à celle des biens. Conformément à l'art 5, le patrimoine de chaque Etat ce sont les biens qui ont été trouvés ou créés sur son territoire ainsi que les biens légalement acquis d'origine étrangère, à condition qu'ils appartiennent à l'un des cinq groupes définis à l'art 2. Un critère important s'appliquant aux trois groupes de biens est le temps. L'origine la plus ancienne datant de la période précédant les contacts de la culture américaine avec la culture européenne est attribuée aux monuments, fragments de constructions en ruine et matériaux archéologiques des anciennes cultures américaines ainsi que les traces de l'homme, de la faune et flore liés à ces cultures. Il s'agissait donc d'assurer une protection aux biens véritablement authentiques, créés en isolation d'influence étrangère. Les Etats particuliers adoptent dans ce cas des limites de temps différentes. Le second groupe comprend les monuments, les constructions et les objets à caractère artistique, utilitaire et ethnologique datant de la période coloniale (avec, bien sûr, des limites temporelles mobiles) ou du XIXe siècle. Dans le cadre du troisième groupe, on distingue les bibliothèques, archives, incunabules, manuscrits, livres, iconographies, cartes et documents créés avant 1850.

D'autres critères sont appliqués à l'égard de deux autres groupes. L'objet de la protection constituent les biens créés après 1850 à condition que les Etats parties de la Convention les ont enregistrés comme biens culturels et ont notifié ce fait aux autres parties de la Convention. Le dernier groupe comprend les biens culturels déclarés par l'une des parties de la Convention comme couverts par son champ d'application. En résultat, la compétence à identifier les objets protégés a été accordée aux Etats qui ne sont pas restreints dans cette activité par aucune des dispositions de la Convention.

La Convention n'emploie pas la terminologie uniforme de l'objet de la protection en employant alternativement les notions du « patrimoine culturel » et des « biens culturels » et dans l'art. 15 introduit une nouvelle notion des « valeurs culturelles » (« *cultural values* »).

[69] « International Legal Materials » [par abrév. ILM], voL XV, 1976, n° 6, pp. 1350-1355.
[70] ILM, vol. XXV, 1986, n° 2, pp. 380-386.

D'autre part, la notion du « patrimoine architectural » prévue à l'arL 1 de la Convention du Conseil de l'Europe s'en réfère expressément à la définition du « patrimoine culturel » adoptée dans la Convention et dans la Recommandation de 1972. Elle se rapporte aux mêmes trois groupes d'objets protégés, ainsi donc : monuments, groupes de constructions et sites, et l'énumération est précédée d'une information préliminaire qu'il s'agit des biens immeubles. En comparaison des documents de l'UNESCO, le contenu des groupes particuliers est différent. Les monuments couvrent les constructions et les bâtiments à valeur historique, archéologique, artistique, scientifique, sociale ou technique imminente avec leur contenu et équipement. Les groupes de constructions comprennent les ensembles uniformes de constructions urbaines ou rurales à cette valeur imminente, suffisamment complexes pour constituer des unités topographiques. La notion des sites a été réservée aux oeuvres conjuguées de l'homme et de la nature, aux régions en partie bâties, caractéristiques et uniformes du point de vue topographique et ayant une valeur imminente. Dans les dispositions de la Convention, on n'a prévu aucune restriction quant au temps de la création des biens protégés, mais, pour faciliter leur identification, on a recommandé aux Etats parties d'entretenir des registres appropriés.

4. Les nouvelles définitions de l'objet de la protection et le retour à la notion du « bien culturel »

4.1. La notion du « centre monumental »

Dans les documents de l'UNESCO élaborés après l'adoption de la Convention et de la Recommandation de 1972, le « patrimoine culturel » n'apparaît pas comme objet principal de la protection mais dans certaines Recommandations on s'en réfère expressément à cette notion. D s'agit ici en particulier de deux Recommandations adoptées à la XIXe Session de la Conférence générale de l'UNESCO en 1976.

Dans la Recommandation concernant la protection des centres monumentaux et leur rôle dans la vie contemporain [71], on a adopté une définition élargie du « centre monumental ». Selon elle, la notion s'applique à chaque groupe de constructions, bâtiments et espaces, y compris les sites archéologiques et paléontologiques constituant une colonie humaine dans le milieu urbain ou rural dont la complexité et la valeur sont reconnues du point de vue archéologique, architectural, préhistorique ou socio-culturel. Dans une énumération exemplifiée en vue de faciliter l'identification de ces centres, on a cité : les sites préhistoriques, les villes historiques, les anciens quartiers de

[71] *UNESCO, Records of the General Conference, Nineteenth Session,* vol. I, Nairobi 1976.

villes, les villages et petits villages ainsi que les centres monumentaux uniformes conservés dans leur ancienne forme. La protection a été étendue sur l'environnement de ces centres, ce qui prouve l'existence d'une conviction que la sauvegarde des biens isolés sans leur environnement naturel et modelé par l'homme non seulement fait baisser leur valeur mais ne permet pas également d'estimer d'une façon adéquate leur beauté, harmonie et unité avec le paysage [72].

Le rapport entre la définition du « centre monumental » et la notion du « patrimoine culturel » se manifeste dans le fait que la notion du groupe de constructions apparaissait déjà dans la Convention de 1972 et que, dans les deux documents, des biens protégés sont les biens immeubles. Dans la Recommandation, on a en plus mentionné que les centres et leur environnement devraient être traités comme éléments constituant « un patrimoine universel et irremplaçable » et que leur préservation contribuerait à l'enrichissement du « patrimoine culturel du monde » [73].

41. La notion des « biens culturels » dans les Recommandations de l'UNESCO de 1976 et 1978

Dans la Recommandation concernant l'échange international des biens culturels [74], évoquant les dispositions de la Convention de Paris de 1970, on est revenu à la notion des « biens culturels ». Cette notion se rapporte âux « biens constituant une expression et une preuve de créativité de l'homme et d'évolution naturelle qui, conformément à l'opinion des autorités compétentes des Etats particuliers, ont ou peuvent avoir une valeur et une importance historique, artistique, scientifique ou technique [73]. Pour mieux présenter ces biens, on s'est servi d'une énumération comprenant : les spécimens zoologiques, botaniques et géologiques, les objets archéologiques, les objets et documents à caractère ethnologique, les oeuvres des beaux-arts et celles d'art utilitaire, les oeuvres littéraires, photographiques et cinématographiques, les archives et les documents. Bien que cette énumération soit plus modeste que celle de la Convention de 1970, on a exposé, comme dans le cas de cette dernière, le rôle des autorités des Etats dans l'identification pratique des objets définis dans la Recommandation.

Par la même occasion, on a exprimé la conviction d'une importance considérable pour notre étude que « tous les biens culturels forment le

[72] M. SIEROSZEWSKI, *Ochrona dóbr kultury w ustawodawstwie UNESCO [La protection des biens cultureb dans les actes de VUNESCO]*, Warszawa 1978, p. 44. Biblioteka Muzealnictwa i Ochrony Zabytków, série B, voL LIV ; M. M. BOGUSLAVSKIJ, *Mezdunarodnaja ohrana...*, pp. 22-23.

[73] Pts 2 et 6 de la Recommandation.

[74] *UNESCO, Records of the Genera! Conference, Nineteenth Session*, vol. I, Nairobi 1976.

[75] Pt 1 de la Recommandation.

patrimoine culturel commun de l'humanité et que chaque Etat est responsable dans ce domaine non seulement dans le cadre de son territoire et de sa compétence mais également devant la communauté internationale » [16]. C'est pour la première fois que dans les documents de l'UNESCO apparaît la constatation si expresse et univoque concernant les relations entre la notion des « biens culturels » et celle du « patrimoine culturel », situant la première au plan national et la seconde, au plan international.

La notion des « biens culturels » apparaît également dans la Recommandation de l'UNESCO de 1978 sur la protection des biens culturels meubles [11]. Conformément à la pratique de la formulation d'une définition séparée de l'objet de la protection aux fins de chaque document de l'UNESCO, la notion des « biens culturels meubles » s'applique à tous les biens meubles constituant une expression et une preuve de créativité de l'homme ou d'évolution naturelle et ayant une valeur et importance archéologique, historique, artistique, scientifique ou technique. Ces biens doivent également appartenir à l'un d'onze groupes cités dans la Recommandation et définis d'une manière semblable à la Convention de 1970. D'autre part, dans le préambule, on s'en est référé à la Convention de 1972 en constatant que « les biens culturels meubles représentant des cultures différentes constituent une partie du patrimoine culturel commun de l'humanité et que chaque Etat est moralement responsable devant la communauté internationale dans son ensemble pour leur préservation ».

4.3. L'emploi de la notion des « biens culturels » dans les conventions régionales

La notion des « biens culturels » a acquis une approbation également dans les documents adoptés en dehors de l'UNESCO, ce qui semble être prouvé par les dispositions de deux conventions multilatérales signées dans les années quatre-vingt.

Dans la Convention européenne concernant les infractions contre les biens culturels, signée par les Etats du Conseil de l'Europe le 23 juin 1985 à Delft [78], la notion des « biens culturels » a été employée à l'égard des biens cités dans l'Annexe II à la Convention. Celui-ci prévoit deux catégories de biens protégés: à la première est accordée la protection conventionnelle (neuf groupes de biens, tels que : monuments archéologiques, ouevres de peinture et sculpture, outils, meubles, instruments de musique, manuscrits, documents) ; à la seconde, cette protection est accordée en ce qui concerne les biens expressément indiqués par les Etats (dix-neuf groupes de biens, à savoir entre autres : oeuvres d'art

[76] **Pt 2 de la Recommandation.**

[77] *UNESCO. Records of the General Conference. Twentieth Session,* **vol I, Paris 1978.**

[71] **ILM, vol. XXV, 1986, n° 1, pp. 44-55.**

utilitaire, livres, archives, spécimens de faune, flore et minerais, biens paléontologiques et ethnologiques, monuments architecturaux et sites archéologiques. En plus, les Etats parties, par voie de notification, peuvent étendre l'application des dispositions de la Convention sur d'autres catégories de biens culturels meubles et immeubles ayant une valeur artistique, historique, archéologique ou scientifique.

Une seconde convention faisant usage de la notion des « biens culturels » est l'Accord sur la coopération et assistance mutuelle en matière d'appréhension et restitution des biens culturels illégalement transportés à travers les frontières des Etats, signé le 22 avril 1986 à Plovdiv par la Bulgarie, la Hongrie, la République démocratique allemande, la Corée populaire, le Cuba, la Mongolie, la Pologne et l'U.R.S.S.[79] L'art. 1 de l'Accord statue que par « biens culturels » on comprend les biens traités comme tels par les lois et autres actes législatifs de l'Etat de leur exportation. Ainsi donc, on a adopté ici une construction juridique différente de celles appliquées jusque-là, consistant à un renvoi à la législation interne des Etats parties de l'Accord sans indication des éléments caractéristiques des objets protégés.

4.4. La notion des « valeurs culturelles »

Il semble utile de mentionner également qu'en dehors des notions du « bien culturel » et « patrimoine culturel », dans certains documents de l'O.N.U., on a employé une nouvelle notion lors de la définition de l'objet de la protection, à savoir celle des « valeurs culturelles ». Cette notion est apparue dans quelques résolutions de l'Assemblée générale concernant la préservation et le développement consécutif des valeurs culturelles : 3026 A/XXVII/ du 18 décembre 197280, 3148/XXVIII/ du 14 décembre 197381 et 3130/XXXI/ du 30 novembre 197682, on n'y a cependant pas donné une définition de cette notion.

Il semble que c'est une notion à un champ d'application très large couvrant toutes les oeuvres apparues en résultat d'une activité créative de l'homme, ancienne et actuelle, les oeuvres à caractère artistique, scientifique, culturel et éducatif d'une importance pour la présentation de la culture du passé ainsi que pour son développement dans les temps contemporains et futurs[83]. Un élément essentiel de la notion des « valeurs culturelles » c'est la reconnaissance du fait qu'elle se rapporte non seulement aux biens matériels mais aussi à certaines oeuvres dont l'importance ne se manifeste pas dans leur forme mais dans leurs qualités plutôt intérieures et spécifiques ne pouvant être appréciées par le sens

[79] J. des L., 1988, n° 38, texte 296, annexe.
[80] GAOR, 27th Session, 1973, vol. I.
[81] GAOR, 28th Session, 1974, vol. I.
[82] « Zbiór Dokumentów », 1976, n° 112, pp. 1361-1362.
[83] E. ALEXANDROV, *op. cit.*, pp. 7-11

de la vue. Cette notion s'applique entre autres aux oeuvres littéraires, oeuvres de musique, progrès scientifiques, découvertes et inventions ainsi qu'aux attitudes et modèles fixés dans la conduite et la conscience sociale, les idéaux moraux et éléments de la culture juridique et politique. Ce ne sont que des exemples illustrant les différentes variétés de la signification de la notion des « valeurs culturelles » qui font cependant preuve de son caractère complexe et autre champ d'application par rapport aux notions antérieurement employées.

Conclusions

L'analyse présentée de l'objet de la protection dans les documents internationaux ne considère pas toutes les possibilités et les solutions adoptées en la matière. Il s'agissait plutôt de présenter les définitions les plus intéressantes et surtout celles qui jouent un rôle essentiel dans le développement du droit international et influencent la pratique internationale.

Le groupe de notions le plus souvent rencontrées se bornait en principe à un trio : « monument », « bien culturel » et « patrimoine culturel ». En matière de solutions conventionnelles, la pratique d'application de deux derniers éléments a révélé leur utilité sur le plan international.

Les limites de notre étude ne permettent pas de confronter ces solutions à la pratique législative des Etats particuliers, ce qui pourrait sans doute apporter un matériel comparatif intéressant[84]. Néanmoins il faut constater que cette pratique a joué le rôle d'un baromètre très sensible à tout changement dans ce domaine et adoptait des solutions internationales tout ce qu'il y était de plus précieux et utile.

La présentation de l'évolution de la notion de l'objet de la protection dans les documents internationaux constitue l'exemple d'une voie de recherche empruntée par la communauté internationale visant l'élaboration d'une définition la plus adéquate et utile. La tendance à aboutir à un tel résultat était visible dans le cadre de toutes les notions ci-présentées et ce manque de conséquence dont le signe fut la nécessité d'adopter chaque fois une définition distincte, constitue la preuve d'adaptation de la notion à l'objectif essentiel et au champ d'application de la protection. L'évolution a abouti à un développement consécutif de la portée de la notion elle-même. Avec une conscience internationale croissante des menaces pour les biens ci-considérés et les conséquences de leur destruction pour la culture nationale et mondiale, nous avons affaire à un développement du champ d'application des documents, partant d'une notion plutôt restrictive du « monument », passant par une

[84] H. NIEĆ, *Legislative Models of Protection of Cultural Property*, « Hastings Law Journal », vol 27, 1976, n° 5, pp. 1089-1122.

notion plus large du « bien culturel », jusqu'à un terme collectif du « patrimoine culturel » (ou même une notion à champ d'application non limité d'une façon expresse — « valeurs culturelles »).

La caractéristique des relations entre les notions mentionnées justifie la thèse que la notion du « patrimoine culturel » est la résultante des notions antérieurement employées, car les critères de l'identiflcation des biens protégés forment un groupe fermé : valeur artistique, intérêt culturel ou historique, parfois enregistrement dans le registre en tant que prémisse juridique de la protection accordée ou identification expresse par l'Etat intéressé ainsi qu'une désignation énumérative en cas de renonciation au critère temporel [85]. On peut donc admettre que le « patrimoine culturel mondial » constitue un ensemble des biens culturels les plus précieux dont la destruction serait une perte pour le patrimoine de toute l'humanité ; de cette façon il constitue la somme des patrimoines nationaux « des Etats possesseurs » des biens.

[*5] H. NIEĆ, *Uwagi do projektu konwencji międzynarodowej dotyczącej nielegalnego wywozu dóbr kulturalnych [Remarques sur le projet de convention internationale concernant l'exportation illégale des biens culturels]*, « Muzealnictwo », 1970, n° 19, pp. 18-20.

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVIII, 1989-1990
PL ISSN 0554-498X

Privilege of Inviolability of Consular Archives and Premises

by STEFAN SAWICKI

1. Introductory Notes

The privilege of inviolability of archives and premises of a consular post is, in a sense, an indispensable supplement to the jurisdictional immunity and consul's personal immunity in regard to his official activities since this ensures proper law protection of official documents in a consular post. The need for this privilege in consular relations is equally necessary like in diplomatic relations, since consular files include very often materials concerning very important interests of a sending State. Therefore, as they are usually of confidential or even secret character, they recquire equally efficient protection as the official documents of a diplomatic mission.[1] Recently however, this privilege has been frequently violated by terrorist groups which aimed at freeing terrorists kept in custody or at obtaining a ransom.[2]

2. The Range of Inviolability of Archives and Premises of a Consular Post

The privilege of the inviolability of consular archives and premises has been regulated for many years by numerous international treaties — bilateral and multilateral ones — and by acts of internal law of many States. However, the scope of this privilege, *i.e.* what exactly premises of the consular post fall under it, is differently formulated in particular legal acts. From this point of view we can differentiate a few basic solutions.

---

[1] *Cf* W. BECKETT, "Consular Immunities" *British Yearbook of International Law*, 1944, No. 25, p. 37; K. LIBERA, *Zasady międzynarodowego prawa konsularnego* [*Principles of International Consular* Law], Warszawa 1960, pp. 320—321 and J. SUTOR, "Zagadnienie nietykalności pomieszczeń konsularnych" [Problem of Inviolability of Consular Premises], *Nowe Prawo*, 1975, No. 12, p. 1603.

[2] Concerning this situation the General Assembly of the UN, during the XXVIII Session in 1973, passed the Convention on Prevention and Punishing Offences against Persons under International Protection. In Art 2 it says: It is an offence to violate official premises, private appartments or transport means of a person under international protection. No doubt this regulation can be applied to consular archives and premises or lodgings belonging to consular officials. Polish text of this convention in: Dz.U. (*Dziennik Ustaw – Journal of Laws*, further as Dz.U.) 1983, No. 37, item. 230 (appendix).

Taking the first solution, the privilege of inviolability covers only consular archives.[3] This kind of solution was commonly accepted many years ago. In the light of the second solution the privilege of inviolability covers also, except of consular archives, consular premises.[4] The third solution anticipates that the inviolability privilege covers also private lodgings of a head of a consular post (general consul, consul, vice-consul and consular agent).[5] The Polish-Italian convention of 1973 states that the privilege can be applied to the residence of a head of a consular post under condition that the residence is situated in the same building or within the area of the consular premises.

The fourth solution assumes that the privilege of inviolability covers consular archives and premises, private residence of a head of a consular post and private lodgings of consular officers, *i.e.* persons employed to fulfil consular functions.[6] According to the fifth solution the privilege of inviolability can be applied not only to the archives, consular premises, a residence of a head of

[3] Such a solution was accepted by consular conventions agreed upon by Italy and Netherlands in 1875 (Art VI, *Supplement* to the *Volume on Laws Regarding Diplomatic and Consular Privileges and Immunities,* New York 1963, p. 15, further cited as *Supplement],* by Italy and Guatemala in 1905 (Art. V, *Supplement,* p. 14), by Italy and Czechoslovakia in 1924 (Art 9, *Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities, United Nations Legislative Series,* New York 1958, p. 440, further cited as *Legislative*), by Denmark and Paraguay in 1903 (Art. XIV, *Legislative,* p. 431), by Germany and Turkey in 1929 (Art 6, League of Nations Treaty Series, vol. 133, p. 285, further cited as LNTS), by Philippines and Spain in 1948 (Art IX, *Legisbtive,* p. 465), by the USA and Ireland in 1950 (Art. 10, United Nations Treaty Series, vol. 222, p. 108, further cited as UNTS) and by Poland and France in 1925 (Art 6, Dz.U. RP, 1928, No. 56, item 528). It can also be found in the internal law of Philippines *(Legislative,* p. 237), the USA *(Legislative,* p. 376), Netherlands *(Legislative,* p. 15) and Ireland *(Legislative,* p.173).

[4] We come across such a solution in conventions signed by the USA with Germany in 1923 (Art. XX, *Legislative,* p. 434), with Costa Rica 1943 (Art VI, *Legislative,* p. 457), and with France in 1966 (Art 12 and 14, UNTS, vol. 700, p. 258), by China with the USSR in 1959 (Art 13, vol. 356, p. 98), with Czechoslovakia in 1960 (Art. 7, UNTS, vol. 402, p. 222), by Belgium and Turkey in 1972 (Art. 15 and 16, UNTS, vol. 1029, p. 208) and also by Poland with Iraq in 1980 (Art 27 and 29, Dz.U., 1982, No. 27, item 194) with Yugoslavia in 1982 (Art. 17 and 18, Dz.U., 1984, No. 11, item 48). They were also adopted by the Vienna Convention on consular relations in 1963 (Art. 31 and 33, Dz.U., 1982, No. 13, item 98) and by internal legislation of Pakistan *(Legislative,* p. 227) and of Belgium *(Legislative,* p. 24).

[5] Such a solution can be noticed in conventions signed by Great Britain with France in 1951 (Art. 11 and 13, UNTS, vol. 330, p. 146) with the USA in 1951 (Art. 8 and 10, UNTS, vol. 165, p. 122), with Mexico in 1954 (Art. 10 and 12, UNTS, vol. 331, p. 22[illegible]) by the USSR with the USA in 1964 (Art. 17, UNTS, vol. 655,, p. 215), with France in 1966 (Art. 21 and 22, UNTS, vol 699, p. 272), with Great Britain in 1965 (Art. 14 and 15, UNTS, vol. 655, p. 261) and with Sweden in 1967 (Art. 13 and 14, UNTS, vol. 635, p. 352), by Romania with Yugoslavia in 1962 (Art. 8, UNTS, voL 848, p. 106), with Cuba in 1971 (Art 19 and 21, UNTS, vol. 881, p. 127) and with Finland in 1971 (Art 28, UNTS, vol. 887, p. 38). They were also adopted by the conventions between France and Tunisia in 1972 (Art. 9 and 11, UNTS, vol. 939, p. 162), Greece and Bulgaria in 1973 (Art 11 and 12, UNTS, vol 965, p. 258) and in these signed by Poland with Finland in 1971 (Art 9, Dz.U. 1973, No. 2, item 11), with Italy in 1973 (Art. 32 and 35, Dz.U. 1977, No. 9, item 15) with France in 1976 (Art 14 and 17, Dz.U., 1977, No. 19, item 76), with Algeria in 1983 (Art 14 and 17, Dz.U., 1985, No. 16, item 67) and with Mexico in 1985 (Art 13 and 14, Dz.U., 1986, No. 37, item 183). It is also present in the Havana Convention on Consular Agencies from 1928 (Art 18, *Legislative,* p. 424) and in the Soviet Law on the Privileges of Foreign Diplomatic Missions and Consular Posts on the Territory of the USSR from 1966 (Art 21 and 23, *Vedomosti Verhovnogo Soveta SSSR* 1966, No. 22 [1316], item 387

[6] This solution was adapted by the following conventions: the USSR—Japan from 1966 (Art. 15 and 16, UNTS, vol 608, p. 158) and Finland—Hungary from 1971 (Art 10, UNTS, vol. 859/860, p. 26) and the conventions signed by Poland with, among others, Great Britain in 1967 (Art. 16 and 20, Dz.U., 1971, No. 20, item 192), with Czechoslovakia in 1972 (Art 12 and 15, Dz.U., 1973, No. 19, item 108), with Cuba in 1972 (Art. 13 and 15, Dz.U., 1974, No. 21, item 111), with Belgium in

a consular post or private lodgings of consular officers but also to the lodgings of administration and technical staff of the consular post[7]

Finally, on the basis of the sixth solution, the privilege of inviolability can be applied not only to the archives and premises mentioned by the fifth solution but also to private lodgings of the consular post service staff *i.e.*, to people employed in the consular post domestic service.[8] Acceptance of this solution causes that not only consular archives and premises but also private lodgings of all the members of a consular post are covered by the privilege of inviolability.

It is characteristic that this kind of solution was accepted in consular conventions signed by socialist States.

3. The Notion of Archives and Premises of a Consular Post

The definition of the notion of consular archives and premises does not vary in its essence. Numerous consular conventions which attempt to specify the term state that it covers all the writings, documents, correspondence, books, films, photographs, tapes, registers, seals, stamps, office technical means together with safes, cipher materials, chests, files and furniture in which they are kept and secured. Computer and video equipment should be added to the above mentioned objects due to the technical progress.

The premises with consular archives are inviolable and they constitute the most guarded part of a consular post That is why the States claim univocally the inviolability of the consular archives. Thus it can be assumed that there is a commonly accepted custom of international law recognizing the privilege of inviolability of the consular archives, functioning as an obligation independent of its specification in a consular convention signed by two or more States.

The problem how to define the term of consular premises is not controversial, either. The Vienna Convention on Consular Relations of 1963 and other consular conventions bilaterally and consistently state that this term designates buildings or their parts and attached grounds irrespectively to whom they belong but used exclusively for consular post purposes. It should be added that it can be also only one building with grounds surrounding it

1972 (Art 11 and 14, Dz.U., 1974, No. 3, item 18), with the USA in 1972 (Art 11, Dz.U., 1973, No. 30, item 173), with Austria in 1974 (Art 14, Dz.U., 1975, No. 24, item 131) with Cyprus in 1980 (Art. 13 and 14, Dz.U., 1984, No. 48, item 249) with Libya in 1982 (Art 14 and 17, Dz.U., 1985, No. 60, item 307) and with China in 1984 (Art 34 and 35, Dz.U., 1985, item 24)

[7] This kind of solution was accepted in the Soviet—Romanian convention from 1972 (Art 22 and 23, UNTS, vol. 881, p. 183).

[8] This kind of solution can be seen in conventions of the USSR with Hungary from 1971 (Art 12 and 13, UNTS, vol. 897, p. 120), with Somalia in 1971 (Art 12 and 13, UNTS, vol. 897, p. 22) with Czechoslovakia in 1972 (Art 11 and 12, UNTS, voL 897, p. 276) and with Cuba in 1972 (Art 11 and 12, UNTS, vol. 897, p. 327) and also in the conventions signed by Hungary with Czechoslovakia in 1973 (Art 13 and 14, UNTS, vol 986, p. 204). It can be also seen in the conventions signed by Poland with the USSR in 1971 (Art 11 and 12, Dz.U., 1972, No. 15, item 106), with Bulgaria in 1972 (Art 12 and 16, Dz.U., 1973, No. 24, item 138) with Hungary in 1973 (Art 12 and 13, Dz.U., 1974, No. 5, item 28) and with Mongolia in 1973 (Art 12 and 16, Dz.U., 1974, No. 3, item 22)

including a garden and that they are of the same legal status as the building of a consular post.

The notion of the consular premises covers also all the equipment, movable property and the consular post actives inccluding radio and TV equipment, cars, motors boats and the like.

The problem how to define consular premises evoked some discussion during the international conference in 1963 devoted to the codification of consular law. It aimed, first of all, at widening of the notion of consular premises to cover the residence of a head of a consular post (general consul's, consul's, vice-consul's and consular agent's residence) and at granting it the privilege of inviolability no matter where it is situated. However, the proposition of Japan, the FRG, and Nigeria, supported by socialist States, including private residence of a head of a consular post into the definition of consular premises was not accepted. Spanish compromise proposition was also rejected. It provided that the residence of a head of a consular post would enjoy the privilege of inviolability if it is situated in the building of a consular post. Therefore the Vienna Convention of 1963 provides, let us remind once again, that the privilege of inviolability covers only the premises of a consular post.

4. The Content of the Privilege of Inviolability of Archives and Consular Post Premises

As far as the content is concerned *i.e.*, the essence of the privilege of inviolability of consular archives and consular premises, it can be noticed that it varies.

In relation to consular archives it functions fully. It means that the archives are inviolable irrespectively of time and place they are situated. Moreover it means that the officers of a receiving state are not only forbidden to enter the premises the consular archives are kept in but also they may under no pretext inspect or retain them. Thus numerous consular conventions make it obligatory for the agreeing states to separate official documents and correspondence from private correspondence of consular post members.[9]

In practice it means placing of official documents and correspondence in a separate room which should be well secured and clearly marked. Numerous consular conventions state, for example, the following:

"Consular archives are inviolable and authorities of a receiving state may under no pretext inspect or secure papers belonging to archives. Archives must be kept separate from personal documents of consular post members."[10]

[9] *Cf* L. LEE, *Consular Law and Practice*, London 1961, p. 239.

[10] *Cf. e.g.* conventions Germany—Turkey from 1929 (Art. 6), the USA—Ireland from 1950 (Art 10), Romania—Yugoslavia from 1962 (Art 8) and Poland—Belgium from 1972 (Art 11).

However, the requirement to separate consular archives from diplomatic ones is not obligatory when a consular post is in the premises of a diplomatic mission.[11]

The content of the inviolability of consular archives means first of all, the inviolability of all the official files irrespective of the form and technology they have been made with. It is not necessary to keep them in a specially isolated and marked room unless it has been clearly stated in a consular convention. They can be also kept in separate cases but they should be adequately marked and separated from personal documents of consular post members which do not fall under the privilege of inviolability.[12]

The obligation of precise marking of consular archives occurs especially when consular conventions limit the inviolability of consular premises in extraordinary circumstances allowing at the same time the possibility of entering consular premises in exceptional situations such as fire, flood or a pursuit of an offender. In case of encroachment of the receiving state officers into the consular premises in such extraordinary situations they may under no pretext enter consular archives and inspect official documents kept there. Therefore, as it was mentioned before, numerous consular conventions declare that the documents should be kept separately from personal documents of consular post members. In practice, special marking of rooms or furniture consular archives are stored in, is applied.

Consular archives go under the privilege of inviolability irrespective of the consular post premises. This privilege says that the head of a consular post is entitled to refuse to give out the documents or make statements or inform on the content of the documents kept in consular archives even if it is a demand of a receiving State supported by a warrant[13] However, according to W. Beckett, such a demand should be met to do justice and, if it is possible, not to do any harm to the interests of a sending State.[14]

It should be stressed that the privilege of inviolability of consular archives is not unlimited in time and it covers the period of the consul's exequatur since it is commonly believed that it is given to a sending State not to its consular post.

As far as the content of the privilege of inviolability of consular premises is concerned, it is differently formed in consular law. We can differentiate two basic solutions.

The first one assumes that officers of a receiving State organs must not enter this part of a consular post which is used exclusively for its work unless

[11] *Cf. e.g.* Conventions signed by Great Britain and Denmark in 1962 (Art. 11, UNTS, voL 562, p. 76) and by the USA and Japan in 1963 (Art. 8, UNTS, voL 518, p. 252).

[12] *Cf.* SUTOR, *op. tit.*, p. 1608.

[11] This point of view was presented in 1964 by the US Department of State in a note to the Canadian Embassy in Washington. *Digest of International Law*, M. Whiteman (ed.), vol. VII, Washington 1970, pp. 782—783.

[14] BECKETT, *op. tit.*, p. 34.

a head of a consular post or other person entitled by him or a head of a diplomatic mission of a sending State agree to do it. However, the consular post head's consent may be presumed in case of fire or other accident requiring immediate security action.[15] Some consular conventions add that those organs may under no pretext violate the principle of inviolability of consular archives and especially to inspect or detain them. However, the consular conventions signed by Great Britain accept that the consent to enter consular premises may be presumed not only in case of fire or other accident but also when the organs of the receiving State have serious reasons to assume that a crime of violence has been committed in consular premises.[16]

It should be assumed that when consular conventions allow the officials of a receiving State to enter inviolable consular premises without the consent of a head of a consular post or other persons entitled to issue such a consent — there should be real reason for entering and not only general assumption. It may be, for example, necessity of extinguishing a fire or detaining a terrorist group or when it is evident that an offender wanted by the authorities is hiding in the premises or if a crime is or has been committed there.

It seems obvious that entering consular post premises by the officials of the receiving State organs without the consent of a head of a consular post involves serious danger of abuse on the part of these organs and the possibility of using by them various, often false, pretexts to justify the entering.[17] Therefore, during the Vienna Conference on codification of consular Law the clause allowing the entrance into the consular premises in particular circumstances was objected by socialist States together with France, India, Mexico, Norway, Ghana and others which were of the opinion to grant full inviolability for consular premises. However, the point of view of the majority of states, including among others the USA, Great Britain, Canada, Sweden, Greece and Indonesia, won. These states were the followers of the acception of the clause assuming the consular post head's consent in case of "a fire or other accident requiring immediate security action."

[13] This kind of solution was accepted by conventions signed by France with the USA in 1966 (Art 12) and with Tunisia in 1972 (Art. 9) and also in the Belgium — Turkey Convention from 1972 (Art. 16) and the Vienna Convention from 1963 (Art. 31). It can be also noticed in the conventions signed by Poland with Finland in 1971 (Art 9), with the USA in 1972 (Art 11), with Italy in 1973 (Art 32), with Iraq in 1980 (Art 27), with Yugoslavia in 1982 (Art 17) and with Algeria in 1983 (Art 14).

[16] This kind of solution was agreed upon in the conventions signed by Great Britain with France in 1951 (Art 11), with the USA in 1951 (Art 8) and with Mexico in 1954 (Art 10).

[17] *Cf.* J. OSIECKI, "Służba dyplomatyczna a konsularna w świetle kodyfikacji prawa konsularnego" [Diplomatic and Consular Service in the Light of Codification of Consular Law], *Państwo i Prawo*, 1964, No. 5—6, p. 798; M. GĄSIOROWSKI, *Dyplomaci i konsulowie [Diplomats and Consuls]*, Warszawa 1966, p. 155 and I. SUTOR, "Niektóre problemy współczesnego prawa konsularnego" [Selected Problems of Contemporary Consular Law], *Przegląd Stosunków Międzynarodowych*, 1978, No. 4 (76), p. 85.

It is worthy to stress that the project of convention on consular relations worked out by the UN Commission of International Law from 1961 did not provide the possibility of entering consular premises in, so called, extraordinary situations. The commision underlined in the commentary to that regulation that the inviolability of consular premises is of the same significance for functioning of a consular post as the inviolability of diplomatic mission's premises for performing diplomatic functions.[18]

It should be noticed that the presumption of the consent for entering into consular premises in case of a fire or other accident concerns also private residence of a head of a consular post and even the apartments of consular officers if they fall under the privilege of inviolability.

The consular premises are inviolable on the basis of the second solutioa The organs of a receiving state cannot enter them without the head's of a consular post consent.[19] Some conventions add also a head of a diplomatic mission of a sending State[20] and some other persons entitled by them.[21] Acceptance of this solution means that the legal status of consular premises is identical to the status of diplomatic mission premises. They have become fully inviolable and there is no exception to the rule.

Thus a question arises what possible action can be undertaken by organs of a receiving state in the case when entering the consular premises is permissible only after the consent of a consular post head or other person entitled by him. So in case a head of a consular post has not issued the consent, they may demand the permission for entering the premises through diplomatic channels. If this way fails, the authorities of a receiving state have at their disposal other means like, for example, the threat of the revocation of exequatur of the head of a consular post or direct intervention at the authorities of a sending State or even surrounding the consular premises by police forces. However, they may in no case enter consular premises without the permission of the consular post's head. Such an encroachment would equal the violation of presently functioning international law.[22]

" *Yearbook of the International Law Comission,* 1961, voL II, pp. 109—110.

[19] This solution was accepted by the Havana Conventions from 1928 (Art 18) and by the conventions between Romania and Yugoslavia from 1962 (Art 8).

[20] This solution was accepted by the Romania — Cuba convention from 1971 (Art 19) and by the Soviet law on the privileges of diplomatic missions and consular posts of foreign states from 1966 (art. 21).

[21] This solution occurs in conventions signed by the USSR with the USA in 1964 (Art 17), with Great Britain in 1965 (Art. 14), with France in 1966 (Art 21), with Japan in 1966 (Art 15) and with Cuba in 1972 (Art 11) and also in those signed by Romania with Great Britain in 1968 (Art 31), with Austria in 1970 (Art. 28), and with Finland in 1971 (Art 28). It was also used in the following conventions: Greece — Bulgaria from 1971 (Art 11), Hungary — Czechoslovakia from 1973 (Art. 13) and in those signed by Poland with, among others, Great Britain in 1967 (Art 16), with the USSR in 1971 (Art 11), with Cuba in 1972 (Art 13), with France in 1976 (Art 14), with Libya in 1982 (Art 14) and with Mexico in 1985 (Art 13).

[72] *Cf. J.* SUTOR, "Zagadnienie nietykalności...", p. 1606.

The privilege of inviolability of consular premises causes consequently that the premises together with the property of a consular post and its transport means do not fall under requisition for the needs of national defence or for public use.[23] However, some conventions allow the possibility of expropriation but under the condition that appropriate means are applied to avoid disturbance in fulfilling consular functions. Moreover, an adequate and effective indemnity should be paid.[24] Other conventions taking on this solution do not mention the indemnity[25] or they declare that if the expropriation is necessary, it may only result from the mutual agreement between the receiving State and the authorities of a sending State.[26] Undoubtedly the latter solution is most practical one for it creates real chances to concern interests of states in a particular situation.

Another consequence of the privilege of inviolability of consular premises and a residence of a head of a consular post owned or rented by a sending State or a person acting on its behalf is the exemption from any fees and state taxes, both local and municipal, excluding cost of taken service.

A very important and practical result of the fact of the inviolability of consular premises is the obligation of the authorities of a receiving State to undertake all the necessary means to secure consular premises against any infringement or harm and to prevent any disturbance of peace of the consular post or an offence to its dignity.[27] This is of particular meaning during riots and political demonstrations often directed against foreign consular posts. In such circumstances the authorities of a receiving State are obliged to reinforce the security of those consular premises. Due to the damages and losses of a consular post in regard to its premises caused by the organs of a receiving State or by a third party, the receiving State is obliged, as it comes from the international law, to adequate satisfaction and compensation of damages and punishment of the offenders.[28]

[23] *E.g.*: Conventions signed by Poland with Cuba in 1972 (Art 13) and with Cyprus in 1980 (Art. 15).

[24] *E.g.*: Conventions signed by Poland with Belgium in 1972 (Art. 12), with Bulgaria in 1972 (Art. 13), with Romania in 1973 (Art 28), with Italy in 1973 (Art 33) and with Algeria in 1983 (Art 14) see also the Vienna Convention of 1963 (Art. 31).

[25] *E.g.* Polish-British Convention from 1967 (Art 28).

[26] *E.g.* Polish-Mongolian Convention of 1973 (Art. 13).

[27] This duty was strongly stressed by the International Court of Justice in 1980 in the sentence concerning occupation of the United States Embassy and Consular premises in Teheran in November, 1971 by the Iranian demonstrators, International Court of Justice, Case concerning *United States Diplomatic and Consular Staff in Teheran,* Judgement of 24 may, 1980, p. 30. Also in: L. GREEN, *The Teheran Embassy Incident and International Law,* Toronto 1980, p. 9. It is also reflected in the Vienna Convention of 1963 (Art 31) and also in the conventions signed by Poland with, among others, Belgium in 1972 (Art. 11), with Italy in 1973 (Art 32), with Iraq in 1980 (Art. 28) and with Mexico in 1985 (Art. 3).

[24] *Cf.* K. LIBERA, *Zasady międzynarodowego prawa konsularnego [Principles of International Consular* Law], Warszawa 1960, p. 330 and J. SUTOR, *Prawo dyplomatyczne i konsularne [Diplomatic and Consular* Law], Warszawa 1982, p. 378.

5. The Prohibition of Granting an Asylum in Premises of a Consular Post

The privilege of inviolability of consular premises is related to the question of contingent giving of an asylum in those premises. The Vienna Convention of 1963 and numerous other bilateral consular conventions do not mention the problem because — as it is generally believed — the awamess of not giving an asylum in the premises of a consular post is common.[29] Moreover, the prohibition of giving an asylum is based upon so commonly accepted norm of international Law that its repetition in consular conventions is actually redundant and its occurence can be explained as an act of intention to avoid possible abuses.

However, some consular conventions and acts of international law state unanimously that the premises of a consular post must not be used for granting an asylum.[30] Part of them add that if a head of a consular post gives an offender asylum and refuses to give him out in face of well-founded demands of the authorities of a receiving State the authorities, if they find it necessary, may enter the consular premises to detain the fugitive.[31] This prohibition concerns granting an asylum for persons wanted for both, common and political crimes regardless of their citizenship and of the place the crime has been comitted. The head of a consular post not only has no rights of granting asylum in consular premises but he is also obliged to remove the person who took shelter in the premises or to give him out to the authorities of a receiving state.[32] Otherwise he would seriously transgress his rights. Neither has he rights to detain in consular premises a citizen of a sending State against his will nor to give out the person to the authorities of this State if the person lives in a receiving State or is under its protection.[33] It does not exclude, in my opinion, the possibility of giving shelter to a person during a demonstration or street riots in case of direct danger, particularly when the person is a citizen of a sending State. Such a person should, after the threat ceases, leave the consular premises or should be given out to meet the demands of the authorities of a receiving State.[34] In

[29] *Cf.* K. STRUPP, *Eléments du droit international public, universel, européen et américain,* 2nd ed., Paris 1930, p. 230; P. GUGGENHEIM, *TYaité de droit international public,* Genève 1953, p. 515, and LIBERA, *op. cit.*, p. 355.

[30] This solution was accepted, among others, in conventions signed by Germany with the USA in 1923 (Art. XX) and with Turkey in 1929 (Art. 6) and by Spain with Philippines in 1948 (Art. IX) and by Poland with Great Britain in 1967 (Art. 17).

[31] This kind of solution can be seen in conventions signed by Great Britain with, among others, France in 1951 (Art 11), with the USA in 1951 (Art 8) and with Mexico in 1954 (Art 10).

[32] This point of view was accepted by the Havana Convention from 1928 (Art. 19) See also: W. GOULD, *An Introduction to International Law,* New York 1957, p. 286.

[33] This was the point of view of the government of Netherlands expressed in the memorandum sent to the UN General Secretary: "Asylum in a consulate can never be granted, nor does the consul have the competence to detain persons there against their will," *Legislative,* p. 197.

[34] *Cf.* LIBERA, *op. cit.*, pp. 358—359 and J. SUTOR, "Zagadnienia nietykalności...," p. 1610.

case the fugitive is a citizen of a sending State, consul has the right to require from the authorities of a receiving State a warrant of personal security for the fugitive. He is also obliged to internment to secure life safety of the wanted citizen of a sending State.

The prohibition to grant asylum in consular premises regards not only persons wanted by the authorities of a receiving State but it also includes the prohibition of any actions aiming at removing objects belonging to a third party but wanted by the authorities of a receiving State because of their connection with a commited crime or because of a claim proffered by court.

Therefore, the objects which are subject matters of a crime or belong to a third party but wanted by a receiving State must not be kept in consular premises. Objects of this kind should be immediately given out to meet the demand of the authorities. Similarly, a consul must not refuse the court of a receiving State information on the possessions, valuable objects or immovables, if the property is directly claimed or it is to fulfil the claims of third parties processed by the local court Rejection of giving out the information might be regarded by local authorities as inadmissible use of the right of asylum.

6. The Security of Archives and Premises of a Consular Post in Exceptional Circumstances

An outbreak of war between two States causes the break off of all the official relations between them,[35] including diplomatic and consular ones. K. Libera underlines that

"Breaking off of all the official relations due to the outbreak of war causes, as a direct consequence, legal expiration, from the very law, of all the missions established by interested states in their mutual peaceful relations".[36]

Since a consul is an official representative of a sending state functioning within the territory of a receiving State, so his mission and the mission of a diplomatic representative alike[37] expires automatically because of the very fact of the state of war between the States.

[33] L. OPPENHEIM, *International Law,* vol II, London 1955, p. 301; P. CAHIER, *Le droit diplomatique contemporain,* Paris 1962, p. 180; J. MAKOWSKI, *Organa państwa w stosunkach międzynarodowych. Zjazdy międzynarodowe. Umowa międzynarodowa [Organs of State in International Relations. International Conferences. International Ileaty]*, Warszawa 1957, p. 51; LIBERA, *op. cit.,* pp. 503—504 and W. GÓRALCZYK, *Prawo międzynarodowe publiczne w zarysie [Public International Law in Outline]*, Warszawa 1983, p. 373.

[36] LIBERA, *op. cit.,* p. 504.

[37] F. PRZETACZNIK, " Imunitety dyplomatyczne w czasie wojny" [Diplomatic Immunities during a War], *Wojskowy Przegląd Prawniczy,* 1965, No. 4, p. 467.

The moment the war actions start, a head of a consular post should not leave his post until a diplomatic mission or a third state takes care of archives and consular premises.

The Vienna Convention of 1963 confirms in Art. 27 the norms of customary law according to which, in case of an armed conflict and the break off of consular relations between two States, the receiving State is obliged to respect and secure consular archives and premises together with the property of a consular post [38] In such a situation the authorities of a sending state should confide consular archives and premises with the property in these premises to the care of a third State agreed upon with a State of residence.

In case of temporary or final close-down of a consular post, the receiving State authorities are obliged to secure consular archives and premises with the property in them. Moreover, if the sending State is not represented by a diplomatic mission but has another consular post, it can be confided with the care of the closed consular post premises together with the property in these premises and consular archives. If a sending State has no diplomatic mission or another consular post in the state of residence, then it may confide the consular archives and premises together with the property to the care of a third State under the condition that the receiving State would agree to it.

7. The Privilege of Inviolability of Archives and Premises in the Light of the Doctrine of International Law

The privilege of inviolability of consular archives and premises enjoys attention of numerous representatives of the science of international law. They confirm that the privilege exists and has an important role in proper fulfilling of consular functions by a consular post. [39] A. River writes that consular archives are commonly inviolable. However, if the privilege is to cover them they should be precisely separated from the consul's personal documents. [40] C. Hyde states that consular archives are inviolable and the authorities of a State of residence may not search them. [41] According to A. Bonde consular archives are inviolable and local authorities have no right to enter to do the search or confiscation. [42]

[38] *Cf.* J. SUTOR, *Prawo dyplomatyczne...*, p. 386.

[39] Though some of them, when disscussing this privilege, directly refer to the adequate statements of the Vienna Convention of 1963. *E.g.* C. BEREZOWSKI, *Prawo międzynarodowe publiczne [Public International Law]*, vol. 2, Warszawa 1969, pp. 195—196; N. GREEN, *International Law. Law of Peace*, London 1973, p. 144; GÓRALCZYK, *op. cit.*, p. 278 and K. SANDROWSKI, *Prawo vnesnih snoïenij*, Kiev 1986, p. 314.

[40] A. RIVIER, *Principes du droit des gens*, vol. I, Paris 1896, p. 539.

[41] C. HYDE, *International Law Chiefly as Interpreted and Applied by United States*, Boston 1922, p. 797.

[42] A. BONDE, *TYaité élémentaire de droit international public*, Paris 1926, p. 329.

K. Strupp[43] and J. L'Huillier[44] present similiar approach. According to N. Green consular archives consisting of writings, documents, correspondence, books, films, tapes and the consulate's registers together with cipher, codes and furniture in which they are stored and secured, are inviolable regardless of time and place they are in.[45] G. Scelle, C. Colliard and J. Starke state that the privilege of inviolability covers not only consular archives but also consular premises.[46] In C. Rousseau's opinion the privilege covers not only archives and premises but also the lodgings of consulate members.[47]

There are also in the Polish science of international law authors who discuss the problem of inviolability of consular archives and premises. Z. Sarna states, confirming the meaning of this privilege for the practice of consular relations, that organs of a receiving State have no right to inspect, search or confiscate the documents from consular archives. According to the author the archives include all the objects the whole consul's functioning consists of.[48] W. Namysłowski writes that the consular archives are given the inviolability because of the sovereignty of a sending State. The archives are, in their essence, a material manifestation of this foreign sovereignty appearing as documents and correspondence.[49] According to K. Bertoni consular archives are always inviolable and local authorities may under no pretext inspect or seize books, writings or other objects belonging to them. The books, writings and objects should be always isolated from private documents, books and papers on trade and industry some consular officers may exceptionally work on. Consular premises are also inviolable. The authorities of a State of residence may under no pretext enter them.[50] L. Babiński understands the notion of the inviolability of consular archives very widely. It is not — as he writes — "a book-case excluded from the access of the local authorities, since inaccessible is the whole of consular post, its premises, all the desks consular officers work at and papers in there do not go under control of the local authorities."[51]

The views of numerous authors analyzed here allow us to believe that they are principally in agreement with the declarations of many consular conven-

[43] STRUPP, *op. tit.*, p. 229.

[44] J. L'HUILLIER: *Eléments de droit international public*, Paris 1950, p. 289.

[43] N. GREEN, *International Law...*, p. 144.

[46] G. SCELLE, *Manuel de droit international public*, Paris 1948, p. 554; C. COLLIARD, *Institutions internationales*, Paris 1956, p. 217, and J. STARKE, *An Introduction to International Law*, 4th ed., London 1958, pp. 278—279.

[47] C. ROUSSEAU, *Droit international public*, Paris 1953, p. 354.

[41] Z. SARNA, *Prawo konsularne [Consular Law]*, Kraków 1936, p. 14.

[44] W. NAMYSŁOWSKI, *Instytucje współczesnego prawa narodów w zarysie [Institutions of Contemporary Law of Nations]*, Warszawa 1947, p. 13.

[30] K. BERTONI, *Praktyka dyplomatyczna i konsularna [Diplomatic and Consular Practice]*, Kraków 1947, part I, p. 106.

[31] L. BABIŃSKI, *Prawo międzynarodowe publiczne [Public International Law]*, Szczecin 1948, part I, p. 91.

tions and acts of international law concerning the privilege of inviolability of consular archives and premises.

The legal basis of the privilege we are interested in, is the next important problem which should be considered. From the above considerations appears that international agreements, both bilateral and multilateral ones, are the source of this privilege. But is it enough to state so? In my opinion — it is not because norms of customary law are also the source of the privilege. This privilege has, however, a long and rich practice coniirmed by the norms of the treaty law. This point of view is strongly supported by the science of international law. Numerous authors approach the question of the existence of the privilege of inviolability of archives and consular premises and, at the same time, discuss its legal grounds. F. Liszt writes that the inviolability of the office premises, consular archives and official writings kept there is a common law.[52] W. Beckett states that consular and official papers are inviolable by the virtue of international law.[53] In G. Stuart's opinion the inviolability of consular archives is a commonly accepted principle of international law.[54] P. Guggenheim is of the similiar opinion.[55] L. Oppenheim states, when writing on the privilege of inviolability of consular archives, that numerous agreements stipulating the inviolability "are declaratory in relation to this what can be regarded as a norm of international law recognized by majority of states including Great Britain."[56] W. Gould stands on the same position.[57] According to B. Sen the privilege of inviolability of consular archives and documents is recognized by customary international law.[58] L. Lee[59] and J. Delupis[60] represent the same opinion.

Among Polish authors, Z. Cybichowski states that consular archives are inviolable and this inviolability is recognized by international law.[61] In J. Makowski's opinion consuls are, by virtue of customary law, granted the inviolability of archives and consular premises.[62] K. Libera stated, having analyzed numerous consular conventions, that the existence of a commonly

[52] J. LISZT, *System prawa międzynarodowego [System of International* Law], Kraków 1907, p. 128.

[53] BECKETT, *op. cit.*, p. 38.

[54] STUART, *op. cit.*, p. 380.

[35] GUGGENHEIM, *op. cit.*, p. 514.

[56] OPPENHEIM, *op. cit.*, vol I, p. 841

[57] GOULD, *op. cit.*, p. 286.

[a] B. SEN, *A Diplomat's Handbook of International Law and Practice*, The Hague 1965, p. 245.

[59] L. LEE, *Vienna Convention on Consular Relations*, Leyden 1966, p. 99.

[60] J. DELUPIS, *International Law and Independent State*, London 1974, p. 120.

[61] Z. CYBICHOWSKI, *Prawo międzynarodowe publiczne i prywatne [Public and Private International* Law], Warszawa 1932, p. 231.

[62] J. MAKOWSKI, *Podręcznik prawa międzynarodowego [Handbook of International* Law], Warszawa 1948, pp. 174—175.

recognized norm of international law establishing the inviolability of consular archives cannot be questioned.[63]

From the above discussed approaches of numerous authors it may be concluded without any doubts, that the science of international law speaks for the existence of the privilege of inviolability of consular archives and premises as a norm of the common international law.

[61] K. LIBERA, "Przywilej nietykalności archiwum konsularnego i nietykalności placówki konsularnej" [Privilege ofInviolability of Consular Archive and Inviolability of Consular Post], in: *Księga pamiątkowa ku czci Juliana Makowskiego z okazji 50-lecia pracy naukowej [The Book Commemorating Julian Makowski on the 50th Anniversary of His Scholarly Work]*, Warszawa 1957, p. 150.

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVIII, 1989-1990
PL ISSN 0554-498X

Les fonctions de la justice internationale dans les relations internationales contemporaines

par JANUSZ SYMONIDES

I

La Cour Internationale de Justice (C.I.J.), organe judiciaire principal des Nations Unies, n'est pas un unique tribunal permanent à caractère international, car fonctionnent également le Tribunal des Communautés Européennes et le Tribunal Européen des Droits de l'Homme et on envisage la création d'un Tribunal de Droit de Mer, néanmoins son rôle et signification pour la communauté internationale sont extrêmement particuliers. La C.I.J. demeure un tribunal à caractère universel, accessible à tous les Etats et aussi un organe suprême et autoritaire dans les questions relevant du domaine de droit international.

Conformément à la Charte des Nations Unies, la Cour règle les litiges entre Etats et formule des avis consultatifs sur demande du Conseil de Sécurité et de l'Assemblée générale ainsi que d'autres organes des Nations Unies agissant sur autorisation de cette dernière et des organisations spécialisées. Sur commun accord des parties, la Cour peut statuer *ex aequo et bono* en réalisant dans un tel cas les fonctions d'un tribunal d'arbitrage. En dehors des fonctions strictement judiciaires, le Statut accorde à la C.I.J. des compétences en matière d'adoption et de modification du Règlement, tandis que le président peut, sur demande formulée dans une convention multilatérale ou bilatérale, désigner des arbitres ou des membres des commissions de conciliation.[1] Les arrêts prononcés par la C.I.J. ont une signification non seulement pour l'affaire donnée et pour les parties en litige mais également pour le droit international. En prononçant un arrêt la Cour indique toujours sa motivation, constate l'existence des règles coutumières, interprète et clarifie le contenu aussi bien des règles coutumières que des normes conventionnelles et participe ainsi au processus du développement constant du droit international. A titre d'exemple on peut citer toute une série de litiges en matière de délimitation des surfaces

[1] Au cas où le président jouit de la nationalité de l'une des parties du litige, la nomination, comme le prévoient de nombreuses conventions, peut être faite par le vice-président ou le juge de rang le plus élevé. Certains conventions autorisent le président à nommer des magistrats. Voir « Yearbook International Court of Justice », 1984-1985, pp. 58-59.

maritimes qui ont permis de définir le contenu de la règle de justice lors de la délimitation de ces surfaces. Une importance considérable pour le développement du droit des organisations internationales et une bonne compréhension de la Charte des Nations Unies ont eu les avis consultatifs formulés par la Cour, en particulier en ce qui concerne la responsabilité pour les dommages survenus au service des Nations Unies et l'affaire de Namibie. On peut donc constater d'une manière générale que l'existence et l'activité de la C.I.J. favorise le renforcement du droit international et de son autorité dans les relations internationales.

La C.I.J. est un organe des Nations Unies dont la tâche principale est la sauvegarde de la paix et de la sécurité internationale, ce qui implique que l'activité déployée par la Cour devrait servir et sert à réaliser cette tâche. En réglant un litige entre Etats, la Cour en élimine les causes et prévient sa transformation en un conflit. En prononçant une décision sur les mesures provisoires, comme ce fut p. ex. le cas dans l'affaire d'un litige de frontière entre le Burkina Faso et le Mali, la Cour aide les parties à prévenir une aggravation de la situation qui déjà en 1985 a provoqué un conflit armé. Comme le constate d'une façon correcte Oscar Schächter il n'y a aucune contre-indication pour que la Cour ne puisse statuer en matière de litiges liés à l'emploi de la force.[2]

Les fonctions qui peuvent être accomplies par la C.I.J. non seulement à l'égard des parties en litige mais également en faveur de renforcement du droit et de la paix et sécurité internationale, impliquent que toute la communauté internationale devrait être intéressée dans son activité là où les mesures non obligatoires de règlement des différends n'apportent pas de résultats. Dans ce cadre, un appel à présenter une attitude plus positive et active à l'égard de la Cour a été entre autres formulé dans la résolution n° 3232 de l'Assemblée générale adoptée au cours de sa XXIXe session en 1974 et dans la déclaration de Manille adoptée en 1982.

II

Une comparaison de l'activité déployée par la Cour Permanente de Justice Internationale (C.P.J.I.) qui au cours de 18 années (1922-1940) a examiné 57 affaires, y compris 20 demandes d'avis consultatifs, et de celle de la Cour Internationale de Justice qui pendant plus de 40 ans d'existence (1946-1988) a examiné 75 affaires, dont 18 étaient des demandes d'avis consultatifs, permet de formuler la conclusion qu'après la guerre l'activité du Tribunal des Nations Unies est relativement moindre. Une constatation supplémentaire que sur 52 membres de la Ligue des Nations beaucoup car 40 étaient liés par la juridiction

[2] O. SCHÄCHTER, *Disputes Involving the Use of Force,* dans : *The International Court of Justice at a Crossroads,* ed. L. Fisler Damroseh, New York 1987, pp. 223 et suiv.

obligatoire de la C.P.J.I. grâce à l'adoption de la clause obligatoire, tandis que dans le système des Nations Unies en 1988 sur 159 membres seulement 46 reconnaissaient la juridiction obligatoire de la C.I.J., nous amène parfois à une conclusion prématurée sur le déclin de la justice internationale dans le monde actuel. Bien que cette thèse aille trop loin, il n'y a cependant point de doute que la C.I.J. n'est pas suffisamment utilisée, ce qui était particulièrement apercevable dans la deuxième moitié des années soixante et les années soixante-dix.

Quelles en sont les raisons, d'où vient cette sous-estimation ou même ce sentiment de méfiance à l'égard de la justice internationale? [3] En marge, on peut remarquer qu'une relativement plus rare utilisation de la C.I.J. par comparaison à la C.P.J.I. peut s'expliquer en partie par le fait que les membres de la Ligue des Nations constituaient un groupe d'Etats plus homogène, en majorité européen, où les différences en matière de traitement du droit international et du concept du règlement définitif des différends étaient moindres.

Les raisons d'aversion de s'adresser plus souvent à la justice internationale sont justifiées dans la doctrine par la composition du tribunal, le caractère des litiges internationaux, l'état de droit international, la procédure, ayant lieu parfois la non-exécution des arrêts et enfin la préférence des mesures non obligatoires de règlement des différends.

Dans la première période d'activité de la C.I.J., l'avantage quantitatif des juges représentant le système occidental de droit révélait des doutes du côté des pays socialistes et ceux en voie de développement quant à l'impartialité et l'utilité de la Cour dans le règlement des différends entre blocs [4]. Avec le temps, l'importance de ce problème diminua.

Les litiges entre les Etats ont très souvent, comme l'a remarqué Lon Fuller, un caractère polycentriste [5] où en dehors d'éléments juridiques subsistent des éléments économiques, historiques et politiques. De là peuvent se manifester des doutes fondamentaux si les aspects juridiques sont les plus importants, et si les normes légales peuvent constituer un fondement approprié et suffisant pour les régler. En plus, parfois un litige porté devant la Cour en tant que juridique, peut lui être adressé pour motifs expressément politiques. Malgré son caractère apparemment bilatéral, le litige peut avoir en réalité une dimension inter-

[1] En réalité, on peut parler d'une utilisation insuffisante par les Etats non seulement de la C.I.J. mais également du Tribunal des Communautés Européennes qui très rarement examine des litiges entre Etats. On peut aussi affirmer que le nombre des litiges examinés par les tribunaux de médiation après ta Seconde Guerre mondiale est moindre par rapport aux premières dizaines d'années du XX* s.

[4] Voir A. KAPLAN, N. B. KATZEUBACH, *The Institutions of International Decision Making*, dans : *Legal and Political Problems of World Order*, ed. S. H. Mendlovitz, New York 1962, p. 320.

[1] L.F. FULLER, *Adjudication and the Rule of Law*, dans : *The Strategy of World Order*, The United Nations, ed. R. A. Falk, S. H. Mendlovitz, New York 1966, pp. 440 et suiv.

nationale et concerner toute la communauté internationale comme ce fut le cas des affaires de la délimitation des eaux territoriales.

Dans certains cas, les Etats s'abstenaient de porter le litige à caractère purement juridique devant la Cour en raison d'incertitude subsistant quant au fondement juridique de la future décision. On peut citer ici l'inexistence d'une codification suffisante, les doutes subsistant en matière de règles coutumières, les soupçons que la C.I.J. était animée par la tendance d'une interprétation conservatrice du droit et qu'elle n'était pas capable de régler les différends résultant du développement de droit des nations. La majorité de ces réserves ont disparu avec le temps. La C.I.J. a également prouvé qu'elle pouvait contribuer avec succès au développement constant du droit international. Quant à la procédure devant la C.I.J., on affirmait qu'elle était trop rigide, qu'elle ne permettait pas aux parties de contrôler le déroulement de l'affaire et enfin qu'elle était trop lente et coûteuse pour les parties. D'autre part, les mesures non obligatoires de règlement des différends par un facteur tiers offraient aux parties un plus grand contrôle et une plus grande influence sur le déroulement de la procédure et ne menaient pas à une intensification de tension, ce qui pouvait arriver si un autre Etat était cité à comparaître en vertu de la clause facultative ou de la clause de compromis contenue dans une convention multilatérale.

III

A la question portant sur ce qui pouvait contribuer à rendre le rôle de la justice dans les relations internationales plus significatif, ce qui permettrait de surmonter les doutes et d'utiliser plus fréquemment la C.I.J., les réponses étaient multiples et souvent contradictoires les unes aux autres.

Le passage des années cinquante aux années soixante apporta des idées ambitieuses, bien que totalement utopiques, de transformer les Nations Unies en une organisation supragouvernementale, disposant de ses propres forces de police, d'un fort pouvoir exécutif et d'un procureur général. La fondation d'un ordre mondial envisageait, comme l'ont proposé Greenville Clark et Luis Sohn*, la création d'un nouveau système complexe de justice internationale, basé avant tout sur la juridiction obligatoire de la C.I.J. pour tous les membres des Nations Unies qui par la même occasion aurait été une cour d'appel pour les décisions prononcées par les tribunaux régionaux. La C.I.J. aurait été accessible non seulement aux Etats mais également aux organisations internationales ainsi qu'aux personnes physiques et morales. Pour régler les litiges n'ayant pas forcément un caractère juridique, on proposait de créer un

[6] G. CLARK, L. B. SOHN, *World Peace through World Law*, 2nd ed., Cambridge, Mass. 1964, pp. 335 et suiv.

Tribunal Mondial de Justesse. La réalisation d'une telle proposition allant tellement loin dans son ensemble est, un quart de siècle après sa formulation, toujours impossible, car celle-ci envisage une modification considérable sinon totale de la lettre et de l'esprit de la Charte des Nations Unies, néanmoins certaines propositions moins ambitieuses et plus réalistes de la modification de la Charte ou du Statut de la C.I.J. ne devraient pas être exclues.

Quant à l'accès à la Cour, il semble que demeure toujours actuelle la suggestion formulée dans les années soixante-dix par Leo Gross que la Cour soit accessible non seulement aux Etats mais également aux organisations internationales qui pourraient être parties aux litiges les opposant les unes aux autres ainsi qu'aux Etats [7]. C'est, semble-t-il, une conséquence logique de la personnalité des organisations internationales jouissant d'une capacité d'exercice dans les relations internationales.

Une autre proposition qui mérite d'être considérée est la suggestion d'extension du domaine de la juridiction obligatoire de la C.I.J., et ceci non au moyen de l'adoption des clauses facultatives additionnelles ou le retrait des restrictions figurant dans ces clauses mais au moyen de la conclusion d'une convention multilatérale dans laquelle les Etats pourraient se soumettre à la juridiction obligatoire de la C.I.J. dans les litiges concernant l'interprétation ou l'exécution d'une convention internationale ainsi que dans les litiges concernant des problèmes précisément définis du domaine du droit international [8].

Pour éliminer les raisons des charges souvent formulées à l'égard du caractère politique de la composition de la Cour, une représentation géographique inadéquate ou même l'incompétence de certains juges, dans la littérature du sujet, on proposait de diverses mesures de prévention souvent contradictoires et peu convaincantes. La suggestion d'agrandir la composition de la Cour de 3 ou 5 juges ou même plus n'est pas conforme aux besoins d'élasticité et d'activité rationnelle ; la prolongation du terme ou nomination pour une période indéfinie diminuent les possibilités de rotation et apportent la menace de vieillissement des juges et ne doivent pas forcément aboutir au renforcement de leur indépendance. D'autre part, leur choix uniquement selon le critère de compétence pourrait déranger l'équilibre intérieur existant et faire naître de fortes aversions et très certainement ne pourrait pas être approuvé par les Nations Unies, car il est contraire à la tendance dominante. Une appréciation objective de l'activité du Tribunal ne confirme pas d'ailleurs la

[7] L. GROSS, *The International Court of Justice : Considerations of Enquirements for Enhancing Its Role in the International Legal Order*, dans : *The Future of the International Court of Justice*, vol. I, New York 1976, pp. 36 et suiv.

[8] L. B. SOHN (*Step-by-Step Acceptance of the Jurisdiction of the International Court of Justice*, dans : *The Strategy of World Order*. The United Nations, ed. R. A. Falk, S. H. Mendlovitz, New York 1966, pp. 422 et suiv.) prévoyait la possibilité d'acceptation de la juridiction de la Cour en vertu des accords régionaux et une possibilité pour les Nations Unies de formuler des recommandations à l'égard des parties de soumettre leur litige à la C.I.J.

charge sur le caractère politique ou le manque d'objectivité des juges et la nécessité de modification radicale des règles actuelles régissant l'élection des juges. Cette charge, formulée par les Etats-Unis à l'occasion de l'afTaire portée contre eux par le Nicaragua, a été rejetée par les auteurs américains. Comme l'ont constaté Anthony D'Amato et Mary O'Connell jusqu'au moment du refus de participation à ladite affaire, l'expérience des Etats-Unis dans leurs contacts avec la C.I.J. doit être appréciée comme satisfaisante[9].

Le problème auquel la doctrine ne sait pas trouver un remède adéquat est le refus de l'exécution de l'arrêt ou de la décision de la C.I.J. sur les mesures provisoires. Conformément à l'art. 94 pt 2 de la Charte, le Conseil de Sécurité peut, dans un tel cas et s'il le juge nécessaire, faire des recommandations ou décider des mesures à prendre pour faire exécuter l'arrêt. Les mesures proposées et non prévues dans la Charte, telles que la saisie de la propriété ou des créances de l'Etat refusant d'exécuter l'arrêt, le refus de s'acquitter de dettes qui lui sont dues comme cela a lieu en cas de non-exécution de la décision du Tribunal des Communautés Européennes, n'apportent pas une solution au problème, car les difficultés résultent non tellement du manque de sanctions éventuelles (celles-ci sont prévues au Chapitre VII de la Charte) mais avant tout du fait que le Conseil de Sécurité confronte de sérieux embarras dans la prononciation des décisions pertinentes en raison, entre autres, du droit de veto. Les tentatives à surmonter les difficultés, créées par le Conseil de Sécurité, par l'intermédiaire des organisations spécialisées ou régionales ou une pression exercée en coopération avec d'autres Etats en vue de l'exécution de l'arrêt ou, eniln, une référence aux tribunaux locaux, ce qui avait été postulé par Wilfred Jenks[10], ne semble pas une solution pratique. En marge, on peut noter que le problème d'une rare non-exécution des décisions ou le refus de se conformer aux mesures provisoires résulte en général du refus de l'Etat intéressé de la reconnaissance de la juridiction de la Cour dans l'affaire donnée.

La solution des problèmes résultant du caractère complexe des litiges ayant également ou forcément un aspect politique pourrait être favorisée par une meilleure mise à profit des possibilités déjà existantes. Dans ce cadre, l'arL 96 de la Charte prévoit que le Conseil de Sécurité et l'Assemblée générale peuvent demander à la C.I.J. un avis consultatif sur toute question juridique. De là les doutes quant à l'aspect juridique des litiges ou situations examinés par ces organes pourraient être transférés à la compétence de la Cour. De même, comme l'a proposé Manfred Lachs, les parties pourraient transmettre à la C.I.J. seulement la partie juridique du litige ou même seulement certains de ses éléments en se réservant la décision quant au mode de règlement de l'ensemble

[9] A. D'AMATO, M.E. O'CONNELL, *United Nations Experience at the International Court of Justice*, dans : *The International Court of Justice at the Crossroads*, ed. L. Fisler Damrosch, New York 1987, pp. 421-422.

[10] C. W. JENKS, *The Prospects of International Adjudication*, London 1964, pp. 663 et suiv.

du litige[11]. Les tentatives des Etats visant la possibilité d'une plus grande influence sur la composition de la Cour et la procédure ainsi que le postulat de rendre cette procédure plus élastique et simplifiée, peuvent être réalisées par la Cour elle-même sans aucune nécessité de modification de la Charte ou du Statut, au moyen d'une modification appropriée du Règlement et de son adaptation aux voeux des Etats.

IV

Est-ce que la communauté internationale s'oriente vers une plus grande que jusque-là utilisation de la justice internationale et est-ce que les Etats sont prêts dans un degré plus considérable à accepter la juridiction obligatoire de la C.I.J. ? Une réponse univoque et ferme à cette question n'est pas facile, mais de multiples éléments créent des fondements pour manifester un optimisme modéré. Essayons d'en indiquer quelques-uns.

La tendance à s'adresser à la justice internationale obligatoire lors du règlement des différends s'est manifestée d'une façon uniforme pendant la IIIe Conférence de Droit de Mer, et a trouvé son expression dans la convention adoptée en 1982 à Montego Bay. L'art. 287 statue que lors de la signature de la ratification ou de l'adhésion à la convention ou dans un moment ultérieur, les parties sont libres dans le choix de la procédure ou des procédures pour le règlement des litiges concernant l'interprétation ou l'application de la convention. Cette liberté comprend la possibilité à porter le litige devant : a) le Tribunal International de Droit de Mer ; b) la C.I.J. ; c) un tribunal d'arbitrage (constitué conformément à l'annexe VII) ; d) un tribunal d'arbitrage spécial (constitué conformément à l'arL VIII).

Ainsi donc, les Etats participants à la IIIe Conférence se sont mis d'accord qu'au cas où les autres procédures n'aboutissent pas au règlement du litige, celui-ci sur demande de l'une des parties sera transféré à une cour ou à un tribunal en vue d'être définitivement réglé, conformément à la règle statuant que si une partie n'a pas choisi l'une de quatre procédures prévues par l'art. 287, on présume qu'elle a choisi le tribunal d'arbitrage (constitué conformément à l'annexe VII). Au cas où les parties ont désigné la même cour ou tribunal, celui-ci est compétent pour juger l'affaire, tandis que si les parties ont choisi des options différentes, compétent à statuer sera le tribunal d'arbitrage[12].

L'opposition des pays côtiers provoqua que dans quelques catégories des litiges concernant les droits et obligations liés à la zone économique exclusive,

[11] M. LACHS, *The Law and the Seulement of International Disputes*, dans : *Dispute Settlement through the United Nations*, ed. K. Venkata Ramon, New York 1977, p. 296.

[12] Les parties peuvent, indépendamment de leur choix précédent et sur décision prise en commmun, soumettre le litige à l'une des cours ou tribunaux prévus à l'art 287.

la prononciation d'une décision définitive par un tribunal ou un tribunal d'arbitrage fut remplacée par une procédure obligatoire de conciliation. Ceci s'applique également aux litiges liés à la recherche scientifique, la pêche et la délimitation des surfaces maritimes [13].

L'adoption lors de la IIIe Conférence, à quelques exceptions près, du principe d'un règlement obligatoire et définitif des différends prouve que les Etats participants ont apprécié les qualités de la justice et de l'arbitrage en ce qui concerne les questions nécessitant parfois des décisions rapides et ayant forcément un caractère plutôt économique ou technique que politique. En envisageant la création d'un Tribunal International de Droit de Mer [14], la convention, malgré une attitude différente présentée par les pays en voie de développement, a prévu également la possibilité de s'adresser à la C.I.J.

La thèse que la justice et l'arbitrage peuvent jouer un rôle important lors du règlement des différends dans le domaine du droit de mer trouve sa confirmation non seulement dans les dispositions de la convention de droit de mer qui n'est pas encore entrée en vigueur, mais également dans la pratique internationale. Il suffit d'indiquer que seulement dans les années quatre-vingt la C.I.J. a statué dans des affaires concernant les litiges de délimitation entre la Tunisie et la Libye (1982), les Etats-Unis et le Canada (1984), et la Libye et la Malte (1985). En 1985, la C.I.J. a prononcé un arrêt en matière de révision et d'interprétation de son arrêt précédent rendu dans l'affaire de délimitation du plateau continental opposant la Tunisie à la Libye. Actuellement, la C.IJ. est en train d'examiner, depuis décembre 1986, un litige concernant la délimitation de la frontière terrestre et maritime entre le Salvador et l'Honduras. Le litige entre le Canada et la France concernant le droit de pêche dans la baie Saint-Laurent a été réglé par voie d'arbitrage.

L'utilité de la C.I.J. pour le règlement des litiges dans le domaine du droit de mer ne révèle point de doutes aussi bien du point de vue de la convention de 1982 que de la pratique ; on peut seulement se demander si existent des raisons justifiant l'opinion qu'il y a des chances pour utiliser plus souvent la C.I.J. lors du règlement d'autres différends.

---

[13] L'art 298 prévoit la possibilité de l'exclusion par les parties par voie d'une déclaration écrite du champ d'application des procédures en vigueur des problèmes concernant la délimitation ainsi que des litiges de caractère militaire et des litiges examinés par le Conseil de Sécurité conformément à la Charte des Nations Unies.

[14] Lors de la rédaction du Statut du Tribunal International de Droit de Mer, on a accepté certaines propositions formulées à l'égard de la C.LJ. Ainsi les dispositions concernant la possibilité de la création des chambres sont volumineuses, y compris la Chambre de Fond des Mers (l'Autorité) devant laquelle peuvent comparaître non seulement les Etats mais également l'Organisation de Fond des Mers (l'Autorité), son Entreprise ainsi que des personnes physiques et morales. Le nombre des juges a été élevé jusqu'à 21 avec cette réserve qu'aucun des groupes régionaux ne peut disposer de plus que de 3 juges, ce qui doit assurer une représentation géographique adéquate.

Une plus vaste utilisation de la C.LJ. dépend surtout de l'attitude présentée par les membres particuliers de la communauté internationale, de leur aptitude à la reconnaissance de la régie de juridiction obligatoire et à la soumission des litiges au règlement judiciaire. Un élément important et promettant constitue dans ce cadre la modification radicale de l'attitude de l'Union soviétique. Dans la publication de Mikhail Gorbatchev du 17 février 1987 a été formulée la thèse sur la nécessité d'une plus vaste utilisation de la Cour[15]. Il a postulé que l'Assemblée générale et le Conseil de Sécurité s'adressent plus souvent à la Cour en vue d'obtenir un avis consultatif dans les questions relevant du domaine du droit international et a également remarqué que la juridiction obligatoire de la C.I.J. devrait être adoptée sur les conditions mutuellement agréées, ce qui implique que les membres permanents du Conseil de Sécurité, vu leur responsabilité spéciale, devraient faire le premier pas dans cette direction. Ces propositions sont complétées par la constatation sur la supériorité du droit international par rapport à la politique. La nouvelle attitude a trouvé son expression lors de la XLII* Session de l'Assemblée générale. En prenant la voix lors du débat sur le rapport de la C.I.J., le délégué soviétique a accentué le fait que la sécurité globale est possible uniquement avec l'existence d'un système universel de droit où la supériorité du droit international aux ambitions politiques des Etats serait garantie. L'accroissement du rôle de la C.I.J. est la conséquence naturelle de la nécessité de renforcement du rôle du droit international dans les relations internationales. De là vient la nécessité de la reconnaissance par les Etats du principe en vertu duquel la présentation des litiges à la Cour est obligatoire sur des conditions agréées et le premier pas dans cette direction devrait être fait par les membres permanents du Conseil de Sécurité.

Quelle est l'attitude des membres permanents du Conseil de Sécurité à l'égard de la juridiction obligatoire de la C.I.J., présentent-ils leurs litiges à la décision de la Cour ? A cette question on peut répondre que le plus souvent se sont adressés à la C.I.J. les Etats-Unis et le Royaume-Uni, dans un degré moins considérable la France optant plutôt en faveur de l'arbitrage, tandis que la Chine populaire et l'Union soviétique ne s'y sont jamais adressées. Quant à la reconnaissance de la juridiction obligatoire, seulement le Royaume-Uni est lié actuellement par une clause facultative, tandis que les Etats-Unis dans leur note du 7 octobre 1985 ont notifié au Secrétaire général le retrait de la déclaration du 26 août 1946 reconnaissant la juridiction obligatoire de la CJJ.[16]

Le retrait de la clause facultative par les Etats-Unis était la conséquence imminente de l'affaire concernant l'activité militaire et paramilitaire déployée contre le Nicaragua[17].

---

[15] ***Real'nost' i garantit bezopasnogo mira,*** **« Pravda » du 17 septembre 1987.**

[16] **Le discours d'Ordzhonikidze, Doc. A/42/PV. 36.**

[17] **La lettre du 7 octobre 1985 adressée par le secrétaire George P. Schultz au Secrétaire**

Il faut cependant noter que les Etats-Unis demeurent toujours liés par la juridiction obligatoire de la C.IJ. prévue par quelques dizaines de conventions auxquelles ils sont partie. En plus, déjà après le retrait de la clause facultative, ils ont entamé, le 6 février 1987, une procédure contre l'Italie dans une affaire concernant la Société Elettronica Sicula S.p.A. [18]

Il est difficile de prétendre d'une manière absolue que la proposition soviétique (russe) que les membres permanents du Conseil de Sécurité reconnaissent en premier lieu la juridiction obligatoire de la C.I.J., pourrait être suivie par là formulation de telles déclarations par tous les membres du Conseil de Sécurité ou par l'adoption par eux par voie d'une convention de la juridiction obligatoire dans les matières agréées. Même si cela n'arrive pas dans les jours à venir, la nouvelle approche russe peut résulter, dans la modification, de jusque-là négative attitude de l'Union soviétique à l'égard de la clause judiciaire prévoyant la juridiction de la C.I.J. dans les litiges concernant l'interprétation ou l'exécution des conventions internationales [19].

Dans le cadre d'utilisation éventuelle de la C.I.J. important demeure le fait que de multiples postulats et remarques critiques formulées depuis plus de 40 ans de son existence ont été en partie ou totalement acceptés. Ainsi donc l'afflux de nouveaux membres des Nations Unies résulte d'un plus grand équilibre politique et géographique au sein de la C.I.J. Quant aux groupes régionaux, l'Amérique latine et l'Europe orientale ont chacune 2 juges, 3 juges viennent de l'Afrique et 6 juges représentent l'Europe occidentale et les autres régions. Une participation toujours excessive de l'Europe occidentale est justifiée par un respect sous-entendu du principe de l'élection à la C.I.J. des juges provenant des Etats membres permanents du Conseil de Sécurité, ce qui signifie une désignation automatique des 3 représentants de l'Europe occidentale et d'autres régions.

Les progrès réalisés dans sa codification et le développement constant du droit international impliquent qu'augmente la confiance des parties en ce qui concerne les fondements du jugement. Il suffit de dire qu'ont été déjà codifiées de telles branches du droit des nations comme le droit diplomatique, consulaire, celui des traités, de succession et le droit de mer qui sont des domaines où naissent de multiples litiges. Comme l'a remarqué d'une façon pertinente M. Lachs, le droit international a acquis aujourd'hui un tel degré de maturité qu'il est difficile à un juge ou à un arbitre de prétendre *non liquet* [20].

général des Nations Unies. Voir *The International Court of Justice at a* Crossroads Annex E, pp. 472-475.

[18] A. D'AMATO, M. E. O'CONNELL, *United States Experience*... ; O. SCHÄCHTER, *op. cit.*, respectivement pp. 403 et suiv., 223 et suiv.

[19] En marge on peut noter que la Section du Droit International du Conseil Législatif encore avant les dernières déclarations soviétiques a exprimé l'opinion que lors de la ratification de la Convention de Vienne de droit des traités de 1969, la Pologne ne devrait pas formuler de réserve en ce qui concerne la juridiction obligatoire de la CJ.J. qui y est prévue.

Depuis la fin des années soixante-dix, le nombre des clauses facultatives a augmenté (en 1990, une telle déclaration a été notifiée par S3 pays). La République de Pologne reconnaît comme obligatoire la juridiction de la G.I.J. du 25 septembre 1990. Chaque année aussi un nombre significatif des conventions est conclu dans lesquelles les parties reconnaissent la juridiction obligatoire de la C.I.J. Ce fondement de la juridiction de la Cour avec, d'autre part, les accords de compromis conclus par les parties en litige commence à jouer un rôle important au moment de la présentation du litige.

Certains postulats concernant la simplification de la procédure et une plus grande possibilité d'influence des parties sur la procédure et dans ce cadre une plus grande utilisation des chambres, ont été également réalisés. Dans cette orientation a été modifié le Règlement de la Cour, adopté le 6 mai 194621. La C.I.J. a adopté tout d'abord, le 10 mai 1972, quelques modifications pour adopter finalement le 14 avril 1978 un nouveau Règlement qui est entré en vigueur le 1er juillet 1978[22]. Les dernières années, on a commencé à faire usage plus souvent de la possibilité prévue à l'art 26 al. 2 du Statut de la Cour en vertu duquel celle-ci peut constituer une chambre pour le réglement des affaires particulières et le nombre des juges constituant une telle chambre est fixé par la Cour, avec l'assentiment des parties[23]. Pour la première fois, une telle chambre a été constituée le 20 janvier 1982 pour connaître le litige opposant les Etats-Unis au Canada et concernant la délimitation de la frontière maritime dans la baie de Maine. Des chambres furent par suite constituées : le 3 avril 1985 pour examiner un litige de frontière entre le Burkina Faso et le Mali, le 2 mars 1987 pour l'affaire Elettronica Sicula S.p.A. entre les Etats-Unis et l'Italie, et le 8 mai 1987 pour l'examen du litige concernant la frontière terrestre et maritime entre le Salvador et l'Honduras. La modification de l'attitude des Etats à l'égard de la justice internationale manifestée particulièrement au cours de la IIIe Conférence de Droit de Mer et plus récemment aussi à l'O.N.U., la modification de la procédure et une plus grande adaptation de la C.I.J. aux besoins et attentes de la communauté internationale permettent de supposer que la justice va devenir dans un degré plus considérable un élément primordial du règlement pacifique des différends, d'accroissement du rôle du droit international et de l'importance du droit des nations et aussi — en coopération

[20] M. LACHS, *op. eit., p.* 298.

[21] *International Court of Justice, Acts and Documents*, n° 1, pp. 54 et suiv.

[22] *International Court of Justice, Acts and Documents*, n° 4, pp. 92 et suiv.

[21] Jusque-là les chambres se composent de 5 juges. Si les parties (toutes ou l'une d'elles) ont leurs juges au sein de la C.U., ils font partie de la chambre et au cas contraire, on désigne en plus 1 ou 2 juges *ad hoc*. Cette solution ainsi qu'une plus grande possibilité d'influer sur la procédure rapproche les chambres à l'arbitrage.

avec le Conseil de Sécurité — de renforcement de la paix et sécurité internationale. A la date de mars 1991, pas moins de dix affaires, record historique, étaient en instance devant la C.IJ.[24]

[24] *Droit international. Bilan et perspectives*, t 2, sous la dir. de M. Bedjaoui, Éditions A. Pedane, Paris, p. 1311.

POLISH YEARBOOK
OF INTERNATIONAL LAW
YOU XVm, 1989-1990
PL ISSN 0554-498X

Treaty Obligations of Poland in the Field of Settlement of International Disputes

by RENATA SZAFARZ

L General Remarks

As K. Kocot rightly points out,

"Polish international legal traditions in the field of peaceful regulation of disputes have their roots in the works of representatives of the Polish 15th century school of law of war, that is, Stanislaw from Skarbimierz and Pawel Włodkowic from Brudzew. They play the role of coryphaeus of the principles of peaceful coexistence with dissenters and pagans in the canonistic period of the history of the law of nations. That leads later to the acceptance of the principle of 'inclination to choice of peace' [...] The 20th century brings victory in the 'law of peace' [...] obligations to exclusively peaceful regulation of international disputes combined with the prohibition of the use of force or the threat of its use, *inter alia*, against the so-called fundamental state rights and in 'any other manner inconsistent with the Purposes of the United Nations." [1]

After gaining independence (on 11 November, 1918) Poland acceded to the Hague Convention on the Pacific Settlement of International Disputes of 18 October, 1907. The Convention is still binding on Poland. However, it does not provide for obligatory (compulsory) jurisdiction, and it places a number of different means of dispute settlement, including arbitration, at the disposal of the parties to a dispute. *Inter alia*, the Convention establishes the so-called Permanent Court of Arbitration.

In the inter-war period Poland ratified moreover the Statute of the Permanent Court of International Justice and the Protocol of Signature of the Statute of 16 December, 1920. However, Poland did not accept the optional clause (Article 36, paragraph 2, of the Statute) and as such it did not accept a general compulsory jurisdiction of the Court. [2]

After World War II Poland became bound by the Charter of the United Nations and the Statute of the International Court of Justice. Quite recently, *i.e.* at the end of September 1990, Poland accepted the compulsory jurisdiction

[1] K. KOCOT, *Zobowiązania PRL w kwestii regulowania sporów międzynarodowych* [OMigations of the Polish People's Republic in the Matter of Settlement of International Disputes], 27 (1972), Series A — *Supplement*, Wroclaw 1973, p. 3.

[2] Although in 1931 Poland submitted a relevant declaration, it was never ratified (it contained such a requirement). For its text see: M. O. HUDSON, *The World Court 1921–1931*, Boston 1931, p. 151.

of this Court making a declaration provided for by Article 36, paragraph 2 of the Statute of the ICJ. This declaration reads as follows:

"In accordance with article 36, paragraph 2, of the Statute of the International Court of Justice, I hereby declare, on behalf of the Government of the Republic of Poland, that the Republic of Poland recognizes as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation and subject to the sole condition of reciprocity, the jurisdiction of the International Court of Justice in all legal disputes other than:

(a) disputes prior to the date of this declaration or disputes arisen out of facts or situations prior to the same date;

(b) disputes with regard to the territory or state boundaries;

(c) disputes with regard to pollution of the environment unless the jurisdiction of the International Court of Justice results from the treaty obligations of the Republic of Poland;

(d) disputes with regard to foreign liabilities or debts;

(e) disputes with regard to any State which has made a declaration accepting the compulsory jurisdiction of the International Court of Justice less than twelve months prior to the filing of the application bringing the dispute before the Court;

(f) disputes in respect where of parties have agreed, or shall agree, to have recourse to some other method of peaceful settlement;

(g) disputes relating to matters which, by international law fall exclusively within the domestic jurisdiction of the State.

This declaration shall be valid for a period of five years and be automatically prolonged thereafter for further periods of one year if not denounced by notification addressed to the Secretary General of the United Nations taking effect after six months from the moment of such notification.

The Government of the Republic of Poland also reserves its right to add, by means of a notification addressed to the Secretary General of the United Nations and taking effect after six months from the moment of such notification, new reservations or supplements, or to amend or withdraw, any of the foregoing reservations.

Warsaw, 21 September, 1990.

KRZYSZTOF SKUBISZEWSKI
Minister of Foreign Affairs"

Generally speaking, Poland has formerly adopted the stand that parties to a dispute should always determine the method of settlement of a particular dispute by *ad hoc* agreement. Therefore, in relation to 35 multilateral treaties, Poland advanced reservations derogating judicial and arbitral clauses in those treaties (that is, clauses providing for the compulsory jurisdiction of the ICJ or compulsory arbitration with respect to disputes concerning interpretation or application of the treaties in question — see below).

However, as concerns some multilateral treaties, by acceeding to jurisdictional clauses contained in them, Poland has accepted, in advance, even compulsory jurisdiction of the PCIJ and the ICJ, as well as compulsory arbitration. These obligations relate to disputes concerning interpretation or application of a particular treaty. In such cases the will of one of the parties to a dispute is sufficient for the ICJ or an arbitral court to have capacity to settle

the dispute. The ICJ is competent to consider such cases on the basis of Article 36, paragraph 1, and Article 37 of its Statute.

Below will be presented concrete solutions in the field of settlement of disputes concerning interpretation or application of treaties, provided by treaties binding on Poland (in particular, by multilateral treaties). ICJ jurisdiction and arbitration — procedures raising most controversies — will be dealt with first, followed by conciliation, settlement by organs of international organizations, inquiry and consultations.

It is difficult to categorize two treaties, for they are limited to the enumeration of various methods of dispute settlement at the disposal of the parties, without indicating preferences for any of them. Naturally, in these cases the methods are non-compulsory. These treaties do not contribute anything to the field of settlement of disputes apart from what results from general principles *(inter alia,* from Article 33 of the UN Charter). They are: Convention on the Conservation of Antarctic Marine Living Resources of 20 May, 1980 and Convention on the Protection of the Maritime Environment of the Baltic Sea Area of 22 March, 1974.

This paper covers data available at the beginning of 1989.

II. Jurisdiction of the International Court of Justice

In accordance with Article 37 of the Statute of the ICJ compulsory jurisdiction accepted by Poland in the inter-war period in relation to the PCIJ — concerning interpretation and application of some treaties — is at present binding in relation to the ICJ. This holds for the following 16 treaties:

1) International Convention for the Suppression of the Traffic in Women of Full Age of 11 October, 1933 (Article 4);

2) International Convention on the Abolition of Traffic in White Slaves of 4 May, 1910 (on the basis of Article 4 of the Convention listed in point 1);

3) International Convention for the Suppression of the Traffic in Women and Children of 30 September, 1921 (on the basis of Article 4 of the Convention mentioned in point 1);

4) Convention on Some Questions of Conflicting Legislation related to Nationality of 12 April, 1930 (Article 21);

5) Protocol relating to a Certain Case of Statelessness of 12 April, 1930 (Article 5);

6) International Convention for the Campaign against Contagious Diseases of Animals of 20 February, 1935 (Article 9);

7) Convention for Facilitating the International Circulation of Films of an Educational Character of 11 October, 1933 (Article XI);

8) International Convention for the Suppression of Counterfeiting Currency of 20 April, 1929 (Article 19);

9) Convention to Limit the Manufacture and Regulate the Distribution of Narcotic Drugs of 13 July, 1931 (Article 25);

10) International Agreement relating to the Exportation of Bones of 11 July, 1928 (Article 12 in connection with Article 8 of the International Convention for the Abolition of Import and Export Prohibitions and Restrictions of 8 November, 1927);

11) International Agreement relating to the Exportation of Skins of 11 July, 1928 (Article 8 in connection with Article 8 of the International Convention for the Abolition of Import and Export Prohibitions and Restrictions of 8 November, 1927);

12) International Convention relating to the Simpliiication of Customs Formalities of 3 November, 1923 (Article 22);

13) Slavery Convention of 25 September, 1926 (Article 8);

14) International Convention on Elimination of Obscene Publications from Circulation and Sales of 12 September, 1923 (Article XV);

15) International Opium Convention of 19 February, 1925 (Article 32, paragraph 4);

16) Convention and Statute on Freedom of Transit of 20 April, 1921 (Article 13 of the Statute).

A decisive majority of the above treaties clearly provides that the PCIJ (at present the ICJ) will be competent to consider a dispute at the request of even one of the parties to the dispute. In conformity with some clauses only certain disputes are subject to compulsory jurisdiction of the Court (for example, legal disputes, disputes concerning specific articles of the treaty).

In the inter-war period there was no case of Poland making a reservation which would derogate a treaty clause providing for compulsory jurisdiction of the PCIJ.

After World War II, analogically to other socialist states, Poland's policy was opposed to the compulsory jurisdiction of the ICJ. There were, however, exceptions in Polish practice, which resulted in the acceptance of the Court's compulsory jurisdiction with respect to six statutes of specialized agencies of the United Nations and nine other multilateral treaties. Moreover, an indirect compulsory jurisdiction of the ICJ (PCIJ) was accepted by Poland in relation to 72 international labour conventions (which is the number of labour conventions presently binding on Poland).[3]

Below are enumerated statutes of UN specialized agencies in relation to which Poland is bound by compulsory jurisdiction of the ICJ, having accepted judicial clauses in those statutes:

[1] For a list of international labour conventions binding on Poland see: R. SZAFARZ, *Wielostronne stosunki traktatowe Polski* [*Poland's Multilateral Treaty Relations*], Warszawa 1989, pp. 159—166.

1) Convention on International Civil Aviation of 7 December, 1944 (Article 84 — formally it concerns the PCIJ);

2) Constitution of the International Labour Organization, text of 9 October, 1946 (Article 37 — also concerns international labour conventions);

3) Constitution of the United Nations Food and Agriculture Organization of 16 October, 1945 (Article XVII);

4) Constitution of the United Nations Educational, Scientific and Cultural Organization of 16 November, 1945 (Article XIV);

5) Constitution of the World Health Organization of 22 July, 1946 (Article 75);

6) Statute of the International Atomic Energy Agency of 26 October, 1956 (Article XVII).

Below are listed usual multilateral treaties in relation to which Poland has accepted judicial clauses providing for compulsory jurisdiction of the ICJ:

1) Convention on the Privileges and Immunities of the United Nations of 13 February, 1946 (Article 30);

2) Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 21 March, 1950 (Article 22);

3) International Convention for the Prevention of Pollution of the Sea by Oil of 12 May, 1954 (Article XIII);

4) Convention on the Recovery Abroad of Maintenance of 20 June, 1956 (Article 16);

5) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery of 7 September, 1956 (Article 10);

6) Convention on the Nationality of Married Women of 20 February, 1957 (Article 10);

7) Single Convention on Narcotic Drugs of 30 March, 1961 (Article 48);

8) Universal Copyright Convention of 6 September, 1952 (Article XV);

9) Universal Copyright Convention of 24 July, 1971 (revised, both Conventions are binding; Article XV);

10) Vienna Convention on the Law of Treaties of 23 May, 1969 (Article 66, par. a).

The above list includes treaties the judicial clauses of which expressly state that a request of one of the parties to a dispute is sufficient to initiate procedure before the ICJ, as well as those which simply provide that the ICJ is competent to consider disputes arising in connection with the given treaty. For, in conformity with a general presumption[4] it should be accepted that these

[4] Recently judicial clauses contained in bilateral treaties concluded by the United States with Iran and Nicaragua were interpreted in this spirit by the ICJ — see: *Case concerning United States Diplomatic and Consular Staff in Teheran (ICJ Reports*, 1980, p. 27) and *Case concerning Military and Paramilitary Activities in and against Nicaragua (ICJ Reports*, 1984, p. 427).

clauses also provide for compulsory jurisdiction of the ICJ. This is confirmed by state practice.[5]

Three treaties binding on Poland expressly provide for non-compulsory jurisdiction of the ICJ. They stipulate *expressis verbis* that a dispute can be brought before the Court only at the request of all parties to the dispute. Such a regulation is found in: Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December, 1962 (Article 8), the Antarctic Treaty of 1 December, 1959 (Article XI) and the Convention against Discrimination in Education of 15 December, 1960 (Article 8).

No bilateral treaty concluded by Poland after World War II provides for ICJ jurisdiction.

Poland has made reservation derogating, *inter alia*, judicial clauses providing for compulsory jurisdiction of the ICJ with respect to the following treaties:

1) Convention on the Privileges and Immunities of the Specialized Agencies of 21 November, 1947; reservations concern paragraphs 24 and 32;

2) Convention on the Prevention and Punishment of the Crime of Genocide of 9 December, 1948; the reservation concerns Article IX;

3) Convention on the Political Rights of Women of 31 March, 1953; the reservation concerns Article IX;

4) Convention on the Contract for the International Carriage of Goods by Road (CMR) of 19 May, 1956; the reservation concerns Article 47;

5) Agreement on the Privileges and Immunities of the IAEA of 1 July, 1959; the reservation concerns paragraph 34;

6) Convention reltating to the Unification of Certain Rules concerning Collisions in Inland Navigation of 15 March, I960; the reservation concerns Article 14;

7) Convention on OfTences and Certain other Acts committed on Board Aircraft of 14 September, 1963; the reservation concerns Article 24, paragraph 1;

8) Stockholm Act, revising the Paris Convention on the Protection of Industrial Property of 20 March, 1883, revised at Brussels on 14 December, 1900, at Washington on 2 June, 1911, at the Hague on 6 November, 1925, at London on 2 June, 1934, at Lisbon on 31 October, 1958, done at Stockholm on 14 July, 1967; the reservation concerns Article 28, paragraph 1.

9) International Convention on Elimination of All Forms of Racial Discrimination of 7 March, 1966; the reservation concerns Article 22;

[5] See, for example, reservations submitted by various states to judicial clauses in the Convention on Privileges and Immunities of the United Nations of 13 February, 1946 and in the Single Convention on Narcotic Drugs of 30 March, 1961 (UN Doc. ST/LEG/SERÆ/5, pp. 36—38 and 242—245).

10) Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed on 25 August, 1924, of 23 February, 1968; the reservation concerns Article 8;

11) Convention on Road Traffic of 8 November, 1968; the reservation concerns Article 52;

12) Convention on Road Signs and Signals of 8 November, 1968; the reservation concerns Article 44;

13) Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December, 1970; the reservation concerns Article 12, paragraph 1;

14) Convention on Psychotropic Substances of 21 February, 1971; the reservation concerns Article 31, paragraph 2;

15) Convention on Suppression of Unlawful Acts **against** Security of Civilian Aviation of 23 September, 1971; the reservation concerns Article 14, paragraph 1.

16) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December, 1973; the reservation concerns Article 13, paragraph 1;

17) Convention on the Elimination of All Forms of Discrimination Against Women of 18 December, 1979; the reservation concerns Article 29, paragraph 1;

18) Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, of 25 August, 1924, as Amended by the Protocol of 25 February, 1968, done on 21 December, 1979; the reservation concerns Article III.

When the above data is compiled it may be concluded that at present Poland is subject to compulsory jurisdiction of the ICJ in the case of 104 treaties. Reservations to judicial clauses have, in turn, been made with respect to 18 treaties.

Generally, it should be affirmed that Poland quite frequently, though selectively, consents to compulsory jurisdiction of the ICJ arising from judicial clauses in treaties. This fact contradicts common opinions on Polish practice in this regard.

As concerns the reservations listed above, I am of the view that their withdrawal would be advisable.

No treaties providing for compulsory jurisdiction of the ICJ have been concluded within the CMEA.

in. Arbitration

Poland is not bound by any multilateral treaty acceeded to in the inter-war period which would call for arbitration as a sole method of dispute settlement.

After World War II Poland accepted compulsory arbitration as a mode of settlement of disputes which could arise with respect to the interpretation or appplication of the following treaties:

1) European Agreement concerning the International Carriage of Dangerous Goods by Road of 30 September, 1957 (Article 11);

2) International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties of 29 November, 1969 (Article VIII);

3) International Convention to Facilitate the Importation of Commercial Samples and Advertising Material of 7 November, 1952 (Article VIII);

4) Convention on the International Hydrographic Organization of 3 May, 1967 (Article XVII);

5) Customs Convention on Containers of 2 December, 1972 (Article 25);

6) International Convention for Safe Containers (CSC) of 2 December, 1972 (Article XII);

7) Convention on the International Maritime Satellite Organization (INMARSAT) of 3 September, 1976 (Article 31, paragraph 2);

8) Operating Agreement on the International Maritime Satellite Organization (INMARSAT) of 3 September, 1976 (Article XVI);

9) International Telecommunications Convention of 6 November, 1982 (Article 50);

10) International Convention on Protection of Marine Pollution by Ships of 2 November, 1973 (Article 10);

11) Protocol to the Convention on Responsibility for Damage caused by Radiologic Break-down during International Transport of Burned out Nuclear Fuel from Atomic Power Plants of State-Members of CMEA of 16 September, 1987 (Article II);[6]

12) International Convention relating to the Arrest of Seagoing Ships of 10 May, 1952 (Article 11);

13) Convention on the World Meteorological Organization of 11 October, 1947 (Article 28);

14) Constitution of the Universal Postal Union of 10 July, 1964 (Article 32).

The protocol listed under point (11) is the first and — so far — the only treaty concluded within the CMEA which provides for compulsory arbitration.

A multilateral treaty binding on Poland which clearly provides for non-compulsory arbitration (the requirement of consent of all interested parties) is the Protocol on Privileges and Immunities of the International Maritime Satellite Organization (INMARSAT) of 1 December, 1981 (Article 17).

Poland has formulated reservations to arbitral clauses calling for compulsory arbitration in the case of the following treaties:

[6] Information on the arbitrary clause related to this convention was submitted by a USSR delegate at the International Law Association Conference in Warsaw, in August 1988.

1) Convention concerning Customs Facilities for Touring of 4 June, 1954; the reservation concerns Article 21;

2) Additional Protocol to the Convention concerning Customs Facilities for Touring relating to the Importation of Tourist Publicity Documents and Materials of 4 June, 1954; the reservation concerns Article 15;

3) Customs Convention on the Temporary Importation of Private Road Vehicles of 4 June, 1954; the reservation concerns Article 40;

4) Customs Convention on the Temporary Importation of Commercial Road Vehicles of 18 May, 1956; the reservation concerns Article 38;

5) Convention on Taxation of Road Vehicles served for Private Use in International Traffic of 18 May, 1956; the reservation concerns Article 10, paragraph 2 and 3;

6) Convention on the Taxation of Road Vehicles engaged in International Goods Transport of 14 December, 1956; the reservation concerns Article 9, paragraphs 2 and 3;

7) Convention on the Taxation of Road Vehicles engaged in International Passenger Transport of 14 December, 1956; the reservation concerns Article 9, paragraphs 2 and 3;

8) Agreement concerning the Adoption of Uniform Conditions of Approval and Reciprocal Recognition of Approval for Motor Vehicle Equipment and Parts of 20 March, 1958; the reservation concerns Article 10;

9) European Convention on Customs Treatment of Pallets used in International Transport of 9 December, 1960; the reservation concerns Article 11, paragraphs 2 and 3;

10) Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP) of 1 September, 1970; the reservation concerns Article 15, paragraphs 2 and 3;

11) European Agreement Complementary to the Convention on Road Signs and Signals of 8 November, 1968, signed on 1 May, 1971; the reservation concerns Article 9;

12) European Agreement Complementary to the Convention on Road Traffic of 8 November, 1968, signed on 1 May, 1971; the reservation concerns Article 9;

13) Additional Protocol concerning Road Designation relating to Additional European Agreement of the Convention on Road Signals, signed on 1 March, 1973; the reservation concerns Article 9;

14) Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) of 14 November, 1975; the reservation concerns Article 57, paragraphs 2—6;

15) European Agreement on Main International Traffic Arteries (AGR) of 15 November, 1975; the reservation concerns Article 13;

16) Convention on Physical Protection of Nuclear Materials of 3 March, 1980; the reservation concerns Article 17, paragraph 2;

17) Convention on International Transport by Rail of 9 May, 1980 (COTIF); the reservation concerns Article 12, paragraphs 1 and 2.

It seems that a withdrawal of the above reservations by Poland would be expedient.

As concerns bilateral treaties providing for compulsory arbitration it can be determined that Poland is bound — so far — by two such treaties. They are: the Agreement between the Government of Poland and the Government of the United Kingdom of Great Britain and Northern Ireland for the promotion and encouragement of investment signed on 8 December, 1987 (art. 9) and the Air Transport Agreement between Poland and the USA of 1 February, 1988 (art. 16) (unpublished). Formerly in the Polish-American relations there were binding air transport agreements of 19 July, 1972 and of 16 April, 1985 (unpublished). They also contained arbitral clauses (art. 13 and art. 16 respectively). On the basis of the agreement of 1972 in 1982 Poland initiated arbitration with the USA. It was later discontinued in view of the conclusion of a new agreement. It was the only arbitration in the Polish practice.

Poland will probably be soon bound by further agreements on the promotion and encouragement of investment concluded with Belgium, Austria, France, Italy, the Federal Republic of Germany, Republic of Korea, China, Luxembourg, Kuwait, Switzerland, Finland, Sweden and other States. These treaties too provide for compulsory arbitration.

It is highly probable that in future Poland will conclude more often than up-to-date multilateral and bilateral treaties containing arbitral clauses. Namely, in December, 1988 the CMEA Commission on Legal Matters elaborated and adopted the text of a typical arbitral clause (with rules of procedure concerning the creation of an arbitral court), which will be included (optionally) in agreements on economic, scientific and technical cooperation concluded between state-members of the CMEA. The clause calls univocally for compulsory arbitration in case of disputes which may arise with respect to interpretation or application of these treaties. As such the institution of compulsory arbitration may develop and consolidate in relations between state-members of the CMEA. The possibility of making reservations to arbitral clauses should be created for such States as Romania which are not interested in compulsory arbitration.

IV. Conciliation

Conciliation differs from judicial and arbitral proceedings in that it results in a recommendation which is not binding on the parties to a dispute.

The only multilateral treaty from the inter-war period binding on Poland today and providing for conciliation as a mode of dispute settlement is the Economic Statistics Convention of 14 December, 1928 (Article 10). Poland is probably still bound by some pre-war bilateral conciliation treaties.

After World War II Poland acceeded to two multilateral treaties calling for compulsory conciliation, that is, conciliation initiated at the request of only one of the parties to a dispute. They are: Constitution of the United Nations Industrial Development Organization (UNIDO) of 8 April, 1979 (Article 22, paragraph 1 (b) (ii)) and Convention on International Liability for Damage caused by Outer Space Objects of 29 March, 1972 (Articles XIV and XIX).

Other multilateral treaties binding on Poland provide for non-compulsory conciliation, that is, conciliation conducted with the consent of all parties to a dispute. Below are enumerated six pertinent treaties:

1) Customs Convention concerning Facilities for the Importation of Goods for Display or use at Exhibitions, Fairs, Meetings or Similar Events of 8 June, 1961 (Article 17);

2) Customs Convention on the Temporary Importation of Packings of 6 October, 1960 (Article 14);

3) Customs Convention on the A.T.A. Carnet for the Temporary Admission of Goods (A.T.A. Convention) of 6 December, 1961 (Article 16);

4) Customs Convention on the Temporary Importation of Professional Equipment of 8 June, 1961 (Article 14);

5) Customs Convention on the Temporary Importation of Scientific Equipment of 11 June, 1968 (Article 18);

6) Customs Convention on the Temporary Importation of Pedagogic Material of 8 June, 1970 (Article 23).

Conciliation is not invoked in any multilateral treaty concluded within the CMEA.

After World War II Poland did not conclude any bilateral conciliation treaties.

V. Settlement of Disputes by Organs of International Organizations

In multilateral treaties binding on Poland two types of regulations can be found with respect to the role of organs of international organizations in the settlement of disputes between parties to the treaties. According to the first type, the settlement of a dispute by an organ is compulsory (that is, it follows the request of one of the parties to the dispute) and comes to an end with a decision binding on the parties to the dispute. This regulation is found in the following three treaties:

1) Agreement on the International Monetary Fund of 22 July, 1944 (Article XVIII);

2) Agreement on the International Bank for Reconstruction and Development of 22 July, 1944 (Article IX);

3) Convention of the Intergovernmental Maritime Consultative Organization of 6 March, 1948 (Article 55).

The second type of regulation, pursuant to which an application to an organ of an international organization is not compulsory (that is, it requires the consent of all parties to a dispute) and in accordance with which the decision of the organ has, in principle, the nature of a non-binding recommendation, is found in the International Convention on the Simplification and Harmonization of Customs Procedures with Supplement E. 5 of 28 May, 1973 (Article 10) and in the Agreement on the Importation of Educational, Scientific and Cultural Materials of 22 November, 1950 (Article VIII).

The possibility to appeal to organs of international organizations, as a mode of dispute settlement, is not provided for by treaties concluded within the CMEA.

VI. Inquiry

The Constitution of the International Labour Organization to which Poland is a party, provides in art. 28 and 29 for the competence of the Inquiry Commission in the case of a dispute concerning the non-satisfactory enforcement by states of the international labour conventions. In the early 1980s the Inquiry Commission investigated the enforcement by Poland of the ILO conventions on trade unions freedoms of 1948 and 1949.

VII. Consultations

The following multilateral treaties binding on Poland provide for consultations between the interested parties in case of problems or disputes arising in the course of their implementation:

1) General Agreement on Tarrifs and Trade of 30 October, 1947 (Article XXII);

2) Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction of 10 April, 1971 (Article V);

3) Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques of 18 May, 1977 (Article V);

4) Convention on Wetlands of International Importance, Especially as Water Fowl Habitat of 2 February, 1971 (Article 5);

5) Agreement on Import Licensing Procedures of 12 April, 1979 (Article 4);

6) Convention on Long-Range Transboundary Air Pollution of 13 November, 1979 (Article 13 provides for negotiations);

7) Convention on the Transfer and Utilization of Data from Remote Sensing of the Earth from Outer Space of 19 May, 1978 (Article VIII);

8) Agreement on Avoidance of Double Taxation of Incomes and Property of Individual Persons of 27 May, 1977 (Article VIII);

9) Agreement on Avoidance of Double Taxation of Incomes and Property of Legal Persons of 19 May, 1978 (Article X).

The three last mentioned treaties were concluded within the CMEA. Consultations were the first method of dispute settlement which appeared in the treaty relations of these states.

VIII. Conclusions

1. Contrary to current opinions cases of acceptance of the compulsory jurisdiction of the ICJ resulting from judicial clauses in treaties are much more frequent in Polish practice than those of advancing reservations to such clauses. Namely, Poland is currently bound by judicial clauses providing for compulsory jurisdiction of the ICJ with respect to 104 treaties, while her reservations concern judicial clauses of 18 treaties.

2. Poland has accepted compulsory arbitration in the case of 14 multilateral treaties, while in the case of 17 treaties it has advanced reservations to arbitral clauses. Thus, the number of cases of lack of consent to compulsory arbitration prevails only insignificantly.

3. Only some treaties with respect to which Poland has accepted judicial and arbitral clauses do not permit any reservations at all.

4. A withdrawal of all reservations to judicial and arbitral clauses contained in multilateral treaties to which Poland is a party would be advantageous.

5. The tendency to include provisons on compulsory arbitration in treaties concluded within the CMEA should be viewed as positive.

6. In connection with the recent change of attitude of Central and East European states in relation to compulsory jurisdiction of international tribunals it is highly probable that judicial and arbitral clauses providing for compulsory procedures will be more often included in treaties. This may also concern bilateral treaties. Moreover, it is to be expected that the number of reservations to judicial and arbitral clauses made by these states will gradually decrease. This tendency should be assessed as positive.

7. Since on the basis of the optional clause a separate system of compulsory jurisdiction is created, the ICJ may deal within this framework — in a case involving Poland — also with treaties the judicial clauses of which were affected by the Polish reservations.

MATERIALS ON POLISH-DUTCH CONFERENCE ON INTERNATIONAL LAW

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL XVIII, 1989-1990
PL ISSN 0554-498X

Introduction

This edition of the *Polish Yearbook of International Law* contains below materials prepared by the participants of the Polish-Dutch conference on international law which took place in Warsaw in 1989.

The main trend of discussion during this conference evolved around the problem of settlement of disputes both in private and public international law. Bearing in mind the fact that the cooperation between Polish and Dutch lawyers has already become a tradition, the *Polish Yearbook of International Law* decided to publish the materials in order to make this interesting considerations accessible to widest circles of lawyers.

A European System of Peaceful Settlement of Disputes?

by ARIE BLOED

1. Introduction

Peaceful settlement of international disputes has been on the agenda of the Conference on Security and Cooperation in Europe since its very inception. Although it has been discussed at the main Conference, at the three CSCE follow-up meetings in Belgrade (1977—1978), Madrid (1980—1983) and Vienna (1986—1989), and at two expert meetings, final agreement on a new European system of peaceful settlement of disputes has not been achieved. In the future new attempts will be made. The question arises to what extent the chances for such a European system have improved at the present time, when East—West relations are undergoing a rapid evolution. Many "traditional" obstacles which hampered progress in the development of East—West relations have been solved at an unprecedented speed, and therefore further progress in the field of the peaceful settlement of disputes might quite well be possible.

Before I shall deal with the desirability and possibilities of a future system of peaceful settlement of disputes on the European continent, I have to sketch the developments in this field since the start of the CSCE process in the beginning of the 1970s until now. At the end of this article I will deal more in particular with the supervisory mechanism for the human dimension of the

CSCE which might form a starting point for a future CSCE system of peaceful settlement of inter-state disputes.

2. The Swiss Proposal on Peaceful Settlement of Disputes at the CSCE in Geneva (1973)

2.1. Introduction

The idea of a European system of peaceful settlement of disputes has been initiated and strongly advocated by Switzerland. A simple confirmation of the principle of peaceful settlement of disputes in a CSCE document would, according to the Swiss view, not be sufficient. A legal-institutional basis would also be necessary. Therefore, Switzerland submitted a draft treaty on this issue at the beginning of the second stage of the CSCE at Geneva in September 1973.[1] Switzerland always has defended the view that security and cooperation in Europe would not be viable without a system for the peaceful settlement of disputes at the European level. The *spiritus rector* of the Swiss proposal stated,

"dass *es langfristig keine Sicherheit und keinen Frieden ohne ein effektives Verfahren der Streiterledigung und der Anpassung des Rechts geben kann. Die Grundsätze verlogen deshalb nach einer Ergänzug durch ein friedliches und letzten Endes obligatorisches Streiterledigungssystem, sofern sie in die Wirklichkeit umgesetzt werden sollen.*"[2]

The total lack of systems of peaceful settlement of disputes was, however, not the reason for the Swiss proposal. As a matter of fact, a great number of bilateral and multilateral instruments were already functioning in this field between the CSCE States. Examples of multilateral instruments are the International Court of Justice, the Court of the EC, the system of the European Convention on Human Rights, *etc.* However, these multilateral instruments *de jure* or *de facto* were applicable almost exclusively to (a number of) the Western CSCE States. Moreover, not all these systems were applied systematically, if at all. As far as bilateral systems were concerned, still greater deGciencies can be observed.[3] Therefore a separate CSCE system would not only be desirable, but it would also enable adaptations focused on the situation in Europe.[4]

---

[1] Text of this draft in: H. A. JACOBSEN, W. MALLMANN, C. MEIER (eds), *Sicherheit und Zusammenarbeit in Europa (KSZE). Analyse und Dokumentation 1973–1978; Dokumente zur Aussenpolitik*, vol II/2 Cologne 1978, pp. 718—774.

[2] R. L. BINDSCHEDLER, "Der schweizerische Entwurf eines Vertrages über ein europäisches System der friedlichen Streiterledigung und seine politischen Aspekte," *Europa-Archiv*, 1976, No. 2, pp. 57—66 at p. 59.

[3] B. SIMMA, D. SCHENK, "Friedliche Streiterlediging in Europa; Überlegungen zum schweizerischen KSZE-Vorschlag," in: *Europa-Archiv*, 1978, No. 14, pp. 419—430 at p. 419.

[4] See about the reasons for the Swiss proposals also V.-Y. CHEBALI, *La diplomatie de la détente: la C.S.C£., 1973–1989*, Brussels 1989, pp. 128—129.

The Swiss proposal aimed at the establishment of a uniform system for the peaceful settlement of disputes which would be applicable to all disputes which can arise in the relations between the CSCE States.

2.2. Contents of the Swiss Proposal

The system, as proposed by Switzerland, would be applicable to all disputes that could arise in the framework of the CSCE. One of the main elements of the draft was the classical fundamental distinction between justiciable and non-justiciable disputes. According to Article 5 of the Swiss draft treaty, justiciable disputes would concern the interpretation and application of public international law in force, whereas all other disputes—also disputes which concern claims concerning the modification of existing law—would be considered to be non-justiciable. The category of the disputes would determine the further procedure. Justiciable disputes would have to be submitted to a permanent court of arbitration, whereas a permanent commission "for investigation, mediation and conciliation" should be established in order to deal with non-justiciable disputes. The draft provided, however, that by mutual agreement between the States concerned justiciable disputes could also be submitted to the permanent commission.

According to the Swiss draft a dispute could be submitted both by CSCE States and by international organizations whose membership is restricted to these same States. However, only States or international organizations which are parties to the dispute would be entitled to submit the dispute to the commission or the court of arbitration. It was laid down in the draft that the new European system would have a subsidiary character: it would only become operative in case the dispute concerned would not be peacefully settled in another way. In that case the European system would be compulsory.

The draft convention excluded an *actio popularis:* only the parties (states or international organizations) directly involved in a conflict would be entitled to start a procedure. This implied that parties to a dispute could only use one of the procedures if it could prove its own substantive interests. This would imply that State A would not be entitled to raise questions of human rights in State B, unless on the basis of diplomatic protection if the citizens of State A are involved. Only in case human rights questions are considered to belong to *jus cogens,* which is nowadays a prevailing view, there would be a basis for raising such disputes under the "Swiss system."

The Swiss proposal was characterized by some major weaknesses. One of the main weak points was the just-mentioned distinction between justiciable and non-justiciable disputes which would enable States to obstruct the smooth

functioning of the system by arguing that the dispute in question was of a different nature than the other State(s) would believe.[3]

23. Controversies about the Swiss Proposal

It has correctly been argued that a system of peaceful settlement of disputes should at least comply with certain conditions in order to have a chance of success, *inter alia:*

— A satisfactory number of States should participate in it, *in casu* ratify the pertinent treaty:

— The system must be structured in such a way that it may really contribute to the solution of disputes;[6]

— A minimum consensus on the applicable law.[7]

The first two conditions are contradictory to a certain extent: stricter, and more effective procedures will deter certain States, whereas less far-reaching procedures may attract a greater number of States at the cost of its effectiveness.

The Swiss proposal put a strong emphasis on compulsory jurisdiction, on third party involvement and on the participation of international organizations in the system. This implied that the Swiss system heavily relied on the second condition. The result was that several CSCE States were not inclined to establish such a system. Objections were raised, in particular, by East European States which considered the proposed system as na infraction of their sovereignty. Moreover, the views of certain socialist States on public international law, more in particular their concepts of different spheres of international law,[8] constituted another obstacle. Objections were also voiced by Western States. The USA in particular, was not in favour of the establishment of any new organ which would have compulsory jurisdiction in disputes in which the USA would become involved.[9]

---

[5] B. SIMMA, D. SCHENK, "Der schweizerische Entwurf eines Vertrages über ein europäisches System der friedlichen Streiterledigung," in: B. SIMMA, E. BLENK-KNOCHE (eds), *Zwischen Intervention und Zusammenarbeit, Interdisziplinäre Arbeitsergebnisse zu Grundfragen der KSZE,* West-Berlin 1979, pp. 363—400 at p. 378.

[6] IDEM, pp. 390—391.

[7] SIMMA, SCHENK, *loc. cit.* (note 3), p. 428.

[8] W. BRUNS, "Die DDR und das Prinzip der friedlichen Streitbeilegung, *Deutschland-Archiv,* 1978-11, No. 11, pp. 956—963 at p. 958.

[9] *Cf.* also the Connally Amendment relating to the US acceptance of the jurisdiction of the International Court of Justice; see S. ROSENNE, *The Law and Practice of the International Court,* voL I, Leyden 1965, pp. 395*iff.*

2.4. Provisions on the Swiss Proposal in the Final Act

The differences of opinion during the negotiations prevented the conclusion of any agreement on the issue of the establishment of a separate system of peaceful settlement of disputes in Europe. However, the discussion was not definitively closed at the CSCE, as, despite all obstacles, certain positive signals were also to be heard. Therefore, it was laid down in the Final Act of Helsinki that the CSCE States

"(a) resolved to pursue the examination and elaboration of a generally acceptable method for the peaceful settlement of disputes aimed at complementing existing methods, and to continue to this end to work upon the Tirait Convention on a European System for the Peaceful Settlement of Disputes' submitted by Switzerland [...], as well as other proposals relating to it and directed towards the elaboration of such a method." [10]

With this end in view it was decided that, on the invitation of Switzerland, a meeting of experts of all CSCE States would be convoked. [11]

It should be stated that the Final Act, of course, contains a separate principle in the Declaration on Principles concerning the peaceful settlement of disputes (Principle V). This principle contains only an elaboration of the general international law principle of peaceful settlement of disputes. However, it does not encompass the establishment of a new system which in the view of Switzerland was meant to be the institutional basis for Principle V. In case of the establishment of such a system, the text of Principle V would form the starting point of the application of such a system.

3. Montreux Meeting of Experts 1978

The meeting of experts, provided for in the Final Act of Helsinki, took place at Montreux from 31 October to 11 December, 1978. This date was agreed upon during the first CSCE follow-up meeting in Belgrade (1977—1978), one of the very few results of this otherwise unsuccessful CSCE meeting.

At Montreux, the Swiss delegation presented a working paper [12] which formed an adaptation to the original Swiss Draft Convention on a European System for the Peaceful Settlement of Disputes. The adaptations boiled down to a moderation of the third party involvement in the proposed procedures. A few examples may suffice here:

— the working paper introduced a new procedure for negotiations in which at the beginning only the parties to a conflict would be involved;

[10] **Final Act of Helsinki, first basket, section 1 (b), paragraph ii.**
[11] **SIMMA, SCHENK,** ***loc. cit.*** **(note 3), p. 428.**
[12] **REM/1.**

— the permanent commission for investigation, mediation and conciliation would also get the right to recommend the resumption of bilateral negotiations;

— a stricter description of those disputes which — subsequent to a phase of negotiations — would have to be submitted to the court of arbitration.[13]

However, from the very begining of the Montreux Meeting it was evident that no consensus would be possible on the Swiss proposals. This was also due to the deterioration in the East — West relations. The socialist States acted, in particular, against elements in the Swiss proposal, such as the exclusion of the possibility to make reservations to the treaty, the involvement of third parties (commission, court of arbitration) in the procedures, and the equal position of States and international organizations. One of the main purposes of the East European, and in particular Soviet, approach during the meeting of experts has remained the prevention of any involvement of third States in procedures on the settlement of disputes between States. Besides, the opposition was directed against any involvement of international organizations in the new system.

The counter-proposal, submitted by the socialist States,[14] opted for a system of consultations. According to this proposal, third parties would only be involved with the consent of all parties to the dispute.

The Western proposal,[15] in contrast, reserved a more important role for third States in the procedures. It also provided for a more gradual extension of the procedures.

Although no consensus was reached on any specific method, the CSCE States agreed on a common approach to the elaboration of a method which should be based on eight criteria (*e.g.*, flexibility, consistency with sovereign equality of States, acceptability to all CSCE States, efc.).Furthermore the participants in the Montreux Meeting recommended that the CSCE States consider the possibility of promoting and extending the existing practice of including, in appropriate treaties, provisions for the peaceful settlement of disputes. Finally, the Report of the Montreux Meeting, adopted on 11 December, 1978, suggested that the CSCE States should consider at the Madrid Follow-up Meeting the possibility of convening another meeting of experts on this subject.[16]

---

[11] It concerns a limitation to legal disputes which would encompass: international responsibility, problems of neighbours, transport law, environmental law, diplomatic and consular law, diplomatic protection, questions of criminal law, interpretation and application of international treaties, and validity, entry into force and termination of treaties. See G. HAFNER, "Bemühungen um ein gesamteuropäisches Streitbeilegungssystem im Rahmen der KSZE," in: K. B. Böckstiegl, H. E. Folz, J. M. Mössner, K. Zemanek (eds), *Völkerrecht. Recht der Internationalen Organisationen, Weltwirtschaftsrecht, Festschrift für Ignaz Seidl-Hohenveldern,* Cologne 1988, pp. 147—171 at p. 150.

[14] REM/4.

[15] REM/5.

[16] Text of this document in: A. BLOED (ed.), *From Helsinki to Henna; Basic Documents of the*

4. Athens Meeting of Experts 1984

The Follow-up Meeting of the CSCE in Madrid (1980—1983) indeed provided for another meeting of experts on peaceful settlement of disputes. This meeting took place in Athens from 21 March to 30 April, 1984.

The Swiss delegation submitted here a new "working paper" which, compared to the previous drafts of 1973 and 1978, was much more moderate in its scope and contents.[17] The new proposal no longer provided for the establishment of a permanent court of arbitration, although the *fiiture* creation of such an institution was still taken into consideration. The Swiss draft only contained an enumeration of possible procedures, such as mediation, conciliation and arbitration.

Some remarkable aspects of the new Swiss proposal are:

— Only the procedures of mediation and conciliation would be compulsory;

— Neither mediation nor conciliation would end with a binding decision;

— A cooling-off period of a year (at most) in case of conciliation;

— Only a limited involvement of third States.

Despite the free choice of procedures by the parties concerned and despite the very limited role for third States, the new Swiss proposal was again confronted with serious opposition on the part of the socialist States. This observation ensues from the counter-proposal of Czechoslovakia,[18] supported by the other socialist States, which almost exclusively provided for consultations in case of disputes. Moreover, it stressed the need of agreement among the parties concerned about the very existence of a dispute. Any involvement of third States, even in case the States concerned would consent to it, was rejected.

Switzerland argued that an institutionalization of the existing practice would be too meagre a result of the meeting of experts. A positive outcome of the Athens Meeting was further hampered by the American bahaviour. Precisely at the time of the Athens Meeting, the USA issued the famous declaration that they considered the application of Nicaragua *versus* the USA inadmissible in view of the restriction of the US acceptance of the jurisdiction of the International Court of Justice.[19]

The Athens expert meeting adopted a short report, but it contained hardly any substance. It noted that "some progress" was made in the examination of a generally acceptable method for the peaceful settlement of disputes and that

---

Helsinki Process, Dordrecht, Boston, London 1990, pp. 105—106.

[17] Proposal CSCE/REA 2 of 22 March, 1984, published in: L. CAFLISCH, "La pratique suissse en matière de droit international public 1984", *Schweizerisches Jahrbuch fir Internationales Recht*, 1985, vol XU, pp. 135—234 at pp. 216—219.

[18] CSCE/REA4.

[19] US declaration of 6 April, 1984, quoted in: *ICJ Reports*, 1984, p. 398.

particular emphasis was put "on ways and means of including a third party element." It also referred to the desire of further discussions on this subject in "an appropriate framework within the CSCE process," but it did not propose a third meeting of experts.

5. Vienna CSCE Follow-up Meeting

Although the Athens Meeting did not propose a third meeting of experts on peaceful settlement of disputes, nevertheless the Vienna Follow-up Meeting of the CSCE decided in January 1989 to convene a third meeting at Valletta in January and February 1991. The mandate for this meeting indicates a certain flexibility on the part of the CSCE States which might enhance the chances of success of the third meeting.

In Vienna, it was agreed that the CSCE States "accept, in principle, the mandatory involvement of a third party when a dispute cannot be settled by other peaceful means." [20] This constituted a certain progress which is reflected in the acceptance in principle of mandatory involvement of third parties. This boiled down to a change in the "traditional" position of the socialist States. This is further confirmed in the mandate for the Valletta Meeting of Experts which reads as follows:

"In order to ensure the progressive implementation of this commitment, including as a first step, the mandatory involvement of a third party in the settlement of certain categories of disputes, they decide to convene a Meeting of Experts in Valletta from 15 January to 8 February, 1991 to establish a list of such categories and the related procedures and mechanisms. This list would be subject to subsequent gradual extension. The Meeting will also consider the possibility of establishing mechanisms for arriving at binding third-party decisions. The next CSCE Follow-up Meeting will assess the progress achieved at the Meeting of Experts." [21]

The Concluding Document of the Vienna Follow-up Meeting of the CSCE is also important for the present subject in another sense. It established a special mechanism for supervising the implementation of the commitments in the field of the so-called "human dimension of the CSCE." [22] This mechanism encompasses four procedures which may be used by all CSCE States

[20] Provision 6 of the first basket of the Concluding Document of the CSCE Follow-up Meeting of Vienna of January 1989. Text of the Vienna Document in: BLOED, *op. cit.* (note 16), pp. 181—263.

[21] Provision 7 of the first basket of the Vienna Document The agenda, timetable and other organizational modalities are set out in the first annex of the Vienna Document

[22] The "human dimension of the CSCE" is described in the Vienna Document as encompassing "the undertakings entered into in the Final Act and in other CSCE documents concerning respect for all human rights and fundamental freedoms, human contacts and other issues of a related humanitarian character" (chapter on the Human Dimension of the CSCE in the Vienna Document).

in — officially — "questions relating to the human dimension of the CSCE" which in practice always will concern alleged violations of human rights.

The mechanism, as laid down in the Vienna Document, contains the following four elements:

1. The exchange of information: The CSCE States decided to exchange information and respond to requests for information and to representations made to them by other participating States on questions relating to the human dimension of the CSCE. The States are obliged to supply the information asked for;

2. Bilateral consultations: If the exchange of information asked for does not lead to satisfactory results, the CSCE States are entitled to convene a bilateral meeting with the other State in order to (further) examine such questions, "including situations and specific cases with a view to resolving them."

3. Notification procedure: If the exchange of information and/or the bilateral meeting has not led to a solution, the CSCE States are entitled to inform all other States about the questions concerned;

4. Annual meetings of the Conference on the Human Dimension of the CSCE: Finally, if the previous procedures, which all aim at the solution of the problems, remain futile, the CSCE States have the right to raise these problems, "including information concerning situations and specific cases," at the (annual) meetings of the Conference on the Human Dimension of the CSCE (usually referred to as the CDH according to the French abbreviation). At these meetings all 35 CSCE States will be present. The first meeting of the CDH was held in Paris in May/June 1989, the second in Copenhagen was held in June 1990 and the third will be held in Moscow in September/October 1991. As a matter of fact the next Follow-up Meeting of the CSCE in Helsinki in 1991 may also be used to raise such unsolved problems of the human dimension of the CSCE.

An important feature of the supervisory mechanism is its compulsory nature. States are obliged to respond to diplomatic démarches by any other CSCE State. Moreover, any CSCE State is entitled to raise issues under the mechanism, without being obliged to prove its special political or legal interest In this sense it resembles an *actio popularis*. However, the mechanism does not provide for binding decisions in the last phase of the mechanism nor for sanctions being imposed on States which violate their obligations. Practice indicates that the many questions which could be raised in relation to the supervisory mechanism, have not prevented its functioning. States have resorted to its procedures a great number of times in the first year of its operation.[23] At the second meeting of the Conference on the Human

[23] On the mechanism see: A. BLOED, "Institutional Aspects of the Helsinki Process after the Follow-up Meeting of Vienna," *Netherland International Law Review*, 1989, No. 3, pp. 342—363 at pp. 352—361. After the revolutionary developments in Eastern Europe at the end of 1989, the

Dimension in Copenhagen in June 1990, a few additonal agreements were adopted in relation to the supervisory mechanism. These concerned time limits for the first and second phases of the mechanism and the agreement to refrain, in the course of a bilateral meeting (second phase), from raising questions not connected with the subject of the meeting, unless both sides have agreed to do so.[24]

Although it has to be recognized that this supervisory mechanism for the human dimension of the CSCE has not been created for the peaceful settlement of inter-state disputes in the strict sense of the word, a close connection exists. It may be stated that the mechanism has been construed in such a way that it should prevent the arising of inter-state disputes, as it allows the CSCE States to take action without the existence of a dispute in the real sense of the word. If, despite the functioning of the mechanism, disputes do arise, it offers procedures for solving them. However, although States are obliged to respond to overtures, made towards them by any other CSCE State, the mechanism does not provide for binding settlements against the will of any CSCE State. Moreover, it has to be realized that the obligations under the supervisory mechanism are CSCE obligations, in other words: they are politically, not legally binding obligations.[25]

Although the supervisory mechanism is restricted to only one, albeit a very important CSCE area, its establishment is of great importance for the subject of the peaceful settlement of disputes. It indicates that all CSCE States are now willing to accept far-reaching procedures of a compulsory nature for solving mutual problems. This development may indicate that similar developments in the more "traditional" held of methods for the peaceful settlement of inter-state disputes might also be possible nowadays.

6. Ideas about a Separate European System of Peaceful Settlement of Disputes

As indicated above, agreements have been reached in order to continue the discussion aimed at the elaboration of procedures and mechanisms for the peaceful settlement of disputes (in particular a meeting of experts in Valletta in

mechanism has been applied only rarely. One example is the application by the EC States in relation to Yugoslavia because of the treatment of Albanians in Kosovo.

[24] Other proposals which aimed at a further elaboration of the rather vaguely formulated supervisory mechanism of the human dimension of the CSCE (*e.g.* a proposal to set up a Committee on the Human Dimension of the CSCE) have not been adopted at the Copenhagen conference. A new effort will be made in Moscow in October 1991 at the third meeting of the CDH.

[25] On the binding force of the commitments, laid down in CSCE documents, see, *e.g.*, P. van DIJK, "The Final Act of Helsinki—Basis for a Pan-European system?," *Netherlands Yearbook of International Law*, 1980, pp. 97—124 at p. 110.

1991). The question has to be raised, however, whether such efforts are still necessary? Is it really needed to create new methods of peaceful settlement of disputes, in particular methods of a compulsory nature, in the CSCE framework? Such questions urge the more as a great number of procedures of a political and legal nature exist already. Would it not be more desirable that CSCE States join existing procedures instead of creating new ones?

First, what was and/or is the main purpose of creating a European system of peaceful settlement of disputes? In principle, as already mentioned above, the purpose is twofold:

1) The creation of a *uniform* and all-encompassing system of peaceful settlement of disputes for all CSCE States, irrespective of their political, economic and social structure and membership of alliances;

2) The institutionalization of a European system for the settlement of *all* disputes between the CSCE States. The system should not only be applicable to disputes relating to CSCE commitments, but also to all other disputes between the CSCE States.[26]

Despite the enormous changes in the States of Central and Eastern Europe in recent rimes, these purposes have not yet been realized. A great number of specific procedures for the peaceful settlement of disputes have been created in the past, but none of them meets the two just-mentioned purposes. Effectively functioning procedures (for instance, the Court of Justice of the European Communities; the European Commission and Europeaq Court of Human Rights) are limited in scope *ratione materiae* and *ratione personae*. Other procedures may be used by all States, but *de facto* this is hardly practised, for instance, the International Court of Justice (ICJ) or the Permanent Court of Arbitration. The latter also applies to the European Agreement on the Peaceful Settlement of Disputes which has been concluded in the framework of the Council of Europe on 29 April, 1957.

Possibilities to improve this situation are either the wider use of existing procedures of peaceful dispute settlement or the creation of new procedures, or a combination of the two. I am of the opinion that the latter option would be most advisable.

The fact that a number of multilateral procedures have not functioned effectively, if at all, in the past should not be equated with their total failure, in each case in the European context The opposite might be true, as in recent times several Central and East European States have developed a positive approach to several of them. To mention some major examples: the Soviet Union has recognized the compulsory jurisdiction of the ICJ in relation to certain human rights instruments and is considering to join the Optional Protocol of the Covenant on Civil and Political Rights. In other Central and East European States similar developments may be observed. Hungary and

[26] SIMMA, SCHENK, *loc. cit.* (note 5), p. 365.

Poland, for instance, have indicated their interest to join the system of the European Convention for Human Rights. This development should be further stimulated as far as possible.

At the other hand it should be taken into account that existing procedures for the settlement of disputes might not be suitable for the framework of the CSCE, or rather not for all CSCE issues. The CSCE forms a highly dynamic political process and the commitments, entered into by the 35 participating States, have not been given the form of legal commitments. Although a further institutionalization of the CSCE is likely, to all probability it will not be converted into a "traditional" international organization. Besides, the CSCE forms the only forum where all European States (except Albania), the USA and Canada periodically convene for consultations on almost all important issues of their mutual relations: political and security issues, economic and scientific-technical cooperation, protection of the environment and humanitarian questions. Therefore, a specific system for the settlement of disputes between the CSCE States which takes into account the peculiarities of the CSCE process might constitute a positive contribution to the strengthening of peace and security in Europe.

At present the chances for the establishment of a European system are probably better than ever before. The Central and East European States indicate an increasing flexibility as far as the acceptance of mandatory forms of peaceful dispute settlement is concerned. Moreover, the traditional obstacle of the divergent views on the nature of public international law between the so-called socialist and capitalist States is apparently fading away completely. The Soviet Union is explicitly emphasizing the unity of international law in the world and apparently no longer adheres to different spheres of law, labelled with the slogans "peaceful coexistence" and "socialist internationalism."[27] The other (former) socialist States of Eastern Europe seem to have fully abandoned any adherence to "socialist international law" after the collapse of the communist regimes in these countries in the second half of 1989.

Although now a greater flexibility on the part of the East European States exists than ever before, the creation of a new system by unanimous consent of all 35 CSCE States will still require enormous efforts. The best solution for the time being will probably be to start a multi-stage process. A good start might be the establishment of a commission (*cf.* the Swiss proposals for a commission of investigation, mediation and conciliation). This commission should be

[27] See, *e.g.*, V. S. VERESHCHETIN, R. A. MIULLERSON, "Novoe myshlenie i mezhdunarodnoe pravo" *Sovetskoe Gosudarstwo i Provo*, 1988, No. 3, pp. 3—9. See also VERESHCHETIN, MIULLERSON, "Primat mezhdunarodnogo prava v mirovoi politike," *Sovietskoe Gosudarstwo* i *Prawo*, 1989, No. 7, pp. 3—11; R. A. MIULLERSON, "Sources of International Law: New Tendencies in Soviet Thinking," AJIL, 1989, No. 3, pp. 494—412; V. S. VERESHCHETIN, R. A. MULLERSON, "International Law in an Interdependent World," *Columbia Journal of Transnational Law*, 1990, No. 1, pp. 291—300.

granted the competence to issue recommendations concerning inter-state disputes at the request of one or more of the States concerned. This commission should be granted the right to deal with disputes at the request of one party, also without the consent of the other. In case of non-fulfilment of the recommendation several options exist, such as, the obligation to motivate the refusal to execute the recommendation and the obligation to reconsider a refusal after a certain time. In a later stage arbitration could be introduced.

Although it may be assumed that such a system would be acceptable to the vast majority of the CSCE States nowadays, it has to be assumed that some CSCE States might still raise obstacles. Therefore, one may wonder whether it would not be more advisable to tackle the problem from another line of approach. What I have in mind here is the presently functioning supervisory mechanism for the human dimension of the CSCE. Although it has to be repeated that in principle this mechanism is not primarily aimed at the peaceful settlement of inter-state disputes, it could nevertheless form a starting-point for a further development in this area. More in particular I am of the opinion that the mechanism for the human dimension of the CSCE — which only a few years ago would have seemed to be an utopia — should be supplemented with another "parallel" mechanism for the peaceful settlement of inter-state disputes. Instead of the creation of a totally new system for the peaceful settlement of inter-state disputes, this would boil down to the enlargement of the existing CSCE mechanism. Both mechanisms should then be integrated to a certain extent under a joint umbrella.

This does not imply, of course, that the presently functioning mechanism for the human dimension of the CSCE would not be susceptible of improvement At the opposite, all four phases of the mechanism should be further elaborated. This concerns, for instance, the fact that the present mechanism does not end with a **recommendation** or binding resolution of the CDH; a situation which should be further investigated in order to establish stricter procedures.[28] But simultaneous to an improvement of the mechanism for the human dimension, a new "parallel" mechanism should be created in order to cover also all disputes between CSCE States in other areas.

Why do I consider this way to be advisable? The major reason is that the supervisory mechanism as it functions today familiarizes all CSCE States with international interference in such a sensitive area as human rights and humanitarian issues. The experience gained so far indicates that all CSCE States have accepted the mechanism[29] without causing insurmountable visible problems. It is evident that all CSCE States — the more so after the changes of

[28] See further BLOED, *loc. cit.* (note 23).

[29] In January 1990 the new Romanian government has withdrawn the Romanian reservations in relation to the provisions on the human dimension of the Vienna Concluding Document alter the collapse of the Ceausescu regime in December 1989.

government at the end of 1989 in the States of Central and Eastern Europe—adhere to a rational, businesslike approach towards the mechanism and have made use of it themselves, even at times of the communist regimes in Central and Eastern Europe. Experience also indicates that the acceptance of such a system—contrary to fears which could be observed in the past—has not had "disastrous" effects on the society. To put it plainly: the world has not come to an end with the international interference in humanitarian questions which is inherent in the functioning of the supervisory mechanism.

Taking all this into account, it should not be an impossibility to enlarge the scope of the mechanism for the human dimension of the CSCE to less sensitive issues in other areas. A simple enlargement of the scope of the present system, however, would not be possible, taking into account the different nature of the cases and conflicts involved. Therefore another "parallel" mechanism should be construed for the peaceful settlement of disputes which should take as a starting point the existing mechanism of the human dimension. In order to be applicable to "traditional" inter-state disputes certain modifications in the CDH mechanism would be necessary.

Let us have a closer look at all four phases successively.

The *first phase* (requests of information) should be maintained for inter-state disputes, but possibly with stricter requirements and with certain minor changes. Instead of requests of information, the applying State should submit a written statement with its view of the (alleged) dispute, followed by a proposal for a solution. The "defendant" State then should be obliged to respond, equally in written form which should encompass a motivated response. The advantage of this first phase for inter-state disputes might be the obligation to formulate the dispute in clear terms in the framework of a CSCE mechanism as a whole. The time limits for the first phase as laid down in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (adopted on 29 June, 1990)[30] should also be prolonged in case of inter-state disputes: a period of no more than four weeks may be considered to be too short to prepare a balanced, motivated response. The more so since this first phase might be the beginning of a procedure which results in the starting of legal procedures (arbitration or justice) at later stages.

The *second phase* (bilateral negotiation) could roughly be maintained as well as the *third phase* (notification of all other CSCE States in case of failure of the previous phases). Finally, a major modification is necessary for the last phase, as the Conference on the Human Dimension would certainly not be the first forum to deal with such inter-state disputes. This could be substituted by

[30] In the Document of the Copenhagen Meeting the obligation for all CSCE States has been laid down "to provide in as short a time as possible, but no later than four weeks, a written response to requests for information and to representations made to them in writing by other participating States." Text of the document in: *Helsinki Monitor* (Utrecht), 1990, No. 3.

either another CSCE plenary conference or by a special commission of mediation and conciliation. The first alternative would not be logic, as I fail to see the effectiveness of it in solving inter-state disputes. The establishment of a special CSCE commission of mediation and conciliation could be much more effective. This commission should be entitled to reach its own conclusions, either by way of recommendations or by way of binding decisions and whether in private or in public. Here we find a combination of the above-mentioned proposals.

Although the just-described system of peaceful settlement of disputes in the CSCE framework leaves of lot of questions open and will be susceptible of further improvement, nevertheless it might constitute a valuable starting point for effective negotiations on a new European system for the peaceful settlement of inter-state disputes in the framework of the CSCE.

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVIII, 1989-1990
PL ISSN 0554-498X

Comments on Arie Bloed's Theses

by ANDRZEJ WASILKOWSKI

Arie Bloed has presented a perspective of establishing a European system of peaceful settlement of international disputes. I quite agree that today there are great chances to achieve this goal. We should also assume that the system in question can be shaped, first of all, within the framework of the Conference on Security and Cooperation in Europe (CSCE). In view of the fact that the United Nations and Canada took part in the CSCE it would be a European-North American system.

In my commentary on the above problem I would like to discuss some requirements which should be met in the process of construction of the future system. It is self-evident that the requirements in question are of the legal nature.

It must be said that so far in the CSCE activity the legal aspects have been rather in the background. However, it does not seem to obstruct the development of cooperation which periodically has been quite lively. On the other hand, it may appear to be an obstacle if construction of a coherent and effective system of peaceful settlement of disputes is aimed at

The insignificant role of law in the CSCE process certainly follows from the character of the Final Act of Helsinki which constitutes a basis for cooperation. As it was defined by one of the authors, the Final Act "is a new kind of animal. It has the body of a treaty, the legs of a resolution, and the head of a declaration of intent."[1] It was exactly because of this similarity to a treaty that many representatives of states expressed their reservations in Helsinki that the signed document was not an international agreement. Many formulations in the Final Act have a form characteristic of the declaration of intent. In agreement with paragraph 3 of the clauses, Finland, the depositary of the Act submitted it to UN Secretary General. However, the document was not meant to be registered in mode of Article 102 of the Charter but to be disseminated as an official document of the United Nations. The analysis of the text of the document brings other directives, like, for instance, that "participating states" (not "contracting parties") do not consider the obligations contained in the Final Act as the legal-international ones.

Therefore, a situation arises in a sense a paradoxical one. It must be said that there are very few international acts which have brought so far-reaching and significant effects to the participating states. A major part of international

[1] *Cf.* J. E. S. FAWCETT, "The Helsinki Act and International Law", *Revue belge de droit international*, 1977, Nos 1—2, p. 5.

agreements does not contain such a consistent and effective system of controlling the commitments taken as that which have been shaped in the process of realization of the decisions of the CSCE Final Act. A foundation of all this is the document of a non-binding nature from the point of view of international law.

This particular formal status of the Final Act does not refrain many politicians and journalists from qualifying it as the "Helsinki Treaty" or the "Helsinki Agreement" Such qualifications point quite adequately to the role the Final Act has been playing in the international life althugh from the strictly formal point of view they are not justified.

There is another very important circumstance — the states themselves seem to treat the Final Act as if it were binding the same way as international agreements, in spite of the formulations contained in it. When meeting the objections with regard to the manner of implementation of the particular decisions of the Final Act, the states use various arguments and interpretations of the taken committments. However, they do not declare that it is not a treaty and thus it is non-binding.

We could claim that today the nature of the Final Act has no greater practical importance. It is true that this particular status of the Act has never been a check on the development of cooperation. However, the problem looks differently from the point of view of the future system of peaceful settlement of disputes. Such a system should be based on a clear legal basis. From the theoretical point of view the legal basis might be looked for in the customary norms shaped in the process of implementation of the Final Act. It is possible that the establishment of such norms can be substantiated. An attempt to prove that the Final Act has gradually become a treaty, although it was not a treaty when signed, may be successful because the participating states consider it as a treaty in their practice.

From the practical point of view the attempts to find the legal foundations of the CSCE could appear hardly satisfying. Finding out if a norm or customary norms have been established is rather a long and controversial process. Moreover, a very broad subject scope of the Final Act and various modes of formulations of its particular decisions must be taken into consideration. In view of the fact that the experience in cooperation has been long and the CSCE functions have been changing in the changing international situation — different from that of 1975 — the best solutions would be imparting to the CSCE a new treaty-like character. This way the system of peaceful settlement of disputes would be provided with the reliable foundations.

However, one should realize that from the point of view adopted here the Final Act is not the only product legally undervaluated. Some other elements of the CSCE process are undervaluated too, like for instance the Follow-up Meetings. Therefore if the cooperation within the CSCE framework would

acquire a character of a treaty, the legal character of the Follow-up Meetings could be more easily defined, and the legal significance of the commitments all the more so. It is worth admitting that the Follow-up Meetings have been a dynamic factor in the development of cooperation in various fields, which is testified to by the Vienna Concluding Document of 1989. The commitments resulting from these meetings could be expected to contain new projects and initiatives, going beyond the Final Act or a future treaty outlining the framework and forms of cooperation.

Looking at the problem in terms of a future system of peaceful settlement of disputes, it would be very important to be able to define the nature of the participating states commitments following from the Follow-up Meetings. Are they obligations of purely political character or have they some legal value? Are they classical recommendations of an international conference or qualified recommendations of an international organization? Perhaps they are international agreements in a simplified form?

All the above interpretations, and certainly some others too, are possible. Therefore if a dispute arises with regard to the character of the commitments, it will be good to have a possibility to define accurately the character of the obligations undertaken by the states-parties.

The future system of peaceful settlement of disputes in Europe will not be shaped as a result of adoption of a general concept. It will be created — at least in the initial phase — during the process of cooperation in some more mature field using the method of attempts and errors. Therefore these commitments undertaken in the CSCE process will occupy here a particular place just because it is primarily they which determine these more mature fields of cooperation. It is also here that a *sui generis* experimental plots are created.

The evolution of the relations between the European states brings into prominence many concrete problems.[2] Among them are human rights, protection of environment, terrorism, drug trading. A great importance acquires here the movement of persons (also in the sense of conflict raising, particularly in the relations between the countries with different level of economic development. Problems of protection of national, denominational and other minorities are also included here.

The economic relations also bring some concrete problems (within the framework of cooperation under CSCE the principal issue in question are the relations between the developed West and underdeveloped European East). Typical of our times are various agreements on the assistance of the West given to Central Eastern Europe in passing from the planned economy to market economy, agreements on the protection of foreign investments, on the flow of modern technologies, *etc.*

[1] A large survey of these problems in: V. Y. GHEBALL, *La diplomatie de la détente: la C.S.C.E. d'Helsinki à Vienne (1973–1989)*. Bruxelles 1989.

Altogether these are the various aspects of the process of a gradual unification of Europe not in a political sense but in a sense of the formation of a more uniform economic and legal-political infrastructures. Against this background a common European legal culture is being shaped (or one may say is being revived).

Today if we speak of a future European system of peaceful settlement of disputes, we primarily have in mind these new spheres and problems mentioned above. It is obvious that among the European states there may arise classical disputes (*e.g.* in connection with demarcation of maritime zones, security of diplomats, *etc).* However, such disputes are not typical of the present development of relations and do not generate the formation of a European system of peaceful settlement of international disputes. A ground on which this system could be shaped are disputes which arise — as we have described it — in the process of a slow unification of Europe. For the most part they are the disputes rooted in the internal competence of states, that is, in the domestic law. A great amount of ever-growing international agreements and commitments is aimed at shaping the domestic policy of states and also at changing law. This is one reason more for giving to the cooperation under CSCE a treaty importance, the binding legal character of commitments taken at the Follow-up Meetings including. Constitutions of most of states know various ways of joining the legal international norms with the domestic legal order (incorporation, transformation, reception, reference, *etc.).* Therefore if a standard procedure agreed upon by states jointly takes a form of an international obligation, a further mode of proceeding is usually specified, aimed at efficacy of a given solution in the internal relations. On the other hand, no mode of proceedings has been established for obligations of a pure political character. If in order to achieve the goal changes of the law in force are needed, the states have then one possibility only, that is, to keep to a usual legislative procedure. This might appear to be too protracted or meet some obstacles difficult to overcome, *e.g.* those resulting from the international relations or the balance of forces in the parliament.

What we have called here a prolonged unification of Europe is primarily manifested in agreeing upon common standards in various fields. As a rule they are concerned partly or totally with internal relations of states *(e.g.* technological, communication, sanitary standards). More and more of them are concerned with the situation of man, citizen and worker. A result of these transformations is that it has become a normal and widely accepted practice that physical and legal persons are the addressee of the norms of international law.

This evolution makes one ponder over the place of legal-international norms in the domestic legal orders of states participating in CSCE. A rational and effective solution of this problem is one of the conditions of creation of the

European system of peaceful settlement of disputes. It follows from the above outlined tendency that a greater part of disputes will be related to the implementation of various commitments in the domestic orders of states. The Concluding Document of the Vienna Follow-up Meeting is devoted to such disputes, dealing with a sphere typical of CSCE and usually termed human dimension.

The studies conducted in Poland on the place of legal-international norms in the domestic legal orders point to serious differences in the constitutional approach to the problem in the particular states participating in CSCE.[3] In many cases they are the differences of fundamental significance. They pertain to such issues as recognition (or non-recognition) of the primacy of international law, direct applications of international law by the courts and other state organs, and a problem of transformation. Some constitutions do not regulate these issues in a clear-cut manner, others reduce them to defining the place of treaty norms and regulate the conflict problem between the law and international agreement. A number of other constitutions refer in one way or another to customary norms.

These differences result from the constitutional texts themselves. Sometimes they become more glaring if we reach to the constitutional practice and to the courts' judicial decisions in particular. Here one may meet, for instance, a narrow or simply restrictive interpretation of constitutional provisions which are to ensure the application of legal-international norms. In many countries one of the controversial issues is the relation between an international agreement and a law laid down later (conflict of regulations). It may also happen that in the constitutional practice various tendencies and interpretations are vying and there is no certainty as to the conduct of legal transactions.

The differences discussed in the present paper lead to some serious consequences also from the point of view of the system of settlement of international disputes. They result in the fact that states concluding an international agreement which is related to the internal legal orders in fact undertake obligations of various values. One may conclude from the very text of a multilateral agreement that all parties take the same obligations. However, if the agreement interferes in the internal affairs of states, it appears that it is not the case. The scope of affairs in which the agreement is binding is delimited by the constitutional provisions and practice of the particular states-parties. Depending on these provisions and practice in a given configration of partners we have to do with partners more obliged, less obliged and little obliged. Thus the principle of mutuality, basic in the international life, becomes violated.

[1] *Cf. Włączenie prawa międzynarodowego do prawa krajowego w konstytucjach i praktyce wybranych państw [Inclusion of International Law into the Domestic Law in the Constitutions and Practice of Selected Countries]*, Warszawa 1988, Rada Legislacyjna przy Prezesie Rady Ministrów.

If we approach this problem from the point of view of the system of settlement of disputes, the possible complications are clearly seen. Therefore, a determination of the scope of mutual obligations is a fundamental problem.

It seems that it is an extremely timely problem to start works on the approachment of constitutional regulations of the place and legal-international norms in the domestic legal orders of the states participating in CSCE. It is dillicult to state if today the governments would show any interest in this problem. However, it certainly can and should become a subject of international cooperation in the field of science.

The present paper approaches the problem from the point of view of creation of a European system of peaceful settlement of disputes. However, its broader context is worth paying attention, namely the process of a prolonged unification of Europe and of shaping the European legal culture in particular.

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVin, 1989-1990
PL ISSN 0554-498X

Paving the Road for Settlement of Investment Issues. Polish Experience so Far

by ANDRZEJ BURZYŃSKI

Ł Introduction

Poland was a late-comer to the international investment market. The first legislation allowing foreigners to set foot on the Polish economic stage was passed only in 1976. It took another 10 years for the Polish legislature to pass the law allowing major foreign investment. That law of April 23, 1986 on the Companies with Foreign Participation was, however, a short-lived one. On December 23, 1988 it was replaced by the law on Economic Activity with the Participation of Foreign Parties (Foreign Investment Law) which presently provides the legal framework for all foreign investment in Poland.

The reasons for Poland's late start and guarded approach to foreign investment are multiple and complex. The economic system developed in Poland during the post-war period did not provide for any direct foreign participation in countries economic life. The vast majority of industrial, commercial, transportation and service enterprises, together with natural resources, became State or cooperative owned. Consequently, the legal and administrative framework for the economic life that was formulated during that period concentrated almost exclusively on regulating the organization and conduct of economic activities of the state-owned enterprises or cooperatives living little room for private initiative. As the result of this approach plans for the supply and distribution system, pricing, tax and financial controls were founded upon the premise that the socialized enterprises (either State or cooperative owned) were the only actors on the economic stage. All these plus the fact that the autonomous pricing system and non-convertibility of the Polish currency rendered any calculation of production cost or estimation of profits and losses very difficult, transformed the Polish economy into a fortress which foreign investors neither could nor — frankly speaking — cared to penetrate.

In these circumstances the successive foreign investment regulations borne out of political will, prompted by economic necessities, to attract foreign capital, skill and know-how have had to perform a double function:

— to encourage foreigners to consider investments in Poland, and
— to build the breach allowing those who decided to take this risk, to enter and function inside Poland in the way most beneficial for the country's economy.

While the later goal was easier to achieve by the mixed technique of providing in the subsequent laws on foreign investments for autonomous regulations pertaining to these investments together with simultaneous lifting of a number of restrictions imposed under general law upon domestic economic entities, the successful attainment of the first goal proved to be quite a formidable task.

II. Importance of the Settlement of Investment Disputes Mechanism in Attracting Foreign Investment

In order to successfully encourage a foreigner to bring in and invest his assets, the host country has to offer more than tax breaks and custom duties exemptions. Prospective investors, especially major corporations, are equally interested in stability and security of the legal environment in which they are to operate. This includes both the assurance as to their continuing enjoyment of the rights acquired at the time of the beginning of the investment as well as the existence of effective mechanism to enforce them. These are by now means of exotic expectations considering the time and effort usually needed for any investment to recoup. And Polish legislature was not oblivious of that. Both the Foreign Investment Law of 1988 and the earlier Law of 1986 made available to foreign investors state guarantees of compensation in case of nationalization of their assets and provided for the unconditional transfer of their profits paid out in foreign exchange as well as liquidation proceeds due to them. Nothing in the Polish law restricts the foreigners' access to the courts of justice, therefore in case of infringement of their rights they would have the full opportunity to defend them.

That, however, as the reactions of the potential major investors to the economic opportunities in Poland soon proved, was not sufficient to win their commitment to make substantial investment in this country. For them a host country is not necessary an impartial but potentially interested party in the whole investment exercise, therefore they as well as their banks and insurance companies find it difficult to accept as good the guarantees and procedures for their enforcement based solely on the laws of that very country, which it can amend or annul.

Consequently, Poland as many other host countries willing to attract foreign investors before found itself in the situation in which in order to

successfully implement its economic policies it had to reach beyond its internal law to the international legal order.

Out of two internationally available procedures perceived by foreign investors and their banks as enhancing the security of their operation on the territory of the host countries, namely Washington Convention on the Settlement of Investment Disputes of 1965 and bilateral conventions on encouragement and protection of investments, Poland has so far decided to resort to the latter. As a member of the World Bank it is, however, entitled to sign the Washington Convention in the future.

Like the opening of its economy for foreign investment marked an important change in Poland's approach to international economic relation, its decision to bind itself by bilateral agreements on investment protection constitutes a major departure from its earlier critical attitude towards any forms of international adjudication.

III. Mechanism for the Settlement of Investment Disputes Contained in the Bilateral Conventions on Investment Protection Signed by Poland

So far Poland has signed and ratified bilateral agreements on protection and encouragement of investment with Great Britain (signed 1987, ratified 1988), China (signed 1988, ratified 1989), Austria (signed 1988, ratified 1989). Italy (signed and ratified 1989). Signed and waiting for ratification are the agreements with Belgium and Luxembourg (1988), France (1989), Kuwait (1989), Switzerland (1989). We hope to ad to this group soon the agreement with German Federal Republic that will be signed in Warsaw in November this year (1989). Also initiated are agreements with Finland and Sweden. In near future will start the negotiations on investment protection agreements with Denmark, Finland and Turkey.

The content of the agreements already ratified or signed is quite similar. All of them provide definitions of the "investment" and the "investor" to which the parties wish to accord protection and guarantees contained in the agreement. All of them provide investors and investment of one of the parties on the territory of the other party with both most favoured nation treatment and treatment not less favourable than that accorded to own nationals and their investments (national treatment). They also contain detailed provisions concerning obligations of the party to the agreement in case of nationalization or expropriation of the investments belonging to the investors of the other party as well as the guarantees accorded by the parties with respect to transfer of profits and other payments by investors.

The most important and perhaps most interesting part of these agreements is, however, the procedure contained therein for the settlement of disputes.

There are two types of disputes envisaged by the agreements on encouragement and protection of investment to which Poland is a party: disputes between the party to the agreement and the investor of the other party and between the parties to the agreement. Poland's acceptance on such a large scale of the submission of the whole class of disputes to international adjudication if only limited to the disputes between the states would suffice to consider these agreements as a breakthrough in this country's diplomatic practice. Submission of the disputes with foreign nationals and corporations to such adjudication amounts to a breathtaking novelty.

1. Settlement of Disputes between a Host Country and an Investor of the Other Party to the Agreement

a) Investor Entitled to Be a Party to the Procedure

All agreements accord this right to nationals and entities of the other party. Sometimes, however, a citizenship of the one of the parties to the agreement is not enough for the individual to qualify for the protection of the treaty and consequently for the status of the party in the dispute settlement procedure. The agreement with Italy requires for example that the natural person have had permanent residence on the territory of the country of his citizenship.

In order for an entity of the party to qualify for the protection of the agreement it has to be created according to the law of this party and to have a seat on its territory. Legal personality (incorporation) is, however, not required.

In addition to the above mentioned categories of investors the agreement with Switzerland accords the protection of the treaty to

> "legal entities established under the law of any country which are, directly or indirectly controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities in the territory of that Contracting Party it being understood that controlling requires substantial portion in the ownership of investment means."

b) Subject of the Dispute

As it was mentioned earlier, the agreements entitle investors to a beneficial treatment on the territory of the other party to an agreement. The provisions setting up the procedure for dispute settlement limit, however, the possible subject of a dispute between the investor and the host country to claims arising out of nationalization and similar measures taken by the party to the agreement against the investment. A different approach represents only the agreement with Austria which extents the scope of the disputes between the

investor and the host country that can be subjected to the procedure provided for in the agreement to all disputes related to the investment

Providing for the possibility to initiate the dispute settlement procedure in case of nationalization and similar measures applied to the investment, the agreements allow the investors to question not only the amount and form of the compensation for the lost assets but also the very legality of the measures taken against their investment. That is because the agreements set the conditions which nationalization acts should meet in order to be recognized as such under the agreement. Only the agreements with China and Italy limit the scope of eventual dispute to the amount of the compensation for nationalized investment.

c) Preliminary Steps

The agreements with Austria and China make it prerequisite for the initiating of the dispute settlement procedure provided by the agreement the exhausting of the administrative and judicial review measures available in the host country.

The agreement with France while considering such a procedure as appropriate in other disputes arising out of investment, make an exception to the disputes concerning nationalization issues which should be directly subjected to the procedure laid out in the agreement. The same solution concerning the disputes over nationalization contains the agreement with Belgium and Luxembourg and with Switzerland.

All agreements allowed, however, a period of time from three months (Italy) to one year (China) before the arbitration procedure is initiated.

d) Dispute Settlement Procedure

All the agreements provide for the arbitration as the settlement of disputes procedure with the only exception of the agreement with Italy which leaves to the party initiating the procedure the choice of either the state court or arbitration tribunal.

They differ very much, however, in the choice of the organizational patterns for such procedure. Several agreements laid out detailed rules on the organization of the arbitral tribunal and basic principles of its procedure. These include agreements with China, Kuwait, Switzerland. The other limit themselves to references to the well accepted rules on organization of the arbitral tribunals and its procedure contained in the rules of arbitration prepared by UNCITRAL or the EEC. In some agreements the reference is made to the institutional arbitration namely this of the Arbitration Institute of the Chamber of Commerce in Stockholm or the arbitration of the International

Centre of Settlement of Investment Disputes formed under Washington Convention provided Poland becomes its member. Several agreements make more than one option available to the parties to the dispute leaving them choice between an *ad hoc* arbitration tribunal or one of the already mentioned institutional arbitrations (agreements with Belgium and Luxembourg, France, Italy, Austria) in which case an additional period is accorded to make the allowed choice. If this period lapses unsuccessfully then either the party that initiated procedure makes the choice (the agreement with Belgium and Luxembourg) or the default solution is provided in the agreement (the agreement with Italy makes it mandatory to resort in such a case to the *ad hoc* arbitration according to the UNCITRAL Rules).

e) law Applicable to the Dispute

The agreements with Italy, Switzerland and China completely ignore the question of applicable law evidently leaving the decision in this respect to the arbitration tribunal. Lack of the indication as to the law governing the dispute can also be interpreted as support for the traditional conflict of law rule of the application of the internal law of the state — party to the dispute. No explicit indication as to the applicable law is contained also in the agreement with Austria, although we find in art. 8.2. of this agreement general reference to the rules of procedure agreed upon in the Washington Convention which should be applied by way of analogy by the *ad hoc* arbitration tribunal deciding the dispute.

Only the agreement with Belgium and Luxembourg and with Kuwait follow the lead of the Washington Convention by instructing the arbitration tribunals deciding the investment disputes to rest their decisions on internal law of the party to the agreement on which territory the investment is located, provisions of the agreement, special agreements related to the investor in question and the generally recognized principles of the international law (the agreement with Kuwait adds cautiously "...and adopted by both Contracting States"). The internal law of the party to the agreement on which territory the investment is located and principles of international law are also indicated as applicable to the dispute by the agreement with Great Britain. On the other end of spectrum we have the agreement with France stating that the disputes are to be decided by arbitration tribunal according the agreement and norms and principles of international law.

2. Settlement of Disputes between the Parties to the Agreement

a) Scope of the Disputes

The importance of the procedure for the settlement of disputes between the parties to the agreements on the encouragement and protection of investment

consists hot only in providing the routine mechanism for deciding the disputes connected with their construction and application. The inherent part of these agreements constitute always the provisions allowing for the subrogation by the party thereto of the claims of its investors against the other party. Such provisions are also contained in the agreements signed by Poland. Therefore the disputes between the states-parties to these agreements are in fact investment disputes.

b) Procedure for the Settlement of the Disputes and Applicable Law

All the agreements provide for *ad hoc* arbitration as preferred way of settlement of their disputes. Consequently, the elaborate procedure for appointment of the arbitrators and subsequent election of the presiding arbitrator is laid down. As to the law applicable for the settlement of the disputes, all agreements indicate the provisions of the agreement and principles of international law. The only exception to that rules contains the agreement with China which reads in art. 9 para. 5:

"...the tribunal shall reach its award in accordance with the laws of the Contracting Party accepting investment, the provisions of this Agreement and the principles of international law recognized by the both Parties..."

IV. Conclusions

The material presented above allows, it seems, several conclusions. First of all Polish effort in setting the framework for foreign investors operation demonstrates the limitations of internal law as an instrument to successfully carry out economic policies contemplated by any given government. It is only the right combination of both domestic and international legal instruments that may bring the promise of the success. Secondly any so called opening of a country to the international cooperation cannot be done partially. The door cannot be kept only slightly ajar. In order for such a policy to be successful, it has to accept the expectations of other countries and of their nationals even if this would lead to the limitation of the control over the countries economy. Thirdly the great variety of the solutions adopted in the investment protection agreements signed recently by Poland with major capital exporting countries demonstrates that there is still no uniformly accepted pattern of relationship between capital exporting and capital importing countries.

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVIII, 1989-1990
PL ISSN 0554-498X

ICSID and the Settlement of Investment Disputes in Poland

by E.PJ. MYJER

When I was asked to comment on Dr Burzyński's lecture on the peaceful settlement of disputes in investment contracts I was aware of the topicality of this subject for Poland, since even to me, as a Western European and a relative outsider to the developments going on in Poland, it is quite obvious that Poland is eager to encourage as many foreign investments as possible at this moment Not yet having been able to study Dr Burzyński's contribution in detail, I must restrict myself to making some general observations.

The great pace of change in Poland already became apparent to me when I set out, as the academic Sherlock Holmes we all try to be now and then, to And out the possible ramifications of Dr Burzyński's talk. In the library of the Peace Palace I found a number of early publications by him on the investment law of Poland, the most recent one available dating back to 1981.1 Since I had learned from an article published at the end of 19882 that Poland had adopted a new law on foreign investment in 1986, 1 realized that Burzyński's 1981 article no longer reflected the present situation in Poland. And Mahmassani, in his 1988 article, just in time managed to squeeze in a footnote that an even more recent law on foreign investment had been accepted by parliament on December 23, 1988! So indeed, in Poland also changes in this realm are occurring at a great pace, for the 1986 investment law was replaced in mere two years!

Furthermore there is a spate of bilateral investment agreements between Poland and other countries. As we learned today, there is not only that between Great Britain and Poland that was published on 8 December,

[1] **A. BURZYŃSKI, J. C. IUERGENSMEYER, "Poland's New Foreign Investment Regulations: an Added Dimension to East-West Industrial Cooperation."** ***Vanderbilt Journal of Hansnational Law,*** **vol. 14:17, Winter 1981, pp. 17—49.**

[2] **M. S. MAHMASSANI, "The Legal Framework for Investment in Poland,"** ***ICSID REVIEW, Foreign Investment Law Journal,*** **voL 3, No. 2, Fall 1988, p. 263 onwards.**

1987,[3] but similar agreements have been concluded with China, Austria, Italy, Belgium, Luxembourg, France, Kuwait and Switzerland while one with the Federal Republic of Germany is to be signed shortly[4] and those with Finland and Sweden are on their way. Similar agreements with Denmark, Finland and Turkey are soon to be negotiated.

From the Polish perspective this may all look like a breakthrough, but it is still too early to regard the means of settling investment disputes offered in these treaties to foreign corporations or foreign nationals investing in Poland as a breathtaking novelty.[5] For, when one looks more closely at these agreements, it becomes clear that a foreign investor is offered less protection than he may find desirable.[6]

For one thing, the class of disputes to be referred to settlement according to these treaties, with the exception of that concluded with Austria, is rather limited in scope, being restricted to claims with respect to nationalisation (expropriation) and similar measures.

Furthermore, the most important institutional arbitrational forum in this field, ICSID, though referred to in these bilateral treaties, still is not available, since Poland has not yet become a party to the Washington Convention.[7]

---

[3] Agreement between the Government of the United Kingdom and Poland on the Promotion and Reciprocal Protection of Investments of December 8th, 1987.

[4] Signed during the visit of Chancellor Kohl in November 1989.

[5] See A. BURZYŃSKI, "Paving the Road for Settlement of Investment Issues. Polish Experience so Far," p. 00.

[6] (1) Disputes between an investor of one Contracting Party and the other Contracting Party *concerning an obligation of the latter under Article 5* of this Agreement in relation to an investment of the former which have not been amicably settled shall after a period of three months from written notification of a claim be submitted to international arbitration *if either party to the dispute so wishes;*

(2) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and nationals of other States, opened for signature at Washington DC on 18 March, 1965 *in the event that the Polish People's Republic becomes a party to this Convention,* and the Additional Facility for the Administration of conciliation, Arbitration and Fact-Finding Proceedings); or

(b) an international arbitrator or *ad hoc* arbitral tribunal:

(i) by an agreement between the parties to the dispute; or

(ii) to be established under the Arbitration Rules of the United nations Commission on International Trade Law.

"If after a period of three months from written notification of the claim there is no agreement to an alternative procedure, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules." (Art 8(2) agreement between Great Britain and Poland, see footnote 3).

[7] The Convention on the settlement of Investment Disputes between States and nationals of Other States opened up for signature on March 18, 1965.

In order to attract as maoy foreign investments as possible, it is imperative for Poland to go even further in maximizing the protection granted to foreign investors in case of conflicts in the sphere of investments. This does not only mean continuing along the line of bilateral treaties mentioned above but also widening the area of protection granted to all disputes related to investment. But most importantly, Poland should become a party to the Washington Convention because this would make the ICSID arbitration, as mentioned in the bilateral treaties, a real option.

It is especially with regard to the last category that I would like to make some comments since in his presentation Dr Burzyński seems to be rather dismissive about ICSID arbitration and appears to place an overemphasis on *ad hoc* arbitration.

There is something cosmetic and contradictory in the Polish approach in that via these bilateral treaties. It creates incentives for private enterprises to invest by appearing to offer either the institutional arbitration of ICSID or *ad hoc* arbitration, while at the same time having no intention to become a party to that treaty as yet, which in the end may leave open the more restricted possibility of *ad hoc* arbitration under UNCITRAL rules.

Why is it that in general the option of the institutional arbitration of ICSID in case of investment conflicts forms more of an incentive for private enterprises to invest than does the option of *ad hoc* arbitration? For this one can enumerate a number of reasons:

1. General

The International Centre for the Settlement of Investment Disputes (ICSID) in Washington is a centre especially established for this purpose under the auspices of the World Bank. The object of creating the Centre was to promote a climate of mutual confidence between states and investors[8] since investors wanted to be assured that they would be offered protection against a number of risks of a political or financial nature such as nationalisation of property or the changing of a tax regime by law. ICSID procedures are not restricted to conflicts between investors and developing countries (*i.e.* third

[1] "Like the World Bank, the paramount objective of ICSID is to promote a climate of mutual confidence between states and investors favourable to increasing the flow of resources to developing countries under reasonable conditions. ICSID, therefore, cannot be viewed solely as a dispute settlement machinery. It must be regarded instead as an instrument of international policy for the promotion of economic development," G. R. DELAUME, "ICSID Arbitration," in: *Contemporary Problems in International Arbitration*, J. M. M. Lew (ed.), London 1986, p. 23.

world countries) but cover investment conflicts *per se* between contracting Slates (or subdivisions or agencies) and a national of another contracting State.

The ICSID Convention ofTers a complete jurisdictional system for the settlement by arbitration (or conciliation) of any legal dispute arising directly from an investment when both parties have given their written consent.[9]

"Thus, the Convention enables a private investor, without aid or intervention of his national State, to initiate litigation with a host State on a footing of procedural equality."[10]

ICSID is not a commercial, private, arbitration institution like the International Chamber of Commerce (ICC). Therefore the costs are significantly lower. ICSID appears to display the three characteristics that according to Schmid any method of resolving conflict with the host state must display to be meaningful:

"easy access to the decisional forum, opportunity to air the merits of a claim and reasonable probability of enforcement of a decision in the investor's favour."[11]

More attention should be drawn in particular to the following aspects:

Mi

2. Established Rules

a. General

When parties have agreed to refer the arbitration to ICSID, a complete body of arbitration rules will normally apply to the arbitration in question. The word *normally* has been added, because the parties to a contract are free, as they are in the case of *ad hoc* arbitration, to select the arbitrators, the place where the arbitration takes place, the rules of the proceedings, as well as the law applicable to the merits of the case.

b. Procedural

For the purpose of settling investment disputes via arbitration, or conciliation for that matter, a complete set of rules is available. This means that proceedings will be conducted in accordance with the provisions of the

[9] **A. BROCHES, "Bilateral Investment Protection Treaties and Arbitration of Investment Disputes," in: SCHULTSZ, *The Dynamics of Arbitration*, p. 64.**

[10] **BROCHES, *ibid*.**

[11] **SCHMIDT, "Arbitration under the Auspices of the International Centre for the Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in *Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*," 17 Harv. Int 1 L. J. 90, 103—104 (1976), in: J. K. LEWELER, *New York University Journal of International Law and Politics*, 1989, vol. 21, No. 2, pp. 398—390.**

Convention and, unless the parties agree otherwise, in accordance with the ICSID Conciliation or Arbitration rules.[12]

c. Substantive Law (law to the merits of the case)

According to Article 42 of the Convention the parties have complete freedom with respect to the choice of substantive law to be applied. They may choose any national law. Only in the absence of agreement between the parties shall the Tribunal apply the law of the contracting State party to the dispute (including its rules on the conflict of law) and such rules of international law as may be applicable.

3. Supervision of the Rules by the ICSID Secretariat

As with institutional arbitration in general, there is a secretariat which supervises the implementation of the agreed arbitration rules. In case of *ad hoc* arbitration such an institution is lacking. Furthermore there is a Secretary General, who heads the Secretariat, and who is elected by an Administrative Council, the Chairman of which is the President of the World Bank. The Secretariat is housed at the World Bank.

4. List of Arbitrators

A list of arbitrators who are familiar with and experienced in a particular kind of dispute is available at the Secretariat.

5. Appointment of Arbitrators by the Secretary General

When parties cannot decide on the arbitrators to be appointed, there is a procedure whereby the Secretary General of ICSID appoints an arbitrator from the list of arbitrators;

6. ICSID Arbitration Is Compulsory Arbitration

ICSID shall have jurisdiction in case of conflict between a contracting state (or a subdivision or agency) and a national of another contracting state when

[12] See A. BROCHES, "The Centre for Settlement of Investment Disputes," pp. 1—15, im E. J. Cohn (ed.), *Handbook of Institutional Arbitration in International Trade* (1977).

the parties have given consent in writing to submit the dispute to the Centre. In fact States will have to submit to ICSID's authority twice;[13] once by becoming a parly iu die ICSID Convention and again through specific consent, as required by Article 25 of the Convention, for instance by inclusion of an ICSID provision in the contract. A State can also establish consent to conciliation and/or arbitration before the Centre by giving such consent in advance in a bilateral treaty.[14] Also according to Article 25, once parties have given their consent, they cannot unilaterally withdraw it!

7. ICSID Arbitration Means Consent to the Exclusion of Other Remedies

This means that parties cannot resort to other remedies (Art. 26). The State whose national is the investor may not espouse the case of its national, give that national diplomatic protection, or bring an international claim in respect of the dispute (Art 27), the only exception being when the host State does not allow execution of the award. In that case the investor's home State may regard this as a conflict between the two states since the host State does not comply with the arbitral award.

8. ICSID Arbitration Is Truly International

The arbitration takes place in the context of purely international norms as embodied in the ICSID Convention and Regulations and Rules. This reflects the way in which the convention was established. "Unlike commercial arbitration, which can never be fully insulated from the reach of domestic law and the control of domestic courts, ICSID constitutes a self-contained machinery operating in total independence from domestic legal systems."[15]

---

[13] See J. K. LELEWER, "International Commercial Arbitration as a Model for Resolving Treaty Disputes," *New York University Journal of International Law and Politics*, voL 21, No. 2, Winter 1989, pp. 399—400.

[14] BROCHES (*op. cit.* pp. 64—67) distinguishes, on a sliding scale, four types of investment protection treaties whereby links with ICSID are established. The one mentioned is the most explicit consent Other possibilities are treaties:

— reflecting a recognition of ICSID arbitration as an appropiate method of settlement of disputes [like that between Poland and the United Kingdom, *E. A/.*];

— implying the obligation not to withhold consent unreasonably;

— requiring host States to give consent to ICSID arbitration.

[15] DELAUME, *op. cit.*, pp. 23—24.

Already the acceptance of international arbitration by a State

"takes the contractual relations between the host State and the investor from the jurisdiction of the host State to an international forum." [16]

Furthermore, according to Article 42 of the Convention, unless parties have decided otherwise, the law to be applied by the arbitral tribunal is both the law of the contracting State and such rules of international law as may be applicable. In practice this means that if there is a conflict between the national law and international law it is the international law that will prevail! [17]

Jeanicke goes even further by pointing out that the incorporation of a

"stabilization clause" [18] if coupled with an arbitration clause, "is a strong additional indicator of the intention of the parties to insulate their contractual relations from the reach of the host State."

9. Recognition ICSID Ruling Guaranteed; Enforcement May Be Blocked via State Immunity

ICSID arbitration has its own rules regarding the enforcement of the award, [19] whereas in cases of *ad hoc* arbitration parties only have the option of the New York Treaty at their disposal.

According to the ICSID Convention contracting States shall recognize an ICSID award and enforce the pecuniary obligations imposed by the award as if it were a final judgement of a court in that State (Article 54). This means that no special procedures are necessary in order to validate the award as in the case of *ad hoc* arbitration or other forms of institutional arbitration.

In the latter cases parties need to follow, if applicable, the New York Convention on the recognition and Enforcement of Foreign Arbitral awards of 1958. It then may happen that a dissatisfied State invokes Article V(2) of that Convention and claims that either the subject matter is not capable of

---

[16] **G. JAENICKE, "The Prospects for International Arbitration: Disputes between States and Private Enterprises," in: A. H. A. SOONS, *Internationa! Arbitration: Past and Prospects*, Dordrecht 1990, p. 158.**

[17] **JAENICKE, *ibid*., p. 159.**

[18] **"Stabilisation clauses have the purpose of protecting the continuous enjoyment of all or part of the investor's rights in respect of his investment against legislative, administrative, or other governmental action of the host State...," *ibid*., p. 159.**

[19] **"(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that State. [...].**

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or another authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. [...].

(3) Execution of the award shall be governed by the laws concerning the execution of judgements in force in the State in whose territories such execution is sought" (Article 54, ICSID Convention).

settlement under its national law or that recognition or enforcement would be contrary to the public policy of that State.

In case of ICSID the Convention limits a dissatisfied State to either revision (Art 51) or annulment (Art 52) and provides for a procedure in order to settle differences in interpretation. In one sense ICSID arbitration is less advanced in that States may still claim State immunity from execution.[20]

When a State does not recognize an award, the investor's home State can always either press the claim at the diplomatic level, or submit the dispute to the International Court of Justice according to Article 64. Although this may lead to an imbalance between States and private investors because the private investor does not have such immunities to claim, the matter of the dispute in question is thus elevated to the level of international law. According to Jaenicke, this in itself is an important consideration for using ICSID.[21]

In short: under the New York Convention it is possible for an award to be challanged on a number of grounds. Even though under the ICSID Conven-

---

[20] "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution" (Article 55 ICSID).

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, foiling any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not foiling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country" (Article V, New York Convention of 1958).

[21] JAENICKE, *ibid*., p. 165.

tion a State may, during the phase of execution of the award, stay such execution on grounds of State immunity, it still leaves the New York Convention the more insecure of the two.

Conclusion

Summarizing, one may say that the above makes clear why so many states, amongst which Romania, Hungary and China,[22] have joined the ICSID Convention either to encourage investments in their home country or to have their nationals' investments abroad protected. Among the many reasons to prefer the institutional settlement of investment disputes of ICSID to *ad hoc* settlement of investment disputes there are five which figure prominently:

1. ICSID is an institution specialized in solving investment disputes via a complete jurisdictional system;
2. ICSID is widely accepted;
3. ICSID enables a private investor to engage in litigation with a host State on a footing of procedural equality;
4. ICSID is a real international form of arbitration;
5. In the case of ICSID the recognition and enforcement is internationally guaranteed as if it were a national award, with the possible exception regardig State immunity from execution.

[22] As of March 21, 1990, 99 States have signed the Convention. Of these States, 92 have deposited instruments of ratification. China signed in February 1990.

J U R I S P R U D E N C E

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVIII, 1989-1990
PL ISSN 0554-498X

The Polish Court Judgements in International Civil Law Cases

by MACIEJ TOMASZEWSKI

Arbitration — Arbitration clause providing for the competence of the Court of Arbitration at the Polish Chamber of Foreign Trade — Regard of arbitration agreement only on the objection of the defendant — Lack of legal personality and capacity of foreign enterprises in Poland operating on the grounds of the Law of July 6, 1982.

The decision of the Supreme Court of May 13, 1987 (ICZ 47/87), in the case of complaint of the Export-Import Society [...] Ltd. in W. against Polonian-Foreign Enterprise [...] in W. concerning payment *(Orzecznictwo Sądu Najwyższego,* seria cywilna, 1988, No. 11, item 159).

With the decision of December 15, 1986, the Voivodship Court in Warsaw dismissed the statement of claim for payment because of the fact that in accordance with point 6 of the contract of August 20, 1982, included in the records of the cause "all disputes that could result between the parties from the present contract or connected with it, will be settled by the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw." The Voivodship Court stated that the statement of claim concerns a dispute which resulted in connection with the execution of the mentioned contract and assumed that in the presence of the arbitration clause in this contract court proceedings are inadmissible, which must lead to the dismissal of the statement of claim on the grounds of Art. 199 para. 1 point 1 of Code of Civil Procedure (CCP).

The plaintiff lodged a complaint against the decision of the Voivodship Court to the Supreme Court which annulled the decision, stating in the reasons for the judgement *i.a.* the following:

"The provision of the agreement according to which the parties submit property disputes which may result from a defined legal relationship for consideration to the Court of Arbitration at the Polish Chamber of Foreign Trade does not mean that in a case concerning such a dispute there occurs inadmissibility of a judicial way, and consequently the dismissal of the statement of claim is well-founded on the grounds of Art 199 para. 1 point 1 of CCP. For the inadmissibility of a judicial way occurs when it results from the provision in force that with regard to a person or an

object the case is not subject to common courts of law. The provision of the agreement in question provides, however, a written arbitration agreement, the so-called compromise (Art. 697 and 698 of CCP) which means that at the will of the parties the settlement of the dispute lies with the arbitral tribunal. If the settlement of the dispute lies with the arbitral tribunal it provides the grounds for the dismissal of the statement of claim (Art. 199 para. 1 point 4 of CCP) which, however, the court takes into consideration only on the objection of the defendant, submitted and duly motivated before entering into a dispute concerning the essence of the matter (Art 202 of CCP).

Thus in the case in question there are no grounds for the dismissal of the statement of claim provided for in Art 199 para. 1 point 1 of CCP. Also, there are no grounds for the dismissal of the statement of claim in compliance with Art. 199 para. 1 point 4 of CCP not only because the defendant did not raise an objection that the settlement of the matter lies with the arbitral tribunal, but, above all, because in fact the parties to the lawsuit in question had not made at all a written arbitration agreement For contract No. [...] of August 20, 1982, was concluded — which results from its content — between the firm [...] — Edward G., West Berlin, and PHZ [...] in W., acting on and in behalf of the Polonian-Foreign Enterprise [...]. Thus the parties to this contract are the firm [...] Edward G., West Berlin, and the plaintiff. The provision in point 6 relating to the submission of disputes which may result from the contract concerns only disputes between those subjects, and not disputes between the plaintiff and the defendant. The firm [...] — Edward G., West Berlin, is not identical with Polonian-Foreign Enterprise [...].

From the decision of the President of the Capital City of Warsaw of September 10, 1985, [...] included in the dossier, it results that the defendant indicated in the statement of claim — Polonian-Foreign Enterprise is in fact the Foreign Enterprise [.J in W., operating on the basis of the Law of July 6, 1982, concerning the principles of business conduct on the territory of PPR in the field of small manufacturing by foreign legal and physical persons (consolidated text: *Dziennik Ustaw* of 1985, No. 13, item 58). The enterprises operating on the basis of the mentioned law have no legal personality. Neither are they 'civic organizations of the working people admitted to operate on the basis of the regulations in force' in the meaning of Art. 64 para. 2 of CCP. Therefore, they do not have judicial capacity (Art 64 of CCP).

In accordance with Art. 199 para. 1 point 3 of CCP the lack of judicial capacity of one of the parties is the ground for dismissing the statement of claim. However, the court dismisses the statement of claim for that reason — according to Art. 199 para. 2 of CCP — only when the deficiency is not made up in compliance with the provisions of the Code of Civil Procedure. Thus the Voivodship Court should set a date for the plaintiff to allow the plaintiff to assign a suitable person able to become defendant in the proceedings (Art. 70 para. 1 of CCP). For enterprises operating on the basis of the Law of July 6, 1982, the owner of the enterprises is such a person, which — in compliance with Art. 6 point 5 of the Law — is also a person whose rights to the enterprise result from other grounds than ownership.

In connection with the activities of Włodzimierz K., acting as the liquidator of the defendant enterprise, it should be noted, that the party in the lawsuit, the owner of the enterprise operating on the basis of the Law of July 6, 1982, just as any party in a lawsuit, may participate in the proceedings personally or through an attorney (Art 86 of CCP). Especially a person administering the property or representing the interests of the party, or a person remaining in a permanent mandate relationship with the party, provided that the object of the case falls within the scope of this mandate, can be such an agent (Art. 87 para. 1 of CCP). An attorney appointed according to Art. 9 of the mentioned law falls into this category. However, the appointment of such an attorney is effective — if from the authorization nothing else results and it has not been earlier revoked — until the liquidation of the enterprise. As results from the decision of the President of the Capital City of Warsaw of September 10, 1985, the owners of the defendant enterprise had the permission to conduct business on the territory of PPR cancelled and it was stated that the liquidation of the enterprise should take place within 3 months 'from the date of receiving the final administrative

decision.' If Włodzimierz K. was the agent appointed according to Art 9 of the Law of July 6, 1986, it should be clarified whether his authorization retained its effectiveness.

Taking into account the mentioned reasons on the grounds of Art. 397 para. 2 of CCP in connection with Art. 390 para. 1 of CCP the decision of the Supreme Court was as in the sentence."

Arbitration — Action for the settling aside of an arbitral award — Legal nature of the Court of Arbitration at the Polish Chamber of Foreign Trade — Relation of rules of the Court of Arbitration to mandatory provisions of law on arbitration — Impact of bankruptcy declared in a foreign country on arbitration proceedings.

The decision of the Supreme Court of June 3, 1987 (ICR 120/87), in the case of complaint of a limited liability Company in W. against the trustee in bankruptcy N.E. Contracting B.V. in A. *(Orzecznictwo Sądu Najwyższego,* seria cywilna, 1988, No. 12, item 174 and *Państwo i Prawo,* book 7, pp. 147//!, gloss by Maciej Tomaszewski).

In 1979 the firm N.E. Contracting B.V., with its seat in Holland, brought an action concerning payment against a Polish Company Ltd. before the Court of Arbitration at the Polish Chamber of Foreign Trade. After answering the action, the defendant company brought a counter-claim. The proceedings lasted for a few years and on April 23, 1985, the Court of Arbitration passed an award admitting in part the main action and in part also the counter-claim.

Shortly after rendering of the award, the Polish Company Ltd. found out that during the arbitration proceedings the Dutch court in A. declared the firm N.E. Constructing B.V. bankrupt and appointed a local counsel as the trustee in bankruptcy. However, the trustee did not inform the Court of Arbitration about this fact, neither did he participate in the case in person nor through an attorney. Therefore the award of the Court of Arbitration of April 23, 1985, was passed in favour and against the firm N.E. Contracting B.V. although its bankruptcy had been declared in Holland.

Referring to the fact that in the proceeedings before the Court of Arbitration the bankrupt's assets had not been duly represented (Art 59 of the Polish Bankruptcy Law of 1934), the Polish Company Ltd. brought an action to the Voivodship Court in Warsaw for setting aside the award of the Court of Arbitration on the grounds of Art. 712 point 5 in connection with Art. 401 point 2 of CCP (lack of proper representation as the reason for setting aside). The trustee, this time summoned to the case, objected against it, stating that the Court of Arbitration at the Polish Chamber of Foreign Trade is not a court of arbitration within the meaning of Art. 712—715 of CCP and he required to dismiss the action. The Voivodship Court shared the standpoint of the Company Ltd. and set aside the award of the Court of Arbitration. Against this decision the trustee lodged an appeal to the Supreme Court, which was dismissed with the following justification:

"It is difficult to agree with the standpoint of the appeal that the Court of Arbitration at the Polish Chamber of Foreign Trade is a peculiar authority or organ of administration of justice within the meaning of Art 10 in connection with Art 5 point 14 and Art 19 of the Decree of September 28, 1949, concerning the formation of the Polish Chamber of Foreign Trade (Dz.U. No. 53, item 403).

The organization of the Court of Arbitration and procedure before the panel of that Court is regulated by Rules of procedure adopted by the Council, which is one of the authorities of the Polish Chamber of Foreign Trade. Para. 1 of the Rules provides that the Court of Arbitration is an independent unit, appointed as an arbitral tribunal to resolve disputes independently and impartially. Such nature of the Court of Arbitration is not annihilated by the mention in this provision that the Court resolves disputes between parties of which one has its seat outside the borders of PPR not only when its competence for a given dispute results from a written agreement of the parties (letter b), but also when it results from an interstate agreement binding the parties (letter a). For the arbitration award is in both cases — as para. 32 section 6 *of* the Rules stipulates — the arbitral award in the meaning of Art 711 para. 2 and 3 of CCP. The institution of the Court of Arbitration was guided by the idea that the parties would voluntarily comply with arbitral awards. The lack of reference in the Rules of procedure to the possibility of compulsory enforcement of arbitration awards (para. 34) was not an obstacle to point out in its final part that the award in question 'is enforceable.' Art. 711 para. 2 and 3 of CCP speaks for the accuracy of this statement The alleged — as stated in the appeal — voluntarity is not in opposition to the recognition of panels of the Court of Arbitration as arbitral tribunals. In consequence apt is the view of the Voivodship Court that the Court of Arbitration at the Polish Chamber of Foreign Trade is a permanent court of arbitration in the meaning of Art 695 of CCP.

Also, the appeal cannot effectively combat the refusal to dismiss the action. The arbitral awards pronounced by panels of the Court of Arbitration have — as has been stated — a legal efficacy equal to judgements of state courts (Art 711 para. 2 of CCP). However, equal effect of such awards with the judgements of state courts is conditioned by previous ascertainment of their enforceability. Para. 32 section 6 of the Rules of procedure also refers to para. 3 of Art 711 of CCP. This means that it is the state court that ascertains enforceability of the awards pronounced by panels of the Court of Arbitration. The reference in para. 32 section 6 of the Rules of procedure that arbitral awards are final does not speak against the possibility of an action for setting aside such awards. The action for setting aside of an award of a court of arbitration is not an appeal, but a legal remedy similar to a petition to resume proceedings. The possibility to examine actions by state courts concerning the reversal of judgements issued by them is not only conditioned by the equal effects of arbitral awards and the judgements of those courts. The indication in the second sentence of para. 2 Art. 705 of CCP that an arbitral tribunal is not bound up with rules of civil proceedings does not apply to mandatory rules contained in Book Three of this code. Articles 712—715 of CCP — of such nature — are operative in every arbitration proceeding. Thus the lack of reference on the subject in the Rules defining the procedure before a Court of Arbitration does not exclude the admissibility to bring an action to the state court for the setting aside of an award issued by a permanent (Art 695 of CCP) Court of Arbitration. Thus the objection that the Voivodship Court violated Art 199 para. 1 point 1 of CCP by refusing to dismiss the action cannot be considered as justified.

This necessitates the consideration whether the trustee was right charging the Voivodship Court with arbitrary acknowledgement that the Company N.E. had not been represented in a proper way in the proceedings before the Court of Arbitration (Art 712 point 5 in connection with Art 401 point 2 of CCP). In the appeal the trustee admitted that on the date of the announcement of the bankruptcy he knew that the sum of money covered by main action from [...] Company Ltd. was included in the bankrupt's assets (Art 20 of Bankruptcy Law). It was later not excluded from those assets, as — shown by the findings of the appealed judgement — the trustee

did not issue a statement that he would not participate in the case on behalf of the bankrupt obligee (Art 60, 90 of Bankruptcy Law). This indicates that — in view of the disappearance of capacity to appear in court of the bankrupt — the main action could farther (analogy with Art 174 para. 1 point 4 and Art 180 of CCP) be supported only by the trustee (Art 59, 70 of Bankruptcy Law). Since after declaring bankruptcy the proceedings continued without the trustee, then the appeal — with reference to Art. 97 para. 2 of that Law which regards a different issue — cannot effectively combat the opinion of the Voivodship Court that in the final phase of the proceedings instituted by the main action the bankrupt Company was not properly represented in the proceedings before the Court of Arbitration. Also, on the date of the declaration of the bankruptcy the trustee knew that the debt claimed in the counter-claim was subject to the declaration with the bankrupt assets (Art 14, 150 of the Bankruptcy Law). He did not state, however, that after this date the creditor abandoned his claim of the mentioned debt in the bankruptcy proceedings. The general provision of Art 61 of the Bankruptcy Law states that a proceeding against a trustee could be instituted only in the case when in the bankruptcy proceedings the judge-commissioner refused to recognize the debt claimed by [...] Company Ltd. in the counter-claim. This means that in the situation — as in the case under discussion — when the claim had not been declared in the bankruptcy proceedings and in consequence the refusal of its recognition by the judge-commisioner was lacking, the panel of the Court of Arbitration could institute proceedings against N.E. Contracting B.V. Company only after the conclusion of the bankruptcy proceedings. For until then the creditors could enter their claims to the judge-commissioner (Art 150, 167 of the Bankruptcy Law). This speaks for the opinion that the final phase of the counter-claim proceedings was conducted in the condition of invalidity defined in Art 712 point 5 in connection with Art 401 point 2 of CCP.

Moreover, as the Voivodship Court accurately pointed out — there existed another reason for complying with the action. The Court of Arbitration was involved in the lawsuit after February 17, 1982, for and against N.E. Contracting B.V. Company, although on that day the company had lost its capacity to appear in court Also, in spite of the inhibition included in Art 59 of the Bankruptcy Law, the award was passed not in favour and against the trustee in bankruptcy, but in favour and against the bankrupt company. The award of the Court of Arbitration affected by such a drawback also transgresses the legality. The transgression of the legality is — in spite of a different stand of the appeal against the judgement — an independent cause for the setting aside of the award made on April 23, 1985, by the panel of the Court of Arbitration at the Polish Chamber of Foreign Trade (Art 714 of CCP).

For that reason the appeal against the judgement was dismissed (Art 387 of CCP)."

Note: In the reasons for the above judgement the Supreme Court rightly pointed out the lack of foundation of the opinion expressed in the appeal that the Court of Arbitration at the Polish Chamber of Foreign Trade was not a court of arbitration but a peculiar authority or organ of administration of justice. This opinion has no foundation in the provisions of the law. In the light of Art. 695 of CCP, which draws a distinction between arbitral tribunals created occassionally *(ad hoc)* and permanent courts of arbitration, it has to be undoubtedly admitted that the court in question is a permanent Court of Arbitration. Also, accurate is the standpoint of the Supreme Court that the Rules of the Arbitration Court at the PCFT do not exclude the possibility to bring an action for setting aside the award passed by the panel of this court The regulations concerning such an action are mandatory and they refer to arbitral awards rendered by *ad hoc* as well as by institutional courts of

arbitration, thus neither the contract of the parties nor the Rules of a permanent Court of Arbitration can eliminate the application of these regulations.

The discussed decision of the Supreme Court may raise many objections because the reason for the judgement lacks explanation concerning the basis on which the Supreme Court assumed that the decision of the Dutch court, which declared the bankruptcy of the Company N.E. Contracting B.V., became effective on the territory of Poland and ought to be treated in the same way as if it had been pronounced by a Polish court For the Supreme Court did not take into consideration the provisions of CCP concerning the recognition (Art. 1145—1149) and enforcement (Art 1150—1153) in Poland of decisions issued by foreign courts in civil cases belonging to the judicial way in Poland, and also the provision of Art. 8 para. 1 of Polish Bankruptcy Law which — according to the doctrine — means the adoption of the territorial principle of bankruptcy. Also, the Supreme Court did not explain why in the matter of the effects of the decision concerning bankruptcy pronounced in Holland it applied solely the provision of the Polish Bankruptcy Law.

In addition, it should be noted that the thesis that declaration of bankruptcy deprives the bankrupt of the capacity to appear in court is unacceptable even on the basis of Polish Bankruptcy Law. From Art. 59 of this law it only results that in proceedings concerning the property included in the bankrupt's estate the trustee is directly vested with the power to sue and the capacity to be sued. The notion of the title to appear before court cannot however be identified with the notion of capacity to appear in court.

The author of the present review presented detailed comments concerning the decision in question in the gloss published in the monthly *Państwo i Prawo,* 1989, No. 7, pp. 145—51.

Recognition of a foreign judgement — Divorce decree pronounced by a court in the United States of America — Exclusive domestic jurisdiction as a negative premise of recognition — Criteria of change of domicile of spouses — Previous final judgement by Polish court as a negative premise of recognition.

The decision of the Supreme Court of October 16, 1987, (ICR 230/87), on the motion by Irena G. involving Robert G. concerning the recognition of the decision by a foreign court *(Orzecznictwo Sądu Najwyższego,* seria cywilna, No. 7—8, item 126).

On November 9, 1982, the District Court in Cook, Illinois, USA, decreed the divorce of Irena and Robert G., Polish citizens, at that time residing in the USA. Irena G. put forward a motion to the Voivodship Court in Warsaw to recognize this foreign divorce decision, but the Voivodship Court dismissed the motion. As the basis for dismissing the motion the Court of the first instance assumed the exclusiveness of domestic jurisdiction of Polish courts as a nega-

live premise of recognition. In the opinion of the Voivodship Court the spouses had Polish citizenship and permanent residence in Poland at the moment the divorce was pronounced by the District Court in Cook, because their stay in the USA was temporary. Therefore, in accordance with Art. 1100 para. 2 of CCL there existed an exclusive jurisdiction of Polish courts which excluded the recognition of the decision of the foreign court In the light of Art. 1146 para. 1 point 2 of CCL the Voivodship Court also established that the parties returned to Poland in 1986, and before their return, but after the divorce was pronounced by the foreign court, Robert G. moved for a divorce decision to the Polish court and divorce was pronounced in a final judgement of the District Court for the Capital City of Warsaw on May 28, 1984.

Irena G. appealed against the decision of the Voivodship Court dismissing the motion concerning recognition before the Supreme Court, charging lack of appropriate explanation of significant circumstances concerning the place of permanent residence of the parties.

The Supreme Court dismissed the appeal giving the following reasons of its decision:

"The criteria of evaluation, if and when a change in domicile from domestic to foreign takes place, are enclosed *La.* in the cited by the Voivodship Court decision of the Supreme Court of July 15, 1978, IV CR 242/78 (OSNCP 1979, book 6, item 120). In particular it is indispensable to establish the existence of objective circumstance, in the light of which it is possible to acknowledge that a given person established the centre of personal matters and matters involving property in a foreign country. Of significance is, *La.*, the type of documents indispensable for travel abroad, in particular passports.

It is undisputable that the parties intended to stay in the foreign country for a few years and the trip was connected with the achievement of satisfactory opportunities to earn money in the USA. It took place on the basis of ordinary passports, defined by the Voivodship Court as 'tourist passports.' The applicant did not mention that during their stay in the foreign country the parties at least attempted to change the status of their stay, and in the motion she explicitly stated that hers and the participant's current domicile was: 'on the territory of Poland.' Thus the statement of the appeal about a 'temporary' return to the home country of the participant is contrary to the statement of the motion and there are no arguments to support it

It is also undisputable that the ex-spouses left considerable assets in Poland, including a dwelling house and a cooperative ownership fiat, to which they returned (addresses as in the motion). In the proceedings before the Court of the first instance the applicant brought forward the purchase of a dwelling house by the parties as the only tangible circumstance that was to point to the concentration of hers and the participant's personal matters and matters including property, in the USA. This fact, however, cannot prejudge the truthfulness of her statements, as in the situation of a planned longer stay of the whole family in a foreign country the purchase of a house could be more to advantage than several years of rent Under given conditions there were no grounds for assuming that the applicant and the participant established the centre of their personal matters and matters involving property in the foreign country, and the appeal disputing the correct statement on this subject of the Voivodship Court, is unfounded.

Apart from the above, another significant circumstance came into being which the Voivodship Court established but did not take into consideration when pointing out the legal basis of its decision. The circumstance is the final decision issued by the Polish court

It should be assumed that the negative premise of recognition of a foreign decision is the final decision of the Polish court before recognition (or instituting legal proceedings), and not before the foreign judgement became final. The reservation 'before the judgement of a foreign court became final' applies only to the second part of Art. 1146 para. 1 point 4 of CCL. If this reservation was to apply to the whole of the provision, it ought to have resulted from its wording, and in particular the word 'already' in the first part would have been superfluous. Also, considerations bearing on the substance of the matter speak for this. A foreign judgement is not recognized by the Polish court until it produces effects on Polish territory. In particular, it cannot be an obstacle to take legal action before a Polish court and to the settlement of the matter. In the proceedings a Polish court cannot examine whether a foreign judgement complies with conditions for recognition and in the case when the decision for recognition is lacking it cannot be taken into account In such situation the recognition of an earlier foreign decision, in spite of an existing final decision of a Polish court in the same case, would lead to certainly undesirable effects.**

Recognition of a foreign judgement — Divorce decree pronounced by a court in the USA — Evidence of a foreign court's force of a final judgement

The decision of the Supreme Court of May 28, 1987 (IICZ 61/87), on the motion by Bożena K. involving Emilian K. concerning the recognition of a decision of a foreign court (*Orzecznictwo Sądu Najwyższego*, seria cywilna, 1988, No. 11, item 162).

Bożena K. brought forward a motion before the Voivodship Court in Wałbrzych concerning the recognition of the decree of the District Court in Cook, Illinois, USA, dissolving through divorce her marriage to Emilian K. The chairman of the Department of the Voivodship Court returned the motion justifying in the Decree of March 4, 1986, that Bożena K., summoned to produce the final divorce judgement within 7 days, did not do so, but sent a letter from the Consulate of the United States in Cracow, dated May 8, 1984, informing that court judgements given in all states of the USA are not provided with finality in law clauses, and the issuing of an authenticated copy speaks of the force of the final judgement

Against the above decree Bożena K. lodged a complaint to the Supreme Court in which she stated that in accordance with the law of the State of Illinois (USA) the issuing of an authenticated copy speaks of the force of the final judgement. She also enclosed a letter from the Ministry of Justice dated July 8, 1979, addressed to the Lawyers' Office in Cracow stating that for the purpose of appropriate proceedings in Poland only an authentical copy of a divorce decree is issued in the USA.

The Supreme Court dismissed the complaint for the following reasons:

"One of the special conditions for recognition of a foreign judgement — according to Art 1146 para. 1 point 1 of CCP — the force of the final judgement in the state in which it has been issued. In accordance with Art 1147 para. 2 of CCP the applicant ought to, *inter* enclose with the motion concerning the recognition of the decision of a foreign court a statement that the judgement is final The quoted provision — as it was explained in the decision of the Supreme Court of February 4, 1975, II CR 849 (OSNCP 1976, book 1, item 11) — has in consideration a formal force of a final

judgement However, in question are decisions which settle the essence of the cause and produce defined effects in the material and legal spheres. Out of doubt is also the opinion that the appraisal whether and, if need be, when the decision becomes final follows the law of the state the court of which issued the decision. The legislator did not leave this matter to be examined by the Polish court, but forejudged unequivocally that the ascertainment of force of a final judgement is an obligatory proof of force of the judgement subject to recognition. This statement — as it is assumed in the doctrine and in court practice — may be inserted in the contents of the judgement, on its copy or in a separately issued certificate by a competent organ in which competence it remains to ascertain the acquisition of force of such a judgement The applicant did not produce such a certificate. The letter of the Consulate of the USA in Cracow cannot be accepted as such evidence, and neither can the information of the Ministry of Justice about the practice of American Courts.

The claimant argued — on the basis of information of the mentioned extrajudical organs — that since the foreign court issued the extract of the judgement and the act of issuing such an extract is to serve as evidence of its force, then the issue in question is classed among proceedings to take evidence. In fact, the claimant constructs a presumption of fact, which is a peculiar means of argumentation, facilitating the court issuing the judgement to infere certain facts on the basis of facts already established. Since the ascertainment — as has been stressed — serves as obligatory evidence, then it cannot be replaced by other evidence and neither can it draw conclusions about the contents of the law nor court practice in the state in which the judgement to be recognized has been issued. The contents of the decree directed to the claimant does not impose on her an obligaton to produce a proof of finality in law issued by the foreign court which pronounced the judgement Thus the ruling court did not prejudge the competence of the organ which was to carry this into effect. This standpoint is well-founded. For, about the competence of the organ stating the force of a final judgement of a foreign court decide the law of the state in which it was issued. The claimant does not object to the argumentation of the decree mentioned in the reasons for the judgement providing the basis for the ascertainment that in the USA (in Illinois) such documents are issued. Since it is possible to obtain such a statement and this is put to practice by the District Court in Cook, then not to submit the evidence provided for in Art. 1147 para. 2 of CCP by the claimant is a formal drawback and it substantiated the return of the motion concerning the recognition of the judgement (Art 1147 para. 2 and Art 130 para. 1 and 2 of CCP)."

POLISH YEARBOOK.
OF INTERNATIONAL LAW
VOL. XVIII. 1989-1990
PL ISSN 0554-498X

Awards of the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw[1]

by ANDRZEJ W. WIŚNIEWSKI

1. Award of 18 June, 1990, in Case No. 73/88

A contract signed by both parties is valid irrespective of order and circumstances under which the signatures have been put to the instrument. Burden of proof of exceptions to the binding force of such contract or to the claims resulting therefrom lies with the respondent.

Excerpt from Reasons

By a statement of claim dated 10 May, 1988 claimant, a Polish foreign trade company having its seat in Warsaw, requested the Court to adjudicate from the respondent Dutch company the amount of 98, 925 Dutch guilders plus interest and costs of the proceedings. This amount was to constitute payment for the services rendered under contract dated 19 January, 1987. Claimant insisted that all contractual obligations were duly performed by the manufacturer and by himself while respondent purported to pay his dues by cheques for which, however, his bank refused payment fot the lack of covering.

Jurisdiction of the Court of Arbitration in the case was based upon para. 9 of the contract. By para. 10, the contract was to be governed by Polish law.

In this statement of defence respondent moved for the denial of the claim stating that he never signed the contract attached to the statement of claim.

[1] The Court of Arbitration (*"Kolegium Arbitrów"*) at the Polish Chamber of Foreign Trade, existing since 1950, has since December 1990 been affiliated with the Central Economic Chamber under changed name (the change is marked only in Polish, now: *"Sąd Arbitrażowy"*). The Court does continue its activity in international arbitration at the former address and on the basis of the same rules (dated 1975). However, its jurisdication has been stretched to cover also domestic business disputes for which a separate set of rules (dated 4 December, 1990) has been enacted.

. . . . . .

On 17 April, 1989 the Court of Arbitration has been notified of the bankruptcy of the respondent firm. The official receiver in bankruptcy submitted on 22 May, 1989 a statement in which he confirmed that the questioned contract had in fact been signed by respondent: however, the signature was allegedly put to a blank form and the contents of the contract never confirmed. The receiver had, in addition, stated a mutual claim in the amount of 175,000 guilders. The arbitration fee on this claim remaining unpaid after the lapse of the proper period of time, the arbitral tribunal — pursuant to para. 20 sec. 2 and para. 10 sec. 2 of its Rules — has deemed the case as to this claim unopened.

. . . . . .

On the basis of offered evidence the arbitral tribunal found as follows:

1) The contract of 19 January, 1987 had uncontestedly been signed by both parties. The receiver's objection that on 19 January the representatives of respondent were not present in Poland nor claimant's representatives in the Netherlands is not conclusive in view of the fact that the instrument does exist and the signatures on it are authentic. Even if (though not proved) the contract were indeed signed blank by the respondent's representative, it was binding on both parties. If the contents thereof have indeed remained unknown to respondent, he could not have delivered necessary components according to the contractual schedule — which he did. Moreover, respondent took deliveries of finished product and paid by cheques. [...] Lack of evidence as to, when the contents of the contract came to respondent's knowledge, has in these circumstances no importance.

2) It has not been contested that the respondent's bank stated lack of covering for the cheques. Moreover, claimant's dues were never put to question as to the principle or amount, neither in the statement of defence not in the later receiver's statement

. . . . . .

3) In his statement of defence respondent claimed exeptions consisting in delays and nonconformity of deliveries having allegedly caused him damage in the amount of 175,000 guilders.

The exception of delay was based upon an alleged amendment of the contract. Originally, the time of performance had been agreed "during 1987." By respondent's statement, performance time would later be reduced to August 1987. However, respondent could offer no evidence at all of such parties' intention. In addition, para. 11 of the Rules requires that all amendments be executed in writing and confirmed by the manufacturer.

As to nonconformity of finished products' quality, the contract provided for specific written reclaim procedure. The evidence offered by respondent and his receiver did not show any claims submitted in accordance with this procedure nor, indeed, any defects that might be clearly traced to the contract in question or to claimant's performance (respondent ordered similar services at the same time from several Polish manufacturers).

Upon the above findings the arbitral tribunal adjudged to claimant from the receiver of respondent's bankruptcy estate the total of his claim with legal interest and costs of the proceedings.

2. Award of 4 December, 1990 in Case No. 145/86

L Pursuant to para. 68 – 70 of the CMEA GCD 1968/75/79 the seller is not deprived of the right to rely upon notorious facts as Force Majeure *even if he failed to give notice thereof and present a proper certificate in due time.*

2. Where a detailed amount of a justified claim of damages cannot be established, the court may in his discretion – pursuant to Art. 322 of the Polish Code of Civil Procedure – adjudge an amount which the court thinks proper.

Excerpt from Reasons

By a statement of claim dated 17 November, 1986 claimant, a Soviet foreign trade enterprise, requested the Court to adjudge from respondent, a Polish foreign trade company, contractual penalties for the delay in delivery of a ship built under a frame-contract of 1973 and a detailed contract of 18 December, 1980. The amount of the claim exceeded 2.5 million rbt. (transfer roubles) — 8 per cent of the ship's price, plus interest and costs of proceedings.

The jurisdiction of the Court was based on the 1972 Moscow Arbitration Convention and the primary applicable law was the CMEA 1968/75/79 General Conditions of Delivery (GCD). The arbitral tribunal established the following facts:

Respondent had been obliged, originally, to build a ship of a certain type and deliver it to claimant in DI quarter 1984 or I quarter 1985. Due to circumstances accepted in agreement by both parties as *Force Majeure* under the contractual clause (after the introduction of material law in Poland in December 1981) the works were delayed. In 1984 the parties agreed upon a new delivery date: April 1985. Actually, the delivery has been effected on 31 December, 1985.

On 3 October, 1984 respondeat asked claimant to agree to a further postponement of the delivery due to new difficulties which he viewed as constituting *Force Majeure*. Claimant expressed his understanding and his hope to be able to relieve respondent, on condition however that the delivery date shall also accordingly be amended in the inter-governmental protocol on mutual deliveries between Poland and the USSR.

The government protocol for 198S contained no mention of the ship under contract: later however it was listed among deliveries for 1986 (!). In the meantime, respondent has failed to inform claimant of *Force Majeure* circumstances (as required by para. 69 of the CMEA GCD) or even to renew the renegotiation attempt. A *Force-Majeure*-certificate covering respondent's difficulties, issued by the Polish Chamber of Foreign Trade, has been presented to claimant only with the statement of defence.

The delay in delivery of the ship caused necessary construction adjustments due to amendments introduced in the meantime to the 1974 Solas Convention. The scope of adjustments has been brought to the shipbuilder's knowledge by telex of 29 August, 1984 and letter of 16 November, 1984. Amendment of documentation was finished in February 1985. On 12 February the documentation was dispatched to the USSR Ship Register, to be returned on 11 July this same year only.

. . . . . .

Summing up the positions of both parties taken during the proceedings, the arbitral tribunal concluded that the source of the dispute constitute two main differences concerning:

— the estimation of the importance of *Force Majeure* circumstances which took place in 1984/1985;

— the estimation of the influence of construction amendments due to the ship's falling within new Solas Convention requirements upon the delay of delivery.

Finally, claimant took the opinion that the delivery postponement already granted by him, *i.e.* until 29 June, 1985 plus one month penalty-free, liquidated any respondent's rights under the *Force Majeure* clause.

. . . . . .

The arbitral tribunal found that, in principle, respondent is liable for the delay in delivery. Nonobservance by him of the provisions of paras. 68—70 of the CMEA GCD as regards notification of *Force Majeure* and presentation of a proper certificate does adversely influence his rights under these provisions and expose him to liability for the delay of notification. The certificate has been issued and presented to claimant with an almost 2-years delay and does contain data of a very general nature, insufficient to establish a clear causal link

between *Force Majeure* circumstances and the actual delay. As regards the problem of inter-governmental protocol of USSR/Polish deliveries of goods for 1986, the arbitral tribunal did agree with respondent's opinion that the ship had been listed there by mistake; moreover, such inter-governmental arrangements are void of any direct influence upon civil-law relationship of claimant and respondent.

On the other hand, strikes and huge employment reduction in the Gdansk shipyard in 1984/1985 are an universally known fact Respondent is not altogether deprived of the right to rely upon these circumstances for his exemption; claimant failed to show any specific damage due to the very lack of notification of *Force Majeure* at the due time (see para. 69 sec. 3 of the CMEA GCD).

In part, also respondent's argument of construction adjustments must be taken into account. The parties negotiated the price of adjustments up to the end of February 1985 and only on 11 July the documentation has been approved by the USSR Ship Register. That means that respondent could not have possibly delivered the ship on the date indicated by claimant, *i.e.* on 29 June, 1985.

. . . . . .

However, respondent failed to justify the continuance of excused delay until 31 December, 1985. Taking into account that a detailed determination of the delay period falling under *Force Majeure* clause and, consequently, of the precise amount of due penalties is not possible, the arbitral tribunal — acting upon Art. 322 of the Polish Code of Civil Procedure and taking into account the rules of equity — decided to adjudge to claimant one-half of the claimed amount. The legal interest in this sum has been adjudged from 15 October, 1985 *i.e.* a middle date between the date required by claimant and the date of actual delivery.

BOOK REVIEWS * COMPTES RENDUS

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVIII, 1989-1990
PL ISSN 0554-498X

Lech ANTONOWICZ, *Państwa i terytoria. Studium prawnomiędzynarodowe [States and Territories. An International Legal Study]*, Warszawa 1988, PWN, 256 pp.

The new book by L. Antonowicz, professor in the Maria Curie-Skiodowska University in Lublin, covers the same area of international law as most of his former writings including his two books *Ukwidacja kolonializmu ze stanowiska prawa międzynarodowego [The Suppression of Colonialism from the Standpoint of International Law]* and *Pojęcie państwa w prawie międzynarodowym [The Notion of the State in International Law]*. The aim of his new monograph is, however, much broader, and amounts to the synthesis describing all contemporary geopolitical entities from an angle of international law (p. 5).

The book is divided into two parts: first discussing various aspects of statehood and second describing territories other than States, and consists of twelve chapters: "The Notion of the State," "Kinds of States," "Creation of States," "Recognition of States," "Identity of States," "Dissolution of States," "State Succession," "Notion of the Territory," "Non-self-governing Territories," "Trust Territories," "Other Colonial Territories" and "Non-colonial Dependant Territories." At the end the list of states is attached.

Professor Antonowicz begins with an analysis of a notion of the State. After critical examination of opinions of many eminent international lawyers he comes to the conclusion that international law necessarily contains the definition of the State. The notion of the State has changed during ages of history, but some essential elements have been preserved (p. 14). The definition should be drawn both from treaties and from custom concerning States.

After thorough analysis the author comes to the conclusion that "the State" means in international law every sovereign geopolitical entity being in conformity with international law (p. 40). The last part of this definition does not mean that violations of international law deprive the entity of being the State, but simply stresses the necessity of application of a legality criterion. Professor Antonowicz disagrees with the concept that any effective State is ultimately the legal one and stresses that effectiveness is a basic, but not a sole requirement of creation of States. Out of two conflicting principles: *ex iniuria ius non oritur* and *ex factis* ius *oritur* the author gives supremacy to the former one, with a warning that sometimes a legitimization of formerly illegal situations occurs.

In discussing various kinds of States the author gives a particular emphasis to the problems of States belonging to different social systems and to the unitary and federal States. In a controversial question of international status of the Soviet republics Professor Antonowicz remains in line with a predominant Soviet doctrine that the republics are States. He supports this conclusion with a description of broad powers of the republics in international sphere, including ius *tractatuum* and *ius legationum*, and stresses that the republics have acquired since 1944 the right to secession (pp. 63 — 67). Professor Antonowicz does not, however, address the issue of the incompatibility of the alleged sovereignty of the republics (as States they are by definition sovereign) with their subordination to the will of the Soviet Union as a whole. This aspect of the problem shows that the republics, being international legal persons, are not States in terms of international law. By the way, on the list of States, attached to the book, the republics are not included.

The author accepts that the City of the Vatican is a State, stemming from the premise of identity of the Holy See and the Vatican. Powers exercised by the Vatican together with the functions performed by the Holy See allow to qualify that entity as a State. Still the very small territory and population show that Vatican is not a normal State (pp. 69 — 71).

In the next chapter the author describes several ways of creation of States: unification, division, secession, granting independence to the dependant territories. This chapter corresponds with Ch. VI, where dissolution of States is discussed. Professor Antonowicz stresses the crucial role of the principle of self-determination of nations in this context Any coercion is in such situations illegal and cannot cause legal effects. The author goes even further and states that the decision of unification of States is so important and carrying so serious consequences that nations in taking this decision cannot be substituted not only by any external factor, but also by their State organs (p. 79). This very intersting and deserving support concept may give rise to further research in this field, for example on legality and legal effects of incorporation of Lithuania, Latvia and Estonia to the Soviet Union in 1940, when those countries were under Soviet military occupation.

The most complex example of dissolution of a State is undoubtedly the German *Reich* after World War II. Professor Antonowicz is of the opinion that Germany ceased to exist as a State in 1945 and that the sovereignty over German territory belonged to the Four Powers in accordance with the obligation undertaken by those Powers to reinstate the democratic and peaceful German State. He stresses that the legal situation of Germany was unique, because in mid-1945 the Charter of the United Nations was not yet in force, and accordingly the principle of self-determination of nations was not yet binding while the prohibition of aggression was in force. Consequently the State-aggressor could be and was liquidated (pp. 147 — 149).

In discussing the issue of recognition of States, the author concentrates on two problems: on legal effects of an act of recognition and on existence of duty to recognize. He tries to combine constitutive and declaratory theories in such a manner that the act of recognition has different effects in a field of existence of law and in a field of application of law. If a geopolitical entity fulfils the legal requirements of being a State, it is a State independently of the recognition. Consequently it is a State according to international law and subject of this law. Recognition has here only a declaratory character. On the other hand international law is applied only among States mutually recognizing each other. Therefore, for the application of the law an act of recognition has a constitutive value (p. 102).

This theory is very interesting and convincing, because it answers questions arising out of practice of States in a manner both coherent with premises of the system and accurately describing the reality. One may only add that effects of recognition may be possibly described more exactly if we accept in international law the two aspects of a legal personality well known in dvil law: a legal capacity and a capadty to legal transactions. Then the legal capacity belongs to any State independently of a recognition, and the capacity to legal transactions is dependant upon an act of recognition.

The author supports the concept of an existence of the duty to recognize a new State. He uses arguments of a logical nature: if an entity fulfils the conditions of being a State, it should be recognized as such (p. 110). Unfortunately, the author does not examine the practice of States, which shows that governments treat the issue of recognition as a discreationary matter of their policy.

The second part of the book deals with the issues of a territory. This term means in this context a non-sovereign geopolitical entity. In the book only inhibited territories are discussed; accordingly a "territory" means a dependant territory. Integral parts of States do not conform to the definition of a territory (pp. 162 — 164).

Then the author presents a categorization of territories: firstly he divides them into colonial territories and other dependant territories, then he further splits colonial territories into the non-self-goveming ones, the trust ones and others. Non-self-governing

territories are the entities recognized as such by the UN. According to the Charter they are overseas territories with a population having a discriminated legal status with a comparison to the status of a population of administering State (p. 176).

The notion of trust territories is so well known that it does not require any further comment Colonial territories other than the non-self-goveming or trust ones are territories with an actual situation comparable to the non-self-goveming ones, which for various reasons have not been claimed to be such, *ejQ*. Algeria or Tanger in the 1950s, or territories, to which the recognition as the non-self-governing was withdrawn, like *e.g.* Guadelupa or Puerto Rico (pp. 221 — 226).

Professor Antonowicz discusses the meaning of independence and self-government in the context of the UN Charter and the Declaration on decolonization of 1960, coming to the conclusion that the terms "self--govemment" and "independence" in Article 76 of the Charter have jointly the same scope than "a full measure of self-government" used in Article 73 (p. 205), which is tantamount to "independence" used in the Declaration (p. 220).

In the last chapter the author discusses the legal status of non-colonial dependant territories, such as Andorra, Sikkim, Free Territory of Trieste, Jerusalem and West Berlin (pp. 234 — 242).

The new book of Professor Antonowicz is very useful for an international lawyer. On appr. 250 pages a concise, but a comprehensive survey of all legal problems relating to States and other territories is presented. The book is written mainly from a theoretical standpoint, but the author does not forget (in most parts) about confronting his conclusions with the practice of States and the United Nations.

The two particular features of the book should also be stressed. A very rich recourse to writings of other scholars published in the last hundred years and the critical examination of them does not affect the clarity of the legal reasoning. The book is also very useful as a handy manual of a history of legal and political changes of the World's map since the last war.

Rudolf Ostrihansky

Forty Years. International Court of Justice: Jurisdiction, Equity and Equality. A. Bloed, P. van Dijk (eds.), Europa Instituut Utrecht 1988, 177 pp.

The book reviewed here is a selection of papers and comments presented during a Polish-Dutch Colloquium organized by the Europa Instituut of Utrecht and the IVth Group (for International Law) of the Institute of State and Law of the Polish Academy of Sciences, held in November 1987, to commemorate the 40th anniversary of the International Court of Justice.

The papers were prepared by Associate Professor R. Szafarz and J. Stańczyk Ph.D. from the Polish side and Professor S. Rosenne and B. Kwiatkowska Ph.D., from the Dutch side. The comments were written by Professors P. van Dijk and PJi.M. de Waart, and A. Wasilkowski and W. Góralczyk.

Chapter I, written by R. Szafarz, is devoted to the evolution of States' attitudes towards the jurisdiction of the International Court of Justice. The author analyzed States' attitudes, taking the forms in which they express their acceptance of the competence of the International Court of Justice as the starting point The author focused her attention on the optional clause, comparing the scope of its acceptance by the States during the operation of the Permanent Court of International Justice and of the International Court of Justice, and subsequently analyzed the reservations and time limitations connected with States' declarations made on its basis. The author concluded that the unrestricted admissibility of reservations with regard to the optional clause has become a customary norm of international law. The author also discussed the attitudes of East European States towards the jurisdiction of the International Court of Justice. She observed that

there have been very clear changes in these attitudes and that the International Court of Justice was gaining increasing recognition in these States.

Professor P. van Dijk wrote the comments to the paper by R. Szafarz. Professor P. van Dijk discussed also the ways in which the International Court of Justice itself, could contribute to change the States' attitudes. He pondered on whether the Court has sufficiently tested the opportunities for conciliation and friendly settlement of disputes. Moreover, he suggested that the States should be able to avail themselves of the Court's advisory jurisdiction and mentioned the possibility of the International Court of Justice giving preliminary decisions to national courts, at their request Lastly, he suggested that also private parties should have access to the International Court of Justice.

Professor P. van Dijk concluded that one should not expect radical changes in the States' attitudes with regard to the introduction of procedural and institutional measures by the International Court of Justice.

Chapter II is devoted to the question of the equality of parties in proceedings before the International Court of Justice, in case of non-appearance of the respondent State. J. Stańczyk, the author of this chapter, was preoccupied mostly with two issues. First "What does non-appearance of a party in proceedings before the International Court of Justice actually mean?" Second: "What does it mean that the parties are equal in these proceedings?" The author attempted to prove that while the principle of the equality of the parties has not been incorporated in the Statute of the International Court of Justice, it was nonetheless inherently tied to the very essence of the Court and is derived from the more general procedural norms. The essence of the equality of the parties lies in their equal treatment by the Court The parties themselves decide whether or not they will fully avail themselves of the possibilities offered by the statutory provisions and the Rules and Regulations of the International Court of Justice.

J. Stańczyk concluded that the respondent State had no duty to appear before the International Court of Justice. He also analyzed the procedure applied by the International Court of Justice in such cases.

In his comment, PJJ.M. de Waart concurred with the theses advanced by J. Stańczyk and considered two issues. First, the rules that govern party equality and — second — whether or not the non-appearance of the respondent State before the International Court of Justice violated the principle of the equality of the parties, in the light of UN members' duty to comply with the derisions of the International Court of Justice, the right of the applicant state to address the Security Council when the respondent state failed to meet its obligations under a derision of the International Court of Justice and the right of the applicant state to have recourse to the assistance of third states in the execution of the decisions of the International Court of Justice.

Chapter HI, written by S. Rosenne, is devoted to the position of the International Court of Justice on the issue of the foundations of the principles of equity in international law. The author concentrated on the question whether the International Court of Justice could at all take a position on the relationship between law and equity. After analyzing the judicial derisions of the International Court of Justice, which involved the issue of equity with regard to the delimitation of maritime and land boundaries, the author stated that the judicial decisions have not made any signiffcant contributions to the predictability of future settlements in such cases, while frequent references to equity, more than anything else, reaffirmed the wide latitude of freedom of the International Court of Justice in such matters. The analysis of judicial derisions which referred to the principle of equity, led to the conclusion that equity was treated as a part of law. The Court clearly emphasized the difference between the rules of equity required by the law and the derision *ex aequo et bono*. S. Rosenne also observed, that the incompleteness of law based on international agreements on the one hand and the unpredictability of judicial decisions, on the other, rendered impossible a systematic presentation of the principle of equity in the contemporary international law.

Commenting on the paper by S. Rosenne, A. Wasilkowski dealt mostly with the relationship between equity and international law. He emphasized that equity had a variety of functions in contemporary international law.

A. Wasilkowski concluded that establishing what equity really meant in general categories, was a difficult if not impossible task. He also noted that the International Court of Justice strove to objectify equity, insofar as practicable.

Chapter IV is devoted to the doctrine of equitable principles applicable to the delimitation of maritime boundaries and their impact on international law. B. Kwiatkowska — the author — presented a general outline of the principle of equity and stated, that in the light of the decisions of the International Court of Justice and of arbitration courts, equity meant that delimitation should result from agreement reached in accordance with the principles of equity and taking account of all relevant circumstances, so as to arrive at an equitable result The author believes that it is a principle which has the character of customary international law, hence, the principle of equity with regard to the delimitation of maritime boundaries operates within law.

B. Kwiatkowska dealt also with the procedural and substantive principles of equity, applicable to the delimitation of exclusive economic zones and the continental shelf

In his comments, W. Góralczyk concentrated on several selected issues. First of all, he pointed to the significance of national interests in the delimitation of maritime boundaries. Then, he dealt with the doctrine of natural prolongation as the basis of the legal title to the continental shelf and as a factor of its delimitation, with the notion of equitable principles and with the consistency and predictability of the decisions of the International Court of Justice with regard to the delimitation of maritime boundaries. While W. Góralczyk concurred with the substantive decisions of the International Court of Justice, he questioned some of the arguments on which these decisions were based.

Giving a brief appraisal of the book reviewed here, one must note that while it is a selection of papers and comments by different authors, the subjects and their order of presentation are by no means fortuitous. They form a certain whole — from the attitudes towards the jurisdiction of the International Court of Justice, through relationships between the Court and the states — parties to disputes submitted for settlement — to the contribution of the judicial decisions of the International Court of Justice to international law.

The theses advanced in the book are a valuable and interesting contribution to the discussion on the activities and achievements, and the future of the International Court of Justice.

It must be also said that the timing for the publicating of this book is propitious, given that some countries, *e.g.* the Soviet Union, are considering a change in their attitude towards the jurisdiction of the International Court of Justice. Poland is also considering the filing of a declaration recognizing the compulsory competence of the International Court of Justice. For all these reasons, the book reviewed here will no doubt attract much interest in Poland.

Wojciech Forysiński

Genowefa GRABOWSKA, *Funkcjonariusze międzynarodowi [International Civil Servants]*, Katowice 1988, Wyd. Uniwersytetu Śląskiego, 160 pp.

The book under review is a first monograph in Polish legal literature concerning the issues of personnel of international organizations. These problems have been discussed extensively in other countries,[1] in Poland, however, were only rarely dealt with in a scientific manner. This lack of proportion raised before the author the necessity of a difficult choice: either to fill the gap in Polish literature by way of discussing almost all different aspects of international civil service, or to contribute to the development of the world knowledge on this subject with a necessary limitation to a few particular subjects of research.

It seems that the author gave primacy to the former of these tasks and presented a book being a comprehensive, and in the same time a concise survey of issues of international civil service. This construction of the book did not, however, affect its scientific importance, because some new concepts (original not only in Polish scale) are developed. The choice taken by the author should be appreciated, because the foreign literature on the subject, especially the newest one, is hardly available in Poland. Accordingly, the informative value of the book should be stressed in the beginning

The monograph is undoubtedly written from the lawyer's angle.[2] The author concentrates on the presentation and commentary of the constructions appearing in legal acts (treaties and resolutions). The last chapter "Independence" has a somewhat different character, because it deals mainly with actual problems laced by international civil servants during a course of their work.

In principle the author limits herself to the analysis of a situation of the officials of the United Nations family with rare excursions to examples of the law of European Communities, NATO or OECD. Such limitation of a field of the research is fully justified, because firstly the comparability of the organizations belonging to this family enhances the credibility of comparing the situation of the personnel of these organizations, and secondly because the solutions worked out in this system influence strongly the administration of other organizations.

The monograph consists of seven chapters: "Origins," "Employment," "Rights," "Duties," "Privileges," "Conflicts" and "Independence." This review does not purport to discuss all questions dealt with in the book and is restricted to several concepts particularly worth mentioning and some controversial aspects.

The title of Chapter I is slightly inadequate, because its main part is devoted to the attempt to construct a definition of the international civil servant. The author presents four criteria which should be met jointly: an impact of the State's will on employment of the international civil servant, an obligation to perform the public service solely in interest of the organization, an exclusiveness and continuity of the international service and a particular legal regime (p. 19). Among these criteria the first one gives rise to some doubts. It is true that the States by way of the ratification of the statute of the organization recognize implicitly the right of their nationals to be employed by the organization, but formally the limitation of persons employed to nationals of the members-States does not exist Employment of nationals of other States as well as stateless persons is not prohibited, although practically, due to the pressure of member-states, their nationals are given preference. This should not, however, amount to the defining criterion. Notwithstanding this critical remark, the new attempt to define such a heterogenic concept like the international civil service, should be welcomed and given due consideration.

---

[1] Among postions published in the 1980s, the following should be mentioned: M.V. MITROFANOW, *Shdascie mddunarodnych organûzacĵ%* Moskva 1981; J.-D. BUSCH, *Dienttreda der Vereinten Nationen*, Köln 1981; C.F. AMBRASINGHE, *The Law of Intenutional Civil Service*, vol. 1—2, Oxford 1988.

[2] An excellent example of a different approach ic NA. Graham, R.Sl. Jordan (etkji *The International Civil Service. Changing Role and Conceptt*, New York 1980.

An observation made by the author that sometimes the same persons perform simultaneously roles of an international official and a State representative, holds true. They are persons occupying such positions as President of the Session of the General Assembly or of the Security Council (pp. 20 — 21). Existence of this group does not allow to construe a definition of international civil servant based solely on employment relationship.

In Chapter II the author draws a distinction between a statutory and contractual recruitment (pp. 34 — 35). The interrelationship between statutory and contractual elements is, however, more complex than it has been described in the book. Among the provisions of the contract concluded between the official and the organization, the subordination of the former to the statute and staff regulations is often inserted. These acts may be amended in a way affecting the situation of the civil servant, who cannot claim his acquired right. As it is seen, apart from the statutory appointments practised in the European Communities and the "pure contractual" recruitment of a local personnel for general services, there often happens the type of recruitment combining both elements.

Chapters HI and IV are particularly interesting, due to the generalization of rights and duties into several broad categories, construed on the basis of staff rules and awards of administrative tribunals. It seems that constructing such broad conceptions like an international loyalty, *desintéressement*, a right to associate, *etc.*, helps the formation of the international civil service as a particular professional group.

Some doubts may be expressed in connection with a statement that the code of professional ethics has not been formed, because it does not belong to the domain of law (p. 55). The roots of lack of such code should be searched rather in still inadequate, or just insufficiently short identity of the officials with a service performed. The difference between legal and moral rules is here of minor importance, which is proven by existing codes of medical or advocates' ethics.

In a controversial question of a right of international civil servants to strike the author takes a position of inadmissibility of this form of protest, showing convincingly the contradiction between the right to strike and the basic duties of the officials (p. 69). Another argument supporting this position is a good material situation of civil servants, especially when a "Noblemaire principle," according to which emoluments of a personnel of international organizations cannot be smaller than salaries of the best paid civil servants of national administrations of member-states, is applied.

In Chapter V devoted to conflicts between the staff and the organization the two basic forms of solving disputes are described: an administrative and a judicial one. Internal administrative proceedings, although more common than the litigation before administrative tribunals, has been treated superficially by most authors writing on the issues of international civil service. Therefore, the proper proportion in analyzing both ways is one of advantages of the book under review.

The description of the judicial way is limited to litigation before Administrative Tribunals of UN and ILO. This limitation is fully justified, because the scope of research is mainly restricted to the organization making use of these tribunals. Moreover, these two tribunals have developed the most comprehensive body of judicial decisions.

In the last chapter, which concerns the independence of international officials, the discussion on a negative impact of supplementary payments granted by some national States on the independence from influence of these States (pp. 141 — 144) is particularly interesting. Worth supporting is a proposal made by the author that the General Assembly should ask the International Court of Justice for an advisory opinion on legality of the supplementary payments. It should be also stressed that the existence of the supplementary payments puts in doubt the respecting of the Noblemaire principle in all cases.

The book of Professor Grabowska is useful for both scholars studying the law of international organizations and practitioners employed in those organizations or thinking of such a career.

Rudolf Ostrihansky

Andrzej JACEWICZ, Jerzy MARKOWSKI, *Kosmos a zbrojenia. Aspekty polityczne, militarne, prawne [Outer Space and Arms Race. Political, Military and Legal Aspects]*, Warszawa 1988, Książka i Wiedza, 460 pp.

Both scientific literature and that written for the wide drdes of readers concerned with the aspects of states' military activities in outer space has been numbering thousands of volumes on the world scale. On the other hand, in Poland this kind of literature is rather unimposing as far as number of books is concerned. This might be due to the fact that a number of people professionally engaged in this subject is unimposing too. The book discussed here just belongs to these rare items devoted to militarization of outer space. The content of the book has been limited to two aspects of such use of outer space: the military-political and international legal ones. The first aspect is discussed by Jerzy Markowski in two parts entitled "Motivation and Aims" and "The Present State and Perspectives." Part three written by Andrzej Jacewicz bearing the title "The International Legal Aspect" attempts at an estimation of militarization of outer space from the point of view of international law.

A discussion of the subject matter in the chronological and topical orders makes it easier to follow the development of military activities in outer space from the theoretical phase through experiments to an installing and a full operational use of the satellite systems. Such an approach reveals the inter-relations between the technological, military, political and legal aspects of the activities in outer space.

Discussing the motivations and aims of this activities the author has concentrated his attention on the development of those premises of the military interest in outer space that are termed as general political ones. He analyzes the relations between the strategic effects of militarization of outer space with the balance of forces and security on the Earth, arms control and disarmament and between the outer space programmes and the political-military doctrines.

After a thorough and extensive presentation of the premises and development of American military interest in outer space — one may put a justified question: Were these interests and activities following from them one-sided? "In other words — Jerzy Markowski writes — how great was the interest of the other side, that is, of the Soviet Union, in use of outer space for military purposes?" Today this question seems to be purely rhetorical. When writing the book the author was not able — because of the objective reasons like a lack of a reliable source material and an exceptionally strict military censorship — to give a direct answer to this question as today do even the Soviet authors. Today one cany say that the "responsibility" for military competition for outher space rests on the two great powers. In this context the too one-sided and critical presentation of the American effort to establish a system of strategic defence requires corrections. Today it is a known fact that the anti-ballistic missile outer space systems were developed in the Soviet Union in the 1980s. The above circumstances are the reasons that the chapter "Doctrines and the USA Programmes," interesting but too partial, has no counterpart like "Doctrines and the USSR Programmes."

In part three devoted to the international legal aspects of militarization of outer space, the author Andrzej Jacewicz poses some fundamental questions and answers them. They are: does international law cover the issues of militarization of outer space? Does it formulate any limitations or bans? Are they sufficient? What else should be done to put a international legal stop to militarization of outer space? How complete could it be? Defining the scope of limitations of militarizations of outer space the author refers to some international agreements containing the respective provisions like: the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies of January 1967; the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of December 1979; the Treaty Banning Nuclear Weapon Tests in the

Atmosphere, in Outer Space and under Water of August 1963; the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of May 1977; into the agreements pertaining to the discussed subject the author included the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 1972.

The authors carries out a detailed interpretation of these agreements coming to the following conclusions and attempting at the same time to answer the questions put earlier:

a) The prohibition to place nuclear weapons and other kinds of weapons of mass destruction concerns the whole outer space. It includes their placing in orbit around the Earth, installing them on celestial bodies or stationing them in any other manner in outer space.

b) The Moon and other celestial bodies shall be used for peaceful purpose only. It is prohibited to establish military bases, installations and fortifications, *etc.*, on the Moon and celestial bodies.

c) The Moon and other celestial bodies are neutralized and totally demilitarized, while the remaining outer space is partially demilitarized, that is, as far as the weapons of mass destruction are concerned.

A very interesting and valuable from the scientific point of view is the analysis of stands of states and authors on the interpretation of the notion "use exclusively for peaceful purpose." While summing up the analysis the author writes that this notion means "the use of the Moon and other celestial bodies for non-military purposes only." Such an interpretation based on the binding agreements is certainly little precise and what is more it does not embrace the whole outer space. The author clearly suggests that this gap or a lack of consequence in interpretation was intended by the authors of the Treaty of 1967.

Answering the question what is the *de lege ferenda* model the author considers the three ceilings of demilitarization of outer space. The first of them embraces the prohibition to place nuclear weapons and any other kind of weapons of mass destruction. The second contains the prohibition to place any kind of weapons. The third means the prohibition of any kind of military activity. Although the prohibition to use the whole outer space for military purposes seems to be a very tempting solution because of its global character, it is hardly realistic just because of this character. If we take into consideration the use of outer space for military purposes in a "passive manner" and, at the same time, aim to prevent the future war in outer space, and aim to prevent from making it a base for activities against the objects in the atmosphere or on the Earth, we should postulate a prohibition to place in outer space and beyond it any kind of weapons meant to be used in outer space, the author claims.

Worth mentioning is a very interesting presentation of drafts of international agreements on the limitation or prohibition of militarization of outer space. The part concerned with a new interpretation of the ABM Treaty attracts our attention too. The author has discussed this problem in a number of other scentific publications.

Janusz Prystrom

Jerzy MAKARCZYK, *Zasady Nowego Międzynarodowego Ładu Gospodarczego. Studium prawnomiędzynarodowe [The Principles of the New International Economic Order. A Study of International Law in the Making]*, Warszawa 1988, Ossolineum, 394 pp.

A New International Economic Order is a problem the attractiveness and timelessness of which are connected with the following complex set of factors:

a. In the contemporary international community the developing States constitute a majority. Their positions and possibilities in the field of economy are principally a result of the previous colonial-economic systems. A confrontation of the economies of the developing and developed countries leads to a progressive degradation or to a prevalance

of the capital of "supranationaT corporations over the economies of developing States.

b. There has been an unprecedented development of the organizations, institutions, plans, programmes, *etcn* which embrace many international fields. Among them the issue of the economic development of the developing States has become a programme objective in the realization of which the UN has been playing a key role in spite of the fact that in terms of numbers it has been dominated by the States with a status of the developing ones.

c. There has been a dispute over the role of international law in putting to order the economic problems; the state of science of international law, the practice of interstate relations and the balance of power in the economic international relations that have been derived from the period before the establishing the UN are the three factors leading to a situation in which: 1) the international public law as the law regulating the interstate relations is not directly applied to the international economic relations; and 2) in the international economic relations a dominant role is played by the international agreements and the commitments with respect to foreign subjects engaged in economic activities and the general principles shaped in the so-called civilized States.

The discussed monograph has been aimed at showing both the "shaping of the principles of a new international economic order" (part I, pp. 23 — 209) and the investigation of one of the basic principles of this order which in the author's opinion is "a permanent sovereignty of a State over its wealth, natural resources and economic activities..." (part 2, pp. 213 — 379). The study arranged this way enables the author to achieve two aims: 1) to present and estimate the particular phases of laying down the principles and to present the conclusions on the role of these principles in the legal international order; 2) to analyze this NIEO principle which affects most of the contemporary problems of the international economic relations connected with nationalization of economies by developing States and in influx of foreign capital.

Part One of the book begins with the chapter entitled: The UN Charter, Principles of Technical Assistance and Financing of Economic Development" which presents the legal situation at the beginning of NIEO. Chapters II — VII are devoted to the course and results of the negotiations on the principles of NIEO which took place on various international forums before the adoption of the Charter of the Economic Rights and Duties of States by the UN General Assembly on 12 December, 1974. J. Makarczyk concentrates his attention on the negotiations which were held 1) at the conferences of non-aligned States beginning from Bandung and ending with Lima; 2) at the first three UNCTAD conferences; 3) at the UN General Assembly, particularly at the VI Session held in 1974 which passed the resolution on the Declaration and the programme of action on the establishment of NIEO. Chapters VIII, IX, X are devoted to the estimation of the results of the work on the formulation and placing the NIEO principles in the legal international order.

Part Two of the study begins with a list of legal problems which play a role in the contemporary economic relations and are connected with "conflicts between the States importing and exporting capital." Chapter I entitled "The History and Genesis of the Principles of the Permanent Sovereignty of the State over Natural Resources" contains two sections discussing concessions and capitulations and the early doctrinal disputes. Taking into consideration the formulations contained in the UN General Assembly resolutions the author voices an opinion that the principle of State sovereignty "did exist and was applied everywhere the balance of power allowed the countries accepting foreign economic activities on their territory to exercise a certain degree of control over them" (p. 213). One can agree that that was a primary reason for the Latin-American States to put forward a proposal for the permanent State sovereignty over its natural resources in the mid-20th century. On the other hand, some important doubts arise whether an early, extensive formulation of the stand of a State on economic issues could be treated as the

principle of the sovereignty of the State over the economic activity.

Chapters III and IV analyze the formulations of the principles of sovereignty of a State over its natural resources and the States' treatment of this principles with reference to the resolution of the UN General Assembly, the UNITAR study and the ILA Declaration. A multitude of interpretations of this principle prove that the dashing interests of the developing and developed States concentrate around it The former regard the sovereignty principle as an element of its self-determination and connect it with all their rights in the sphere of nationalization and control over foreign capital *(cf.* the wording of this prindple in Art 2 of the Charter of Economic Rights and Duties of States). The developed States interpret the principle from the point of view of respect for acquired rights of foreign subjects on the territory of a given State as well as from the angle of such a concept of utilization of natural resources which takes into consideration the interests of the whole international community. In fact, this is a dispute over the two views: 1) economic problems belong to those regulated by domestic law; 2) in economic problems norms of international public law are binding, especially those pertaining to the prindples of responsibility for nationalization and States' commitments following from the agreements with foreign investors.

As it can be judged from the opinion voiced by J. Makarczyk, he is for "... the efforts of the international community influencing the methods and prindples of use of the world's natural resources by individual States..." (p. 245). He does not support the conclusion following from the interpretation of Article 2 that "... the exerdse of sovereignty over natural resources seems to elude all international legal norms" (p. 258). However, the wording of the mentioned principle in the UNITAR study shows that its normative contents "... boils down to an affirmation of the freedom of the State carrying on all manner of economic activity and a ban against any impediments caused by others" (p. 267). J. Makarczyk is of the opinion that such an approach is in fact an admission that "... the principles of international law are of secondary importance in the matter of the soverignty of the State over wealth, natural resources and economic activities; their use or rejection in various concrete disputes is primarily dependent on the balance of power" (p. 267).

Within the framework of the law of treaties (Chap. IV) the author analyzes bilateral international agreements concluded in great numbers to protect foreign investments. They are of great importance in practice, *e.g.* in matters of treatment of foreign investments and of the prindples of nationalization and compensation for nationalization. He points to the fact that the development and content of these agreements are independent of the process of shaping of NIEO principles, that these agreements tend to broaden the guarantees granted to foreign investors as their position becomes less and less stable in the light of the State economic rights and duties within the framework of NIEO. Then the author discusses the evolution of the doctrine (Chap. IV) and shows that the classical formula of "a prompt, adequate and effective" compensation is being replaced by the concept of "just" compensation (p. 286). He also emphasizes that today there is no longer any doubt that violation by the State of a contract concluded with a foreign legal entity is not considered a breach of international law (p. 287).

The monograph contains very valuable results of studies on the judicial dedsions of the Hague courts and international arbitration (Chap. V and VI). They show that international jurisprudence hardly contributed to the development of the principle of sovereignty of a State over its wealth, natural resources and economic activities. The Hague courts either showed conservative tendendes, giving a strong emphasis to the theory of acquired rights, or generally avoided to look into the substantial aspects of this prindple and its practical applications. On the other hand, a terse and correct analysis of the international arbitration in judicial dedsions results in many interesting and constructive conclusions. When analyzing the judidal decisions of arbitration courts I. Makarczyk

shows that in settling matters connected with the principle of sovereignty of a State pragmatic approach was most often taken.

Most of the analyzed problems pertain to the breach of concession obligations as a result of nationalization. The author expresses a view that the experience of the courts of arbitration "creates a real opportunity to advance the formulation of international legal principles of economic sovereignty in a way acceptable to all members of the international community" (p. 386).

A New International Economic Order can be considered a phenomenon which is to fulfil certain outlined aims oriented at equalizing the level of economic development of the developed and developing States. It can also be considered a manifestation of a progressive development of an international legal order. Both views expressed in the analyzed documents, in States' opinions and the doctrinal approaches intersect and thus make the NIEO a problem of particular complexity J. Makarczyk emphasizes this aspect of the problem but he seems not to draw a sufficient distinction between the two views on the NIEO. It is largely a result of the concept of the study conceived as a monograph on the legal-political problems of NIEO. The author does perceive the economic roots of such an order but on the other hand, he does not attempt to formulate an economic definition of NIEO, which renders it impossible to place NIEO on the plane of international relations.

There are several conclusions pertaining to NIEO viewed as a phenomenon contained within certain time limits: a) NIEO origins must be looked for in the period of existence of the League of Nations, in the provisions of the UN Charter an in various initiatives undertaken under the UN system before NIEO was on the UN agenda; b) an adoption and substantiation of a view that within the UN system and the non-aligned countries movement the adoption of the Charter of Economic Rights and Duties of States "is more akin to a summary of the postulates, wishes and demands of the developing States" than "the beginning of a new era" (p. 382); c) an adoption of a view that contained in the Charter "radicalism and a disregard for real international relations [...] delayed, rather than accelerated, the process of change in many matters," and that "the present stagnation, or lack of political interest of States, stem from the attempt at undue acceleration taken up by the developing nations during the decade between UNCTAD I and the adoption of the Charter of Rights" (p. 382).

However, the general concept of the study and views contained in it prove that the author derives the whole process of shaping of NIEO from the progressive development of the international legal order. He voices an opinion that NIEO understood this way is at the initial stage of its development. The following two statements illustrate his view best: "The law of the New International Economic Order is barely emerging, its evolutions is slow, uneven, multidirectional, and under the scrutiny of various forums. It is a good thing that the debate is presently concentrating within the sphere of international law" (p. 383). This view is related to the author's another contention that the work on the NIEO concept and content should start from the studies on UNITAR and ILA Declaration. However, it does not mean that the results of these two documents are assessed positively. As far as ILA Declaration is concerned, 1. Makarczyk says that the most important element of the new order — the principle of sovereignty of the State over its wealth, natural resources and economic activities "lies within the orbit of traditional Western doctrine." On the other hand, as far as the treatment of this principle by UNITAR is concerned he is of the opinion that "UNITAR standpoint is paramount to a negation of the role of public international law in the realization of this principle in practice; this makes all work concerned with the specyfing of its norms pointless" (p. 383). Therefore, he is for the active role of international law in the shaping of the principle of sovereignty of the State over its wealth, natural resources and economic activities thinking that the beginnings of this principle within the UN system show that it "was to guarantee the proper exploitation of wealth and resources in accordance with the will of the people but also in agreement with the needs of the international community" (p. 384).

The author is right in thinking that "the present dispute over the form and the character of the principle of permanent sovereignty, in spite of the philosophical and ideological overlay which it sometimes receives, has essentially become an economic debate" (p. 384). It is only the pragmatism of the parties that can decide on the solution of this problem because in spite of the essential differences in the interests of the States importing and exporting capital there is also a great amount of convergence and inseparability which must result in common solutions. "The only instruments capable of bringing together these interests are the norms of international law formulated and accepted by all parties and not only by one of them. Such norms have, as of yet, not been formulated" (p. 385). J. Makarczyk is not very optimistic about the possibilities to formulate these norms but on the other hand he thinks that both the doctrine and jurisdiction have made certain attempts to create such a law.

It seems to be a certain drawback of the discussed monograph that the doctrine of the socialist countries has hardly been taken into consideration. One may also have some reservations as to the use of the Polish literature of the subject, for instance why the works of K. Libera like *The Principles of the International Consular Law* (Warszawa 1960) and *The International Movement of Persons* (Warszawa 1969) have not been taken into consideration.

Jerzy Makarczyk has enriched Polish legal literature with his valuable monograph summing up and estimating the most important attempts to formulate a New International Economic Order. Due to the rich documents, views and a detailed presentation of the subject the monograph is a valuable source material for further studies on the shaping of the new order. It also suggests what should be avoided and what should be done in the process of formulation and adoption of the principle of NIEO.

Andrzej Całus

Renata SZAFARZ, *Wielostronne stosunki traktatowe Polski [Poland's Multilateral Treaty Relations]*, Wrocław 1990, Zakład Narodowy im. Ossolińskich — Wydawnictwo Polskiej Akademii Nauk, 185 pp.

The discussed study has been elaborated at the Institute of State and Law, Polish Academy of Sciences. It is worth noting that the author, a member of the Team of International Law, the Legislative Council, an advisory body to the President of the Council of Ministers, has already presented some of her research results. Basing on the material prepared by Professor Renata Szafarz the Team has suggested a withdrawal by Poland of the reservations concerning the judicial or arbitration clause in international agreements.

Professor Renata Szafarz has been specializing in the law of treaties for many years. Her earlier monographical studies, highly estimated by the critics, were concerned with general theoretical problems like, for instance, reservations to multilateral treaties, succession of States with regard to treaties while her latest work is devoted more to the practical aspects of the problem. In the discussed study the author has aimed: 1) to get the reader acquainted with the number and contents of multilateral obligations of Poland; 2) to show how the law of treaties operates in the Polish legal practice; 3) to compare this practice with the provisions of the Vienna Convention on the Law of Treaties of 1969.

Chapter I of the study contains a general characterization of Poland's multilateral treaty relations. The next chapters are devoted to some selected institutions of the law of treaties and to settlement of disputes in Poland's treaty practice. Chapter II presents the mode of concluding multilateral treaties by Poland, Chapter III — the effectiveness of treaties in Poland's territory, Chapter IV — reservations and objections in Poland's treaty practice, Chapter V — Poland's position as the third State to the multilateral Potsdam Agreement. Chapter VI presents denunciation and suspension of the operation of multilateral treaties by Poland, Polish law, Chapter VII

— Poland as a depositary of multilateral treaties and Chapter VIII — Poland's treaty commitments in settlement of disputes.

Presenting the operations of the particular institutions of the law of treaties in the Polish legal practice, the author compares it with the solutions adopted in the Vienna Convention and comes to the conclusions that no contradiction exists between them, which implies that there are no obstacles to accession to the Convention by Poland.

The principal part of the study ends with the conclusions contained in 65 points. They are comparatively differentiated in terms of essence of the problem and their detailed description. It is worth emphasizing that the author aims at the most matter-of-fact presentation of the problem and the *de lege ferenda* solutions.

Part Two of the study contains a list of the published and unpublished multilateral treaties of Poland. It is a pity that due to the long publishing cycle the list depicts the state of affairs as of 1986—1987. The list has been classified into ten topical sections (political relations, the status of various territories, the human rights and citizen's rights, economic relations, protection of the environment, transport and communication, labour and social insurance, health protection and social assistance, education, science and culture, legal relations with foreign countries).

One can hope that the study will be of great help to students and research workers as well as to the legal departments of many ministers and offices because it presents, in a dear manner, the various aspects of the Polish treaty practice and contains an exceptional and extremely useful list of nearly 700 multilateral agreements Poland is a party to. Therefore, the issue of 520 copies seems to prove that the merited publishing house which the Ossolineum is, has not come to realize what the factual needs are. A second, enlarged and revised edition seems to be quite purposeful (some remarks are too laconic and the list needs to be updated).

Andrzej Jacewicz

T R E A T I E S * T R A I T E S

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVIII, 1989-1990
PL ISSN 0554-498X

International Treaties Entered into Force in Relation to Poland in 1988 and 1989

The following list includes the most important international agreements, both bilateral and multilateral, to which Poland became party in 1988 and 1989. The list comprises only agreements concluded on state and governmental level; inter-departmental agreements (agreements concluded on the level of ministers) are excluded.

Previous to a constitutional amendment of April 1989 the Council of State was the sole organ authorized to ratify and denounce international treaties. Following that amendment it is now the President of the Republic of Poland who — according to Article 30, para. 1, point 8 of the Constitution — ratifies and denounces international treaties. Paragraph 2 of that provision provides that in case of international agreements that will entail a considerable financial burden for the State or require legislative changes, ratification should be preceded by the consent of the Sejm (Parliament).

Consent to be bound by an agreement may also be expressed by the Council of Ministers in the form of either approval or signature of a duly authorized plenipotentiary.

The Polish Constitution does not specify for which agreements the procedure of ratification is required. The Joint Resolution of the Council of State and the Council of Ministers of 28 December, 1968 concerning the conclusion and denunciation of treaties provides that the procedure of ratification is to be applied to treaties of special importance:

— peace treaties and treaties of friendship, cooperation and mutual assistance,
— other treaties of political character,
— treaties concerning subject-matters regulated by acts of Parliament in internal law,
— treaties concerning regulations different from those found in internal legislation,
— other treaties with which Poland has committed herself to apply the procedure of ratification in order to satisfy the legal requirements of the other party or if the parties have chosen this procedure for special reasons.

All ratified treaties are published in *Dziennik Ustaw [Journal of Laws]*. There exists no complete collection of treaties to which Poland is party.

Bilateral treaties are presented below according to the names of the countries in alphabetical order, according to the following pattern: title of treaty, place and the date of signature, way of expressing content to be bound, date of entry into force in relation to Poland.

Multilateral treaties are listed chronologically, according to the date of their signature and follow the same pattem.

1988

Bilateral Treaties

Austria

— Agreement on cooperation in the prevention and disclosure of crimes and in securing of road safety, Warsaw, 22 August, 1987; approval, 1 August, 1988.

China

— Agreement on cultural and scientific cooperation, Beijing, 30 September, 1986; ratification, 18 August, 1988.

— Agreement on legal assistance in civil and penal matters, Warsaw, 5 June, 1987; ratification, 13 February, 1988.

Cuba

— Agreement on cultural, educational and scientific cooperation, Warsaw, 17 June, 1987; ratification, 24 June, 1988.

Denmark

— Agreement on exchange of information and on cooperation in the field of nuclear safety and protection against radioactivity, Warsaw, 22 December, 1987; approval, 2 December, 1988.

Union of Soviet Socialist Republics

— Agreement on the establishment and activity of the Centre of Information and Polish Culture in the Soviet Union, Moscow, 9 February, 1988; signature, 9 February, 1988.

— Agreement on the establishment and opening of new road frontier crossing points on the state boundary of Poland and the Soviet Union, Warsaw, 7 July, 1988; signature, 7 July, 1988.

United Kingdom

— Agreement for the promotion and reciprocal protection of investments, London, 8 December, 1987; notification 14 April, 1988.

United States

— Air Transport Agreement, Warsaw, 1 February, 1988; approval, 11 October, 1988.

— Agreement on cooperation in the area of veterinary matters, Washington, 19 April, 1988; signature, 19 April, 1988.

Venezuela

— Basic Agreement on scientific and technical cooperation, Caracas, 26 May, 1988; approval, 22 November, 1988.

Multilateral Treaties

— International Convention on maritime search and rescue, Hamburg, 27 April, 1979; ratification, 27 March, 1988.

— Règlement général de l'Union Postale Universelle, Hambourg, 27 juillet 1984; approbation, 12 avril 1988.

— Convention Postale Universelle, Hambourg 27 juillet 1984; approbation, 12 avril 1988.

— Protocole final de la Constitution de l'Union Postale Universelle, Hambourg, 27 juillet 1984; approbation, 12 avril 1988.

— Troisième Protocole additionnel à la Constitution de l'Union Postale Universelle, 27 juillet 1984; ratification, 9 février 1988.

— Protocol to the 1979 Convention on long-range transboundary air pollution on long-term financing of the long-range transmission of air pollutants in Europe (EMEP), Geneva, 28 September, 1984; ratification, 13 December, 1988.

— Intematinal Convention against apartheid in sports, adopted by the General Assembly of the United Nations on 10 December, 1985; ratification, 3 April, 1988.

— Agreement on cooperation and mutual assistance in the matter of arrest and return of cultural goods, transported illegaly accross state boundaries, Plovdiv, 22 April, 1986; ratification, 27 July, 1988.

— Convention on early notification of a nuclear accident, Vienna, 26 September, 1986; ratification, 24 April, 1988.

— Convention on assistance in the case of a nuclear accident or radiological emergency, Vienna, 26 September, 1986; ratification, 24 April, 1988.

Other Treaties

— Agreement between the Government of the Polish People's Republic and the International Baltic Sea Fishery Commission on the legal status and privileges and immunities of the Commission, Warsaw, 12 January, 1988; ratification, 26 October, 1988.

1989

Bilateral Treaties

Austria

— Agreement on the promotion and protection of investments; Vienna, 24 November, 1988; ratification, 1 November, 1989.

Bulgaria

— Agreement concerning fundamental principles of establishment and activity of joint enterprises and economic institutions; Sofia, 15 September, 1988; approval, 11 February, 1989.

Canada

— Convention for the avoidance of double taxation with respect to taxes on income and on capital; Warsaw, 4 May, 1987; ratification, 30 November, 1989.

China

— Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respects to taxes on income; Beijing, 7 June, 1988; ratification, 7 January, 1989.

— Agreement on mutual promotion and protection of investments; Beijing, 7 June, 1988; ratification, 8 January, 1989.

Czechoslovakia

— Agreement concerning the state border line in connection with the results of the first joint inspection of the Polish and Czechoslovak state border line on boundary water courses; Warsaw, 10 December, 1986; ratification, 10 October, 1989.

— Agreement on legal assistance and legal relations in civil, family, labour and penal matters; Warsaw, 21 December, 1987; ratification, 9 April, 1989.

— Agreement on direct cooperation in production, science and technology between enterprises and institutions of Poland and Czechoslovakia; Warsaw, 19 June, 1989; signature, 19 June, 1989.

Federal Republic of Germany

— Agreement on cooperation in the field of environmental protection; Warsaw, 10 November, 1989; signature, 10 November, 1989.

France

— Accord dans le domaine de la formation des cadres d'entreprises, Varsovie, 14 juin 1989; approbation, 4 décembre 1989.

— Accord de consolidation de dettes, Varsovie, 14 juin 1989; signature, 14 juin 1989.

German Democratic Republic

— Treaty on the "Act of Friendship of Youth of the Polish People's Republic and of the German Democratic Republic;" Wrocław, 24 June, 1988; ratification, 22 January, 1989.

— Agreement on the delimitation of the maritime territory of the Pomeranian Bay; Berlin, 22 May, 1989; ratification, 13 June, 1989.

India

— Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; Warsaw, 21 June, 1989; ratification, 26 October, 1989.

Iraq

— Convention sur l'entreaide juridique et judiciaire en matière civile et pénale, Bagdad, 29 octobre 1988; ratification, 22 décembre 1989.

Italy

— Agreement for the avoidance of double taxation with respect to taxes on income and the prevention of fiscal evasion; Rome, 21 June, 1985; ratification, 26 September, 1989.

Kampuchea

— Convention consulaire, Varsovie, 23 juillet 1987; ratification, 8 juillet 1989.

Peru

— Agreement on cooperation in the field of sea fishery; Lima, 25 November, 1988; approval, 30 March, 1989.

Sweden

— Agreement on medical care; Stockholm, 29 November, 1988; approval, 1 June, 1989.

— Agreement for the delimitation of the continental shelf and the fishing zones; Warsaw, 10 February, 1989; ratification, 30 June, 1989.

— Agreement for the delimitation of regions of fighting pollution of the Baltic Sea; Warsaw, 10 February, 1989; entered into force automatically with the Agreement for the delimitation of the continental shelf, 30 June, 1989.

Turkey

— Consular convention; Ankara, 5 June, 1987; ratification, 14 April, 1989.

United States of America

— Agreement concerning the reciprocal establishment of cultural and information centres; Warsaw, 10 July, 1989; signature, 10 July, 1989.

— Agreement regarding the consolidation and rescheduling of certain debts owed to, guaranteed by, or insured by the Government of the United States and its agencies (in accordance with recommendations signed in Paris on 16 December, 1987); Warsaw, 10 July, 1989; 6 September, 1989.

— Agreement for sales of agricultural commodities; Warsaw, 30 November, 1989; signature, 30 November, 1989.

Union of Soviet Socialist Republics

— Agreement on cooperation in the field of normalization, administering of quality of goods and meteorology; Moscow, 20 January, 1989; signature, 20 January, 1989.

Multilateral Treaties

— European Cultural Convention; Paris, 19 December, 1954; accession, 16 November, 1989.

— Annexes to the International Convention on Simplification and Harmonization of Customs Procedures: E.3 concerning customs warehouses; E.4 concerning drawback; F.5 concerning urgent consignments; F.6 concerning repayment of import duties and taxes; Kyoto, 18 May, 1973; entered into force according to Article 12 para. 4 of the Convention, 26 April, 1989.

— Amendment of Article VI of the Statute of the International Atomic Energy Agency, adopted by the General Conference; Vienna, 27 September, 1984; ratification, 28 December, 1989.

— Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December, 1984; ratification, 25 August, 1989.

— European Agreement on Main International Railway Lines (AGC); Geneva, 31 May, 1985; ratification, 27 April, 1989.

— Convention on the system of assessment of quality and attestation of mutually supplied goods; Moscow, 14 October, 1987; ratification, 6 February, 1989.

— Agreement between the governments of Poland, Czechoslovakia and German Democratic Republic on cooperation in the field of environmental protection; Wrocław, 1 July, 1989; approval, 17 October, 1989.

Joanna Gomula

BIBLIOGRAPHY * BIBLIOGRAPHIE

POLISH YEARBOOK
OF INTERNATIONAL LAW
YOU XVIII, 1989-1990
PL ISSN 0554-498X

Polish Bibliography of International Law, 1988

Public International Law

BOOKS

ANTONOWICZ Lech: Państwa i terytoria. Studium prawnomiędzynarodowe [States and Territories. Legal and International Study]. Warszawa: Państwowe Wydawnictwo Naukowe 255 pp., bibliography.

BALCEREK Marian: Międzynarodowa ochrona dziecka [International Protection of the Child]. Warszawa: Wydawnictwa Szkolne i Pedagogiczne 270 pp., bibliography.

BALICKA Janina, BALICKI Jan: Alarm dla ambasad [Alarm for Embassies]. Warszawa: Wydawnictwo Prawnicze 124 pp.

GRABOWSKA Genowefa: Funkcjonariusze międzynarodowi [International Officials]. Katowice: Uniwersytet Śląski 154 pp., bibliography, summaries in Russian and English.

KLEPACKI Zbigniew M.: Organizacja Narodów Zjednoczonych 1945—1985 [The United Nations 1945—1985]. Ciechanów: Ciechanowskie TN 141 pp.

LUKASZUK Leonard: Prawo konsularne. Zarys wykładu [Consular Law. An Outline]. Warszawa: Akademia Nauk Społecznych 300 pp., bibliography.

MAKARCZYK Jerzy: Zasady nowego międzynarodowego ładu gospodarczego. Studium prawnomiędzynarodowe [The Principles of the New International Economic Order. International Legal Outline]. Wroclaw: Ossolineum, Instytut Państwa i Prawa 394 pp., bibligraphy.

MENKES Jerzy: Nowy międzynarodowy ład ekonomiczny. Studium prawnomiędzynarodowe [New International Economic Order. International Legal Outline]. Katowice: Uniwersytet Śląski 235 pp., bibligraphy, summaries in French and English.

SONNEFELD Renata: Resolutions of the United Nations Security Council Warszawa: Państwowe Wydawnictwo Naukowe 168 pp., bibligraphy.

TYRANOWSKI Jerzy: Zasada nienaruszalności granic w prawie międzynarodowym [The Principle of Inviolability of Frontiers in International Law]. Warszawa: Polski Instytut Spraw Międzynarodowych 1987 pp. 142.

ARTICLES

BARCZ Jan: Obywatelstwo polskie a emigracja [Polish Citizenship and Emigration]. *Gazeta Prawnicza* No. 17.

BARCZ Jan: Poszukiwanie mechanizmów gwarancyjnych. Stosowanie i przestrzeganie prawa międzynarodowego [Looking for Guarantee Mechanisms. Application and Observance of International Law]. *Gazeta Prawnicza* No. 3.

BARCZ Jan: Zaopatrzenie wypadkowe w stosunkach PRL — RFN. Problemy prawne [Accident Pension in Relations between Poland and FRG. Legal Problems]. *Przegląd Zachodni* No. 3 pp. 111—128.

BERENT Zbigniew: Pokój międzynarodowy i bezpieczeństwo — próba definicji [International Peace and Security — Attempts to Define]. *Sprawy Międzynarodowe* No. 6 pp. 111—122.

BIAŁOCERKIEWICZ Jam Wpływ doktryny liberalizmu gospodarczego na powstanie prawa międzynarodowego gospodarczego [Influence of the Economic Liberalism Doctrine on the Establishment of International Economic Law]. *Acta Universitatis Nicolai Copernici. Prawo* No. 26 pp. 101—118, Summary in English.

BUKOWSKI Sławomir Rozwój powiązań kooperacyjnych Polski z krajami RWPG [Development of Cooperation Connections between Poland and the CMEA Countries]. *Sprawy Międzynarodowe* No. 9 pp. 33—44.

BUTKIEWICZ Ewa: Przemiany prawnej regulacji międzynarodowych stosunków gospodarczych [Changes of Legal Regulation of International Economic Relations]. Sprawy *Międzynarodowe* No. 3 pp. 117—130.

CIECHAŃSKI Jerzy: "Prawo do interwencji zbrojnej" w prawie międzynarodowym ["The Right to Armed Intervention" in International Law]. *Sprawy Międzynarodowe* No. 2 pp. 97—112.

CISZEWSKI Jam Norms of Competence Concerning Competence of Law and Organs in Civil and Family Matters in Agreements Concluded between Poland and Socialist States. *Polish Yearbook of International Law* 1986 (1988) vol. XV pp. 277—300, English version.

CZAPLIŃSKI Władysław: Akty jednostronne w prawie międzynarodowym [Unilateral Acts in International Law]. *Sprawy Międzynarodowe* No. 6 pp. 97—110.

CZAPLIŃSKI Władysław: Problematyka źródeł prawa międzynarodowego w wyroku MTS w sprawie Nikaragui [The Issue of Sources of International Law in the Judgement of the International Court of Justice Concerning Nicaragua]. *Państwo i Prawo* No. 11 pp. 85—96.

CZARNY Ryszard M.: Teoretyczne i praktyczne aspekty neutralności Szwecji [Theoretical and Practical Aspects of Sweden's Neutrality]. Sprawy *Międzynarodowe* No. 10 pp. 75—92.

CZERNIS Marek: Konwencja w sprawie przeciwdziałania bezprawnym aktom zagrażającym żegludze morskiej [Convention on Counteracting Illegal Acts Threatening the Safety of Martime Shipping]. *Technika i Gospodarka Morska* No. 11 pp. 470—473.

CZUBIŃSKI Zbigniew: Instytucja konsula honorowego w polskim prawie konsularnym i w polskiej praktyce [The Institution of Honorary Consul in Polish Consular Law and Polish Practice]. *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Nauk Politycznych* 1987 No. 31 pp. 7—22, summary in German.

DOBROCZYŃSKI Michał: Ewolucja europejskiego systemu międzynarodowego [Evolution of the European International System]. *Sprawy Międzynarodowe* No. 12 pp. 27—38.

FIUMEL Henryk de, MAKARCZYK Jerzy: Le problème de la force obligatoire des normes du droit international dans l'ordre juridique national. *Polish Yearbook of International Law* 1986 (1988) vol. XV pp. 11—28, French version.

GRABOWSKA Genowefa: Niezależności funkcjonariuszy organizacji międzynarodowych [Independence of International Civil Servants]. *Sprawy Międzynarodowe* No. 9 pp. 115—127.

HARA Ryszard, JACEWICZ Andrzej, RZYMANEK Jerzy: Utrzymujące się konflikty w interpretacji norm prawnych regulujących wojskową działalność kosmiczną [Existing Conflicts in Inerpretation of Legal Norms Regulating Military Outer Space Activity]. *Postępy Astronautyki* No. 3/4 pp. 175—190.

HOŁOWIŃSKI Jan T.: Oczekiwanie przez statek na nabrzeże według prawa angielskiego i kontynentalnego [Ship's Awaiting for Berth according to English and Continental Laws]. *Technika i Gospodarka Morska* No. 4 pp. 154—157.

JABŁOŃSKI Eugeniusz: O nowy status izb morskich i udoskonalenie procedury [For a New Status of Maritime Chambers and Improvement of Procedure]. *Technika i Gospodarka Morska* No. 6 pp. 248—251.

JACEWICZ Andrzej: Development and Testing of "Star Wars" Systems. Remarks with Regard to the "New" Interpretation of the ABM Treaty. *Postępy Astronautyki* No. 1/2 pp. 89—106, English version.

JACEWICZ Andrzej: Nowa interpretacja Układu o ograniczeniu systemów obrony przeciwrakietowej [A New Interpretation of the Treaty on the Limitation of Antiballistic Missile Systems]. *Sprawy Międzynarodowe* No. 5 pp. 41—56.

JĘDRUSIAK Stanisław: Zasada suwerennej równość państw a specjalny stetus wielkich mocarstw w ONZ [The Principle of Sovereign Equality of States and the Special Status of Great Powers in the UN]. *Przegląd Stosunków Międzynarodowych* No. 3/4 pp. 21—36.

KAWECKA-WYRZYKOWSKA Elżbieta: Klauzula największego uprzywilejowania w polityce handlu zagranicznego USA [The Most-Favoured Clause in the USA Foreign Trade Policy]. *Sprawy Międzynarodowe* No. 2 pp. 119—132.

KISIEL Bogusław: Kierunki rozwoju ruchu niezaangazowania [Trends of Development in the Non-Aligned Movement]. *Sprawy Międzynarodowe* No. 6 pp. 19—34.

KNYPEL Zenon: Morze terytorialne NRD [The Territorial Waters of the GDR]. *Technika i Gospodarka Morska* No. 12 pp. 521—522.

KOWALSKI Piotr Międzynarodowe organizacje pozarządowe w systemie ochrony praw człowieka [International Non-Governmental Organizations in the System of Human Rights Protection]. *Sprawy Międzynarodowe* No. 11 pp. 129—142.

KOWALSKI Piotr "Nowe prawa człowieka." Perspektywy i zagrożenia ["New Human Rights." Perspectives and Dangers]. *Ruch Prawniczy, Ekonomiczny i Społeczny* No. 2 pp. 57—75, summary in English.

KOWALSKI Piotr Zbiorowe prawa człowieka [Problems of Collective Subjects of Human Rights — Questions of Theory of Human Rights]. *Studia Nauk Politycznych* No. 5 pp. 163—181, summaries in Russian, English and French.

KOZIŃSKI Mirosław H.: Prawo międzynarodowe a prawo wewnętrzne — uwagi w związku z nowelizacją kodeksu morskiego [International Law and Domestic Law. Remarks Connected with the Amendment of the Maritime Code]. *Technika i Gospodarka Morska* No. 8/9 pp. 348—351.

KOLASA Jan: Proces Norymberski — aspekt proceduralny [The Nuremberg Trial — Its Procedural Aspect]. *Państwo i Prawo* No. 5 pp. 55—64.

KUKUŁKA Jôzeç ZIĘBA Ryszard: Prawo do pokoju a wychowanie w duchu pokoju [The Right to Peace and the Education for Life in Peace]. *Sprawy Międzynarodowe* No. 1 pp. 7—21

LANKOSZ Kazimierz: Spory międzynarodowe wynikające z działalności w przestrzeni kosmicznej l pokojowe środki ich załatwiania [International Disputes Resulting from Outer Space Activity and Peaceful Means of Their Settlement]. *Zeszyty Naukowe Akademii Ekonomicznej*, Kraków 1987 No. 241 pp. 73—87, summaries in Russian and English.

ŁUKASZUK Igor L: Charakter podstawowych zasad prawa międzynarodowego [The Nature of Fundamental Principles of International Law]. *Sprawy Międzynarodowe* No. 11 pp. 111—124.

LUKASZUK Leonard: Organizacje międzynarodowe a morskie badania naukowe (wybrane zagadnienia prawno-międzynarodowe) [International Organizations and Scientiiic Maritime Research (Selected International Legal Problems)]. *Przegląd Stosunków Międzynarodowych* No. 2 pp. 63—77.

LUKASZUK Leonard: Powszechna Deklaracja Praw Człowieka Narodów Zjednoczonych a zagadnienia ochrony praw obywateli w działalności Trybunału Konstytucyjnego w Polsce [The UN Universal Declaration of Human Rights and Human Rights Protection in the Activity of the Constitutional Tribunal in Poland]. *Nowe Prawo* No. 7/8 pp. 3—18.

LUKASZUK Leonard, TYRANOWSKI Jerzy: Miejsce prawa międzynarodowego w systemie prawnym PRL [The Place of International Law in Poland's Legal System]. *Sprawy Międzynarodowe* No. 7/8 pp. 79—98.

MENKES Jerzy: Prawne aspekty wykonywania stałej suwerenności państw nad bogactwami naturalnymi [Some Legal Aspects of Executing Permanent Sovereignty by States over Natural Resources]. *Przegląd Stosunków Międzynarodowych* No. 1 pp. 81—99.

MENKES Jerzy: Zasady prawa międzynarodowego [The Principles of International Law]. Państwo i *Prawo* No. 10 pp. 75—82.

MICHALSKA Anna: Interpretation of the International Covenant on Civil and Political Rights in the Light of Reports of the Human Rights Committee. *Polish Yearbook of International Law* 1986 (1988) vol. XV pp. 45—70, English version.

MORAWIECKI Wojciech: Legal Regime of the International Organization. *Polbh Yearbook of International Law* 1986 (1988) vol. XV pp. 71—101, English version.

MULTAN Wojciech: Układ o likwidacji rakiet średniego i mniejszego zasięgu [Treaty on the Elimination of Intermediate-range and Shorter-range Missiles]. *Sprawy Międzynarodowe* No. 2 pp. 7—24.

MURZYNOWSKI Andrzej: Procedura karna a pakty praw człowieka [Penal Procedure and Human Rights Conventions]. *Gazeta Prawnicza* No. 7.

NAHLIK St E.: On Codification of International Law. *Polbh Yearbook of International Law* 1986 (1988) vol. XV pp. 103—118, English version.

OSTRIHANSKY Rudolf: Kompetencja Międzynarodowego Trybunału Sprawiedliwości do rozpoznawania sporów międzypaństwowych [The Competence of the International Court of Justice to Consider Inter-State Disputes]. *Ruch Prawniczy, Ekonomiczny i Społeczny* No. 2 pp. 77—95, summary in English.

PAWLAK Stanisław: Miejsce i rola ONZ w powszechnym systemie bezpieczeństwa międzynarodowego [The Place and Role of the UN in the General System of International Security]. *Sprawy Międzynarodowe* No. 5 pp. 7—24.

PAWLAK Stanisław: Terroryzm międzynarodowy — aspekty polityczne i prawne [International Terrorism — Political and Legal Aspects]. *Sprawy Międzynarodowe* No. 9 pp. 21—32.

RABIEJ Stanisław: Regulacje prawnomiędzynarodowe dotyczące awarii jądrowych [International Legal Regulations Relating to Nuclear Accidents]. *Sprawy Międzynarodowe* No. 12 pp. 121—135.

SANDORSKI Jan: Organizacja Narodów Zjednoczonych u progu XXI wieku [United Nations at the Threshold of the 21st Century]. *Ruch Prawniczy, Ekonomiczny i Społeczny* No. 3 pp. 15—32, summary in English.

SAWICKI Stefan: Consular Immunity from Jurisdiction in Internal Law and Consular Conventions Binding on Poland. *Polish Yearbook of International Law* 1986 (1988) vol. XV pp. 119—134, English version.

SAWICKI Stefan: Międzynarodowy ruch turystyczny. Zagadnienia prawne [International Tourist Traffic. Legal Problems]. *Zeszyty Naukowe Akademii Spraw Wewnętrznych* No. 51 pp. 29—46, summaries in Russian, English and German.

SAWICZEWSKA Zofia: Międzynarodowe regulacje prawne jako zewnętrzne uwarunkowania funkcjonowania i rozwoju gospodarki morskiej [International Legal Regulations as External

Conditions of the Functioning and Development of the Polish Maritime Economy]. *Technika i Gospodarka Morska* No. 7 pp. 302—303.

SKUBISZEWSKI Krzysztof: Non-Binding Resolutions and the Law-Making Process. *Polish Yearbook of International Law* 1986 (1988) vol. XV pp. 135—161, English version.

SKUPIŃSKI Jan: Prohibition of Torture and Other Inhuman Treatment (The Development of International Legal Regulation within the United Nations). *Polish Yearbook of International Law* 1986 (1988) vol. XV pp. 163—192, English version.

SONNENFELD Renata: Czy immunitet w odwrocie? (Dot immunitetu państwa). Is State Immunity in Retreat? *Gazeta Prawnicza* No. 9.

STAŃCZYK Janusz: The International Court of Justice on the Competence and Function of the Security Council (Related to the Cases brought before it). *Polbh Yearbook of International Law* 1986 (1988) vol. XV pp. 193—216, English version.

STAŃCZYK Janusz: Sprawa Nikaragua c. USA przed Międzynarodowym Trybunałem Sprawiedliwości [The Nicaragua v. USA Case before the International Court of Justice]. *Studia Prawnicze* 1987 (1988) No. 4 pp. 95—140.

SUTOR Julian: Stosowanie sankcji prawnomiędzynarodowych [Application of International Sanctions]. *Sprawy Międzynarodowe* No. 4 pp. 83—92.

SYMONIDES Janusz: Funkcje sądownictwa międzynarodowego we współczesnych stosunkach międzynarodowych [Functions of International Judicature in Contemporaty International Relations]. *Sprawy Międzynarodowe* No. 7/8 pp. 41—52.

SYMONIDES Janusz: Territorial Asylum. *Polish Yearbook of International Law* 1986 (1988) vol. XV pp. 217—232, English version.

SZAFARZ Renata: Poland's Multilateral Treaty Relations. *Polish Yearbook of International Law* 1986 (1988) vol. XV pp. 233—242, English version.

SZAFARZ Renata: Zobowiązania Polski w dziedzinie załatwiania sporów wynikających z traktatów wielostronnych [Poland's Obligations as Regards the Settlement of Disputes Arising out of Multilateral Treaties]. *Państwo i Prawo* No. 2 pp. 83—91.

SZANIAWSKI Zbigniew, FORYSIŃSKI Wojciech: Le problème d'application de la Convention sur le Statut juridique, les privilèges et les immunités des organisations économiques interétatiques fonctionnant dans certains domaines de cooperation. *Polish Yearbook of International Law* 1986 (1988) vol. XV pp. 29—44, French version.

TYRANOWSKI Jerzy: Zagadnienie reintegracji terytorium państwa a prawo ludu do samostanowienia [The Problem of Re-integration of State Territory and the Peoples' Right to Selfdetermination]. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* No. 1 pp. 1—20, summary in English.

WAJDA Stanisław: Nieżeglowne wykorzystanie Nysy Łużyckiej. Prawnomiędzynarodowe aspekty współpracy PRL — NRD — CSRS [The Nonnavigable Use of the Nysa Łużycka River (the Lusatian Neisse). International Legal Aspects of Cooperation between Poland, Czechoslovakia and German Democratic Republic]. *Przegląd Stosunków Międzynarodowych* No. 1 pp. 101—105.

WAJDA Stanisław: Sprawa tzw. mniejszości niemieckiej w PRL na forum Parlamentu Europejskiego [The Problem of the So-Called German Minority in the Polish People's Republic before the European Parliament]. *Przegląd Stosunków Międzynarodowych* No. 2 pp. 87—94.

WASILEWSKI Tadeusz: Kontrola rozbrojenia nuklearnego w działalności Komisji Energii Atomowej ONZ [Nuclear Disarmament Control in the Activity of the UN Atomic Energy Commission]. *Wojskowy Przegląd Prawniczy* No. 1 pp. 13—21.

WASILEWSKI Tadeusz: Kontrola w rokowaniach nad traktatem w sprawie zakazu prób z bronią jądrową z 5 III 1963 r. [Control in the Negotations on the Treaty of Nuclear Weapons Test Ban of March 5, 1963]. *Wojskowy Przegląd Prawniczy* No. 2 pp. 151—159.

WASILEWSKI Tadeusz: Kontrola w rokowaniach rozbrojeniowych w ONZ w latach 1946—1957 [Control in the Disarmament Negotiations in the UN 1946—1957]. *Wojskowy Przegląd Prawniczy* No. 3 pp. 313—326.

WASILEWSKI Tadeusz: Pojęcia i rodzaje kontroli rozbrojenia [The Concepts and Kinds of Disarmament Control]. *Przegląd Stosunków Międzynarodowych* No. 1 pp. 107—121.

WIŚNIEWSKI Andrzej W.: Review of Awards of the Court of Arbitration at the Polish Chamber of Foreign Trade. *Polish Yearbook of International Law* 1986 (1988) vol. XV pp. 301—310, English version.

WOJCIECHOWSKI Jerzy A.: Sytuacja prawna i polityczna Kanału Panamskiego i jego strefy [The Legal nad Political Situation of the Panama Canal and Its Zone]. *Sprawy Międzynarodowe* No. 9 pp. 87—100.

WOLFKE Karol: International Law-making Factors. An Attempt at Systematizaton. *Polish Yearbook of International Law* 1986 (1988) vol. XV pp. 243—250, English Version.

WORONIECKI Jan: Przyszłość Organizacji Narodów Zjednoczonych [The Future of the United Nations]. *Sprawy Międzynarodowe* No. 10 pp. 105—116.

WYROZUMSKA Anna: Odpowiedzialność międzynarodowa państwa za szkodę jądrową (Zarys problemu) [International Liability of States for Nuclear Damage. An Outline]. *Państwo i Prawo* No. 8 pp. 56—66.

WYROZUMSKA Anna: Traktaty ustanawiające reżimy terytorialne [Treaties Establishing Territorial Regimes]. *Studia Prawno Ekonomiczne* 1987 (1988) No. 38 pp. 47—70, summary in English.

WYROZUMSKA Anna: Treaties Establishing Territorial Regimes. *Polish Yearbook of International Law* 1986 (1988) vol. XV pp. 251—276, English version.

ZALEWSKI Bogusław W.: Procesy instytucjonalizacji ruchu państw niezaangażowanych [Institutionalization of the Non-Aligned States Movement]. *Stosunki Międzynarodowe* 1987 No. 7 pp. 111—124.

ZDANOWICZ Mieczysława: Agencja Narodów Zjednoczonych dla pomocy Uchodźcom Palestyńskim na Bliskim Wschodzie — UNRWA [United Nations Relief and Works Agency for Palestinian Refugees in the Near East — UNRWA]. *Sprawy Międzynarodowe* No. 4 pp. 127—134.

ZDANOWICZ Mieczysława: Sprawozdanie jako środek międzynarodowej kontroli realizacji praw człowieka, ze szczególnym uwzględnieniem praktyki Polski [Report as a Means of International Control of the Implementation of Human Rights, with Special Regard to Polish Practice]. *Zeszyty Naukowe Uniwersytetu Warszawskiego, Białystok. Prace Prawnicze* 1987 No. 13, pp. 151—162.

ZIRK-SADOWSKI Marek: Prawo wewnętrzne a prawo międzynarodowe publiczne. Zarys zagadnień teoretyczno-prawnych [Domestic Law and Public International Law. An Outline of Theoretical Legal Problems]. *Państwo i Prawo* No. 6 pp. 58—66.

Private International Law

BOOKS

ADAMCZAK Wojciech, GODECKI Zbigniew: Przywileje na statku i hipoteka morska [Privileges on Ships and Mortgage of Ships]. Gdańsk: Wydawnictwo Morskie 130 pp., bibliography, summary in English.

BRAŚ Władysław: Odpowiedzialność kolei za śmierć i naruszenie zdrowia podróżnego oraz za zniszczenie lub uszkodzenie jego rzeczy według umów międzynarodowych i praw krajowych europejskich państw socjalistycznych [Railway Liability for Death and Impairment of the Health of a Passenger and for the Devastation or Damage of His Goods according to International Treaties and Domestic Laws of European Socialist Countries]. Warszawa: Ośrodek Badawczy Ekonomiki Transportu 1987 158 pp., bibliography.

MAŁECKI Marian: Korporacje transnarodowe a handel zagraniczny krajów kapitalistycznych [Transnational Coorporations and Foreign Trade of Capitalist Countries]. Warszawa: Państwowe Wydawnictwo Naukowe 274 pp., bibliography.

STEC Mirosław: Umowy czarterowe w transporcie lotniczym [Charter Agreements in Air Transport]. Kraków: Państwowe Wydawnictwo Naukowe, Uniw. Jagielloński 183 pp., bibliography, summary in German.

WYSOCKA Barbara: Uznawanie i wykonywanie zagranicznych orzeczeń arbitrażowych w Polsce [Recognition and Execution of Foreign Arbitration Awards in Poland]. Warszawa: Wydawnictwa Prawnicze 178 pp., bibliography, summary in English.

ARTICLES

ADAMCZUK Franciszek J.: Wspólne przedsiębiorstwa w RWPG — nowy etap socjalistycznej integracji [Joint Enterprises in the CMEA — a New Stage of Socialist Integration]. *Prace Naukowe Akademii Ekonomicznej* Wrocław 1987 No. 382 pp. 43—51, summaries in English, French and Russian.

BRAŚ Władysław: Odpowiedzialność kolei za śmierć i naruszenie zdrowia podróżnego oraz za rzeczy w komunikacji CIV [Liability of Railways for the Death and Impairment of the Health of a Passenger and for the Devastation or Damage of His Goods in the CIV Transport]. *Problemy Ekonomiki Transportu* 1987 (1988) No. 4 pp. 50—74, summaries in Rüssian and English.

DOMAŃSKI Grzegorz: Wniesienie nieruchomości państwowej do Spółki z udziałem zagranicznym [Contributing of State-owned Immovable Property to a Joint Venture]. *Państwo i Prawo* No. 1 pp. 59—64.

ERECIŃSKI Tadeusz: Problemy postępowania dowodowego w regulaminach międzynarodowego arbitrażu handlowego [Hearing of Evidence in Rules of Procedure of International Commercial Arbitration]. *Państwo i Prawo* No. 10 pp. 25—37.

GRZELA Bogusława: Przysposobienie obywateli polskich przez cudzoziemców w świetle orzecznictwa Sądu Najwyższego [Adoption of Polish Citizens by Foreigners in the Light of Supreme Court Decisions]. *Palestra* No. 10 pp. 6—21.

KWAŚNIEWSKI Zbigniew: Funkcja i rola dokumentów przewozowych w międzynarodowym obrocie płatniczym [Function and Role of the Bill of Lading in International Financial Transactions]. *Acta Universitatis Lodziensis, Folia Iuridica* No. 34 pp. 97—113, summary in French.

KILIAN-SURDYKOWSKA Danuta: Morskie konwencje MOP jako źródło morskiego prawa pracy [Maritime Conventions of the ILO as a Source of the Maritime Labour Law]. *Technika i Gospodarka Morska* No. 11 pp. 469—470.

KOZIŃSKI Mirosław H.: Państwo jako strona kontraktu [The State as a Party to a Contract]. *Prace Naukowe Uniwersytetu Śląskiego. Problemy Prawne Handlu Zagranicznego* No. 12 pp. 79—101, summaries in Russian and French.

LEWANDOWSKI Piotr Niektóre problemy prawne oszustw morskich [Some Legal Problems of Maritime Frauds]. *Technika i Gospodarka Morska* No. 1 pp. 13—16.

LEWANDOWSKI Piotr: Porozumienie państw RWPG o ujednoliceniu prawa morskiego [Agreement between the CMEA Countries on the Unification of Maritime Law]. *Technika i Gospodarka Morska* No. 8/9 pp. 351—354.

MŁYNARCZYK Jerzy: W kwestii hipoteki morskiej [On Mortgage of Ships]. *Zeszyty Naukowe Uniwersytetu Szczecińskiego. Prace Instytutu Ekonomiki Transportu* 1987 No. 22 pp. 101—113.

OLEJNICZAK Adam: Treść umowy kontrzakupu w międzynarodowym obrocie handlowym [Content of Counter-Purchase Contracts in International Trade Turnover]. *Ruch Prawniczy, Ekonomiczny i Społeczny* No. 1 pp. 83—104, summary in English.

PAZDAN Maksymilian: Język kontraktu — jego znaczenie i wyznaczanie [The Language of a Contract — Its Significance and Delimitation]. *Prace Naukowe Uniwersytetu Śląskiego. Problemy Prawne Handlu Zagranicznego* No. 12 pp. 29—55, summaries in Russian and French.

POCZOBUT Jerzy: Koncepcja umowy leasingu w projekcie konwencji UNIDROIT z 1987 r. [The Concept of Leasing Agreement in the Draft Convention UNIDROIT 1987]. *Państwo i Prawo* No. 4 pp. 99—105.

POCZOBUT Jerzy: Nowe prawo prywatne międzynarodowe RFN [New Private International Law of the FRG]. *Przegląd Stosunków Międzynarodowych* No. 2 pp. 95—97.

POPIOŁEK Wojciech: Znaczenie przepisów "prawa publicznego" w różnych systemach prawnych dla stosunków umownych handlu zagranicznego [Significance of "Public Law" Rules in Different Legal Systems for Foreign Trade Contractual Relations]. *Prace Naukowe Uniwersytetu Śląskiego. Problemy Prawne Handlu Zagranicznego* No. 12 pp. 56—78, summaries in Russian and French.

SIEDLECKI Jacek: Polski rejestr okrętowy a międzynarodowa konwencja o warunkach rejestracji statków (Genewa 1986) [The Polish Register of Shipping and the International Convention on the Conditions of the Registration of Ships]. *Technika i Gospodarka Morska* No. 10 pp. 422—424.

SOŁTYSIŃSKI Stanisław: Prawo właściwe dla umów *know-how* [Law Applicable to Know-how Contracts]. *Państwo i Prawo* No. 9 pp. 44—57.

TYNEL Andrzej: Odpowiedzialność z tytułu kar umownych w umowach o współpracy naukowo-technicznej pomiędzy podmiotami z krajów RWPG [Liability for Breach Contract in Contracts on Scientific and Technical Cooperation between Parties within the CMEA Countries]. *Prace Naukowe Uniwersytetu Śląskiego. Problemy Prawne Handlu Zagranicznego* No. 12 pp. 103—125, summaries in Russian and French.

WIERZBICKI Bogdan: Pomoc prawna w sprawach karnych w świetle umów międzynarodowych wiążących Polskę [Legal Assistance in Penal Matters in the Light of International Treaties Binding upon Poland]. *Zeszyty Naukowe Uniwersytetu Warszawskiego, Białystok, Prace Prawnicze* 1987 No. 13 pp. 139—149.

ZALEWSKI Leszek: *Letter of intent* — pojęcie i charakter prawny [Letter of Intent — Concept and Legal Nature]. *Państwo i Prawo* No. 9 pp. 89—99.

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVIII, 1989-1990
PL ISSN 0554-498X

Polish Bibliography of International Law, 1989

Public International Law

BOOKS

ANTONOWICZ Lech: Prawo międzynarodowe publiczne [Public International Law]. Lublin: University of Maria Curie-Skłodowska 146 pp.

JASUDOWICZ Tadeusz: W obronie dostępu Polski do morza (na tle sporu polsko-niemieckiego o prawnomiędzynarodowy status wód Zatoki Pomorskiej) [In Defence of Poland's Access to the Sea (against the Background of Polish-German Dispute over the Legal Character of Pomerania Gulf Waters]. Warszawa: Wydawnictwo Polskie 116 pp.

KOWALSKI Piotr Potrzeby ludzkie a prawa człowieka [Human Needs and Human Rights]. Wrocław: Ossolineum, Instytut Państwa i Prawa 203 pp.

KOWALSKI Wojciech: Restytucja dzieł sztuki w prawie międzynarodowym [Restitution of Works of Art in International Law]. Katowice: Uniwersytet Śląski 164 pp., bibligraphy, summaries in English and German.

KUNDERA Jarosław: Podział pracy w handlu ugrupowań integracyjnych (EFTA, EWG, EAC, CACM, IAFTA, UDEAQ [Division of Labour in Commerce of Integration Organizations]. *Acta Uniuersitatis Wratislaviensis. Prawo* No. 164 152 pp., bibliography, summaries in English and Russian.

Międzynarodowe zobowiązania Polski w zakresie praw człowieka. Akty prawa międzynarodowego i dokumenty KBWE. Selected by Halina Ognik, Adam D. Rotfeld. Adam D. Rotfeld (ed.) [International Obligations of Poland in Scope of Human Rights. Acts of International Law and CSCE Documents]. Warszawa: Polski Instytut Spraw Międzynarodowych 260 pp.

Prawa człowieka: dokumenty. T. 1: Dokumenty międzynarodowe. Bibliografia. Zdzisław Kędzia, Roman Wieruszewski (eds) [Human Rights. Documents. Vol. 1: International Documents. Bibliography]. Wrocław: Ossolineum Instytut Państwa i Prawa 200 pp.

STĘPNIAK Władysław: Sukcesja państw dotycząca archiwaliów [Succession of States with Respect to Records]. Warszawa: Państwowe Wydawnictwo Naukowe 83 pp., bibliography, summaries in Russian, English and German.

ZAPALOWSKI Lesław: Operacje pokojowe ONZ [Peaceful Operations of the UN]. Kraków: Krajowa Agencja Wydawnicza 290 pp., bibliography.

ARTICLES

ADAMIEC Jolanta: Nowe ramy współpracy EWG z krajami socjalistycznymi [New Frameworks of Cooperation of the EEC with Socialist Countries]. *Handel Zagraniczny* No. 7 pp. 16—18, 32.

BARCZ Jan: Jednolity Akt Europejski [Single European Act]. *Sprawy Międzynarodowe* No. 6 pp. 95—110.

BARCZ Jan: Kraje RFN a Wspólnoty zachodnioeuropejskie [States of FRG and West-European Communities]. *Sprawy Międzynarodowe* No. 11 pp. 125—138.

BARCZ Jan: Projekty ustawodawcze w Bundestagu (1985—1987) w sprawie odszkodowań dla ofiar prześladowań faszystowskich [Proposed Legislation on Compensation for Victims of Nazi Oppresions in Bundestag (1985—1987)]. *Przegląd Zachodni* No. 1 pp. 127—140.

BAY Christian: Koncepcje bezpieczeństwa indywidualnego narodowego i zbiorowego [Conceptions of National and Collective Security]. *Studia Nauk Politycznych* No. 4 pp. 83—111, summaries in Russian, English and French.

BIAŁOCERKIEWICZ Jan: Siła gospodarcza we współczesnych stosunkach międzynarodowych — niektóre aspekty [Economic Power in Contemporary International Relations — Some Aspects]. *Wojskowy Przegląd Prawniczy* No. 2 pp. 195—208.

BIERZANEK Remigiusz: Ochrona kombatantów i ludności cywilnej w umiędzynarodowionych konfliktach zbrojnych [Protection of Combatants and Civilians in International Armed Conflicts]. *Sprawy Międzynarodowe* No. 12 pp. 89—100.

BLAHOZ Josif: Prawa człowieka a globalne problemy współczesności [Human Rights and Contemporary Global Problems]. In: *Państwo – prawo – obywatel* Wrocław: Ossolineum, Instytut Państwa i Prawa pp. 477—487.

BQRUCKA-ARCTOWA Maria: Historyczna ewolucja zasad wolności i równości a koncepcja praw człowieka [Historie Evolution of Principles of Freedom and Equality and a Concept of Human Rights]. In: *Państwo – prawo – obywatel* Wrocław: Ossolineum, Instytut Państwa i Prawa pp. 489—500.

BRODECKI Zdzisław: Koncepcja legislacyjna ochrony środowiska morskiego [Legislative Conception of Protection of Marine Environment]. *Problemy Praworządności* No. 1 pp. 3—9.

BRODECKI Zdzisław: Uwagi do projektu ustawy o ochronie środowiska morskiego [Remarks on Draft of Law on Protection of Marine Environment]. *Zeszyty Naukowe Uniwersytetu Gdańskiego, Studia Iuridica Maritima* No. 1 pp. 153—169, summaries in English and Russian.

CIECHANOWICZ Janina: Ochrona środowiska morskiego w nowym prawie morza [Protection of Marine Environment in the New Law of the Sea]. *Technika i Gospodarka Morska* No. 6 pp. 262—264.

CIECHANOWICZ Janina: Prawnomiędzynarodowa ochrona środowiska morskiego — zagadnienia odszkodowawcze [International Protection of Marine Environment — Question of Compensation]. *Prawo Morskie* vol. 3 pp. 31—41.

CIECHAŃSKI Jerzy: Wkład państw socjalistycznych w postępowy rozwój prawa międzynarodowego [The Contribution of Socialist States towards the Progressive Development of International Law]. *Sprawy Międzynarodowe* No. 1 pp. 79—94.

CUÉLLAR Javier P. de: ONZ w pół wieku po wrześniu 1939 roku [UN — Half a Century after September 1939]. *Sprawy Międzynarodowe* No. 12 pp. 7—28.

CZARKOWSKI Antoni: Prawa człowieka w systemie ONZ [Human Rights in the UN System]. *Wieś Współczesna* No. 12 pp. 10—19.

CZARKOWSKI Antoni: Rola współpracy międzynarodowej w ochronie środowiska [The Role of International Cooperation in the Protection of Environment]. *Wieś Współczesna* No. 3 pp. 102—111.

CZUCHRA Iwona: Wybrane problemy prawne eksploatacji morskich urządzeń górniczych [Selected Legal Problems of Exploitation of Mining Devices on Sea]. *Prawo Morskie* No. 3 pp. 133—144.

DARANOWSKI Piotr Pozycja traktatów w porządku prawnym PRL [Position of Treaties in the Legal System of PPR]. *Acta Universitatis Lodziensis, Folia Iuridica* No. 41 pp. 5—43, summary in English.

DARANOWSKI Piotr Zastrzeżenia do Międzynarodowego Paktu Praw Obywatelskich i Polity-

cznych [Reservations to International Pact of Civil and Political Rights]. *Państwo i Prawo* No. 7 pp. 75—82.

Dwugłos na temat problemu ekwiwalentu za mienie pozostawione za granicą. Authors: Stanisław Nowak, Andrzej Kubas [On the Problem of Equivalent for Property Left Abroad]. *Państwo i Prawo* No. 10 pp. 85—103.

FLEMMING Marian: Osoby uprawnione do statusu jeńca wojennego [Persons Entitled to a Prisoner of War Status]. *Wojskowy Przegląd Prawniczy* No. 1 pp. 34—51.

FORYSIŃSKI Wojciech: CMEA's Cooperation with Third States in the Light of International Law. Selected Problems. *Polish Yearbook of International Law* 1987 (1989) vol 16 pp. 7—20.

GELEWSKI Tadeusz M.: Prawo wojny morskiej a praktyka na przykładzie obu wojen światowych [Law of War on the Sea and the Practice Arising from Two World Wars]. *Prawo Morskie* No. 3 pp. 63—73.

GEORGJEW Edward: Problematyka umów zapobiegających podwójnemu opodatkowaniu [Problems Connected with the Double Taxation Treaties]. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* No. 2 pp. 119—128, summary in English.

GILAS Janusz: Prawnomiędzynarodowe problemy delimitacji obszarów morskich PRL z państwami sąsiednimi [Legal Problems of Delimitation of Polish Sea Space with Neighbour Countries]. *Przegląd Stosunków Międzynarodowych* No. 1/2 pp. 19—27, summary in English.

GILAS Janusz: Rozstrzyganie sporów w konwencji prawa morza 1982 r. [Settlement of Disputes in 1982 Convention on the Law of the Sea]. *Zeszyty Naukowe Uniwersytetu Gdańskiego, Studia Iuridka Maritima* No. 1 pp. 47—60, summaries in English and Russian.

GÓRBIEL Andrzej: Kodyfikowanie prawnomiędzynarodowych zasad teledetekcji z kosmosu [Codifying International Legal Principles on Remote Sensing of the Earth from Outer Space]. *Postępy Astronautyki* No. 3/4 pp. 73—97, summaries in Polish and French.

HARA Ryszard: Status prawny obiektów kosmicznych [Legal Status of Space Objects]. *Państwo i Prawo* No. 9 pp. 73—82.

HERMAN Michał: Instytut San Remo promotorem międzynarodowego prawa humanitarnego [San Remo Institute as a Promoter of International Humanitarian Law]. *Wojskowy Przegląd Prawniczy* No. 3 pp. 340—347.

International Treaties Entered into Force in Relation to Poland in 1986. Elaborated by Joanna Gomuła. *Polish Yearbook of International Law* 1987 (1989) vol. 16 pp. 225—228.

JACEWICZ Andrzej: L'initiative défense stratégique et les engagements conventionnels des Etats-Unis. *Polish Yearbook of International Law* 1987 (1989) vol. 16 pp. 21—38.

JASUDOWICZ Tadeusz: Prawnomiędzynarodowe problemy ochrony środowiska morskiego obszaru Morza Bałtyckiego przed zanieczyszczeniami pochodzenia lądowego [Legal Problems of Protection of Baltic Sea Environment against Pollution from Land Sources]. *Prawo Morskie* No. 3 pp. 43—62.

KAWECKA-WYRZYKOWSKA Elżbieta: Stosunki umowne między europejskimi krajami RWPG a EWG [Contractual Relations between European Members of CMEA and *EEC]. Handel Zagraniczny* No. 9 pp. 10—15.

KJERES Leon: Prawne warunki oddziaływania naczelnych organów administracji państwowej na przedsiębiorstwa państwowe w dziedzinie międzynarodowej współpracy gospodarczej w ramach RWPG [Legal Methods of Influence of Supreme Authorities of State Administration on State Enterprises in CMEA Economic Cooperation]. *Acta Universitatis Wratislaviensis. Prawo* No. 183 pp. 49—64, summary in English.

KOLIŃSKI Andrzej: Stosunki umowne krajów socjalistycznych z EWG [Conventional Relations of Socialist Countries with EEC]. *Sprawy Międzynarodowe* No. 2 pp. 23—40.

KOS-RABCEWICZ-ZUBKOWSKI Ludwik: Panamerykańskie konwencje dotyczące arbitrażu handlowego [Panamerican Conventions on Commercial Arbitration]. *Państwo i Prawo* No. 3 pp. 84—90.

KĘDZIA Zdzisław: Prawa człowieka w prawie międzynarodowym a prawo polskie [Human Rights in International Law and Polish Law]. *Państwo* i *Prawo* No. 9 pp. 16—29.

KILIAN-SURDYKOWSKA Danuta: Źródła morskiego prawa pracy (Stan obecny i perspektywy zmian) [Sources of Maritime Labour Law (Present State and Perspective of Change)]. *Państwo i Prawo* No. 2 pp. 93—103.

KISS Alexandre: Prawa człowieka i środowisko [Human Rights and the Environment]. In: *Państwo – prawo – obywatel* Wrocław: Ossolineum, Instytut Państwa i Prawa pp. 533—544.

KUDRIAWCEW Władimir Proces norymberski a problemy umocnienia praworządności międzynarodowej [Nürnberg Trial and Problems of Strengthening of International Legality]. In: Państwo – *prawo – obywatel* Wrocław: Ossolineum, Instytut Państwa i Prawa pp. 339—347.

KOWALSKI Andrzej: Światowa Organizacja Własności Intelektualnej [World Organization of Intellectual Property]. *Sprawy Międzynarodowe* No. 9 pp. 77—92.

KUBIAK Leszek: Zmiany w modelu integracyjnym RWPG [Changes in CMEA Model of Integration]. *Sprawy Międzynarodowe* No. 2 pp. 57—74.

KUNDERA Jarosław: Umowa w strefie wolnego handlu między USA i Kanadą [Agreement on the Free Trade Zone between the USA and Canada]. *Handel Zagraniczny* No. 2 pp. 17—22.

LACHS Manfred: Dowody w procesie krajowym i międzynarodowym [Evidences in National and International Court Proceedings]. In: *Proces i prawo*. Ewa Łętowska (ed.) Wrocław: Ossolineum, Instytut Państwa i Prawa pp. 127—137.

LACHS Manfred: Kilka refleksji o prawach dziecka [Some Reflections on Rights of Child]. In: *Państwo – prawo– obywatel* Wrocław: Ossolineum, Instytut Państwa i Prawa pp. 545—553.

List of Multilateral Treaties Binding on Poland at the End of 1986. Elaborated by Renata Szafarz. *Polish Yearbook of International Law* 1987 (1989) vol. 16 pp. 205—224.

ŁAKOMY Henryk: Francuska polityka pokojowego współistnienia [French Policy of Peaceful Coexistence]. *Sprawy Międzynarodowe* No. 7 pp. 35—50.

LUKASZUK Leonard: Settlement of International Disputes Concerning Marine Scientific Research. *Polish Yearbook of International Law* 1987 (1989) vol. 16 pp. 39—56.

LUKASZUK Leonard: Współpraca państw nadbałtyckich na rzecz ochrony środowiska morskiego [Cooperation of Baltic States for the Protection of Marine Environment]. *Sprawy Międzynarodowe* No. 11 pp. 77—88.

LUKASZUK Leonard: Z zagadnień metodologii prawoznawstwa (o użyteczności metod teorii państwa i prawa w badaniach teoretycznych problemów współczesnego prawa międzynarodowego) [On the Methodology of Jurisprudence (Methods of Theory of State and Law in Researches on International Law)]. In: *Państwo – prawo – obywatel* Wrocław: Ossolineum, Instytut Państwa i Prawa pp. 365—380.

MACHOWSKI Jacek: Funkcjonowanie Układu w sprawie Antarktyki [Antarctic Treaty as It Works]. *Sprawy Międzynarodowe* No. 12 pp. 55—74.

MANDE George: U.S. Constitutionalism in U.S. Policy towards Central America. In: *Konstytucja Stanów Zjednoczonych Ameryki w perspektywie nauk historycznych i prawnych*. Janusz L. Justyński (ed.). Toruń: Towarzystwo Naukowe w Toruniu 1988 pp. 115—134.

MICHALSKA Anna: Uniwersalizm praw człowieka [Universalisai of Human Rights]. In: *Państwo – prawo – obywatel* Wrocław: Ossolineum, Instytut Państwa i Prawa pp. 589—598.

MICHALSKI Wojciech: Podstawowe Zasady Niezawisłości Sądownictwa w świetle uchwał

Narodów Zjednoczonych [Basic Principles of Court's Independence in the light of UN Resolutions]. *Państwo i Prawo* No. 1 pp. 62—67.

MIK Cezary: Powszechne uznanie a imperatywne normy praw człowieka [Recognition and the Imperative Rules on Human Rights]. Państwo i *Prawo* No. 9 pp. 54—64.

MOKRYSZ-OLSZYŃSKA Anna: Pierwszy krok ku ujednoliceniu prawa o znakach towarowych [First Step toward the Unification of Law on Trade Marks]. *Handel Zagraniczny* No. 9 pp. 23—28.

NAZARÓW Borys: Zasady odpowiedzialności za stworzenie ogólnego systemu bezpieczeństwa międzynarodowego [Principles of Responsibility for Elaboration of an Universal System of International Security]. In: Państwo – *prawo* – *obywatel*. Wroclaw: Ossolineum, Instytut Państwa i Prawa pp. 599—607.

OSTRIHANSKY Rudolf: Nowe tendencje w rozwiązywaniu sporów w GATT [New Tendencies in Settlement of Disputes in GATT]. *Państwo i Prawo* No. 12 pp. 71—82.

OSTRIHANSKY Rudolf: Trybunały administracyjne organizacji międzynarodowych [Administrative Tribunals of International Organizations]. *Państwo i Prawo* No. 3 pp. 70—77.

Projekt ustawy o ochronie środowiska morskiego [Draft of Law on Protection of Marine Environment]. *Zeszyty Naukowe Uniwersytetu Gdańskiego, Studia luridica Maritima* No. 1 pp. 171—192.

ROMAN Witold: System ustalania cen w obrotach wzajemnych krajów RWPG [System of Price Setting in Commercial Activity among CMEA Countries]. *Handel Zagraniczny* No. 2 pp. 14—17.

ROTFELD Adam D.: Spotkanie Wiedeńskie KBWE a zarys nowego systemu bezpieczeństwa europejskiego [Vienna CSCE Meeting and an Outline of a New System of European Security]. *Sprawy Międzynarodowe* No. 7/8 pp. 7—32.

RÓWNY Kazimierz: The Right of Passage through Straits Used for International Navigation and the United Nations Convention on the Law of the Sea. *Polish Yearbook of International Law* 1987 (1989) vol. 16 pp. 57—84.

RYCHŁOWSKI Bogumił: Kształtowanie granic odrodzonej Polski i ich gwarancje [Formation of Frontiers of Reborn Poland and Their Security]. Sprawy *Międzynarodowe* No. 4 pp. 7—34.

RZYMANEK Jerzy: Some Legal Problems of United Nations Peace-keeping: UNEF-2 and UNDOF Experiences. *Polish Yearbook of International Law* 1987 (1989) voL 16 pp. 85—102.

SALKIEWICZ Ewa: Prawne aspekty spłaty długów zagranicznych [Legal Aspects of Foreign Debts Repayment]. *Sprawy Międzynarodowe* No. 12 pp. 135—140.

SANDORSKI Jan: Problemy ekonomiczne i prawnomiędzynarodowe związane z koncepcją utworzenia w Polsce wolnego obszaru celnego [Economic and Legal Problems Arising from a Conception of Free Trade Zones in Poland]. *Prawo Morskie* No. 3 pp. 111—126.

SAWICKI Stefan: Consular Immunity of Personal Inviolability. *Polish Yearbook of International Law* 1987 (1989) vol. 16 pp. 103—119.

SAWICKI Stefan: Przywileje i immunitety attache wojskowego [Privileges and Immunities of a Military Attaché]. *Wojskowy Przegląd Prawniczy* No. 4 pp. 442—453.

SAWICKI Stefan: Przywilej nietykalności archiwum i pomieszczeń urzędu konsularnego [Privilege of Inviolability of Records and Premises of a Consular Office]. *Wojskowy Przegląd Prawniczy* No. 3 pp. 329—339.

SAWICKI Stefan: Przywilej swobodnego porozumiewania się misji dyplomatycznej i urzędu konsularnego [Privilege of Unconstrained Communication of a Diplomatic Mission and Consular Office]. *Zeszyty Naukowe Akademii Spraw Wewnętrznych* No. 57 pp. 89—104, summaries in English, German and Russian.

SAWICKI Stefan: Składanie zeznań w charakterze świadka przez członków urzędu konsularnego

[Testifying as a Witness by a Member of a Consular Office]. *Problemy Praworządności* No. 2 pp. 24—34.

SIKIRYCKI Tomasz: Kompetencja wewnętrzna państwa na tle wybranych przepisów Karty Narodów Zjednoczonych [Internal Competences of a State in the Light of Selected Articles of the United Nations Charter]. *Acta Universitatis Lodziensis* No. 43 pp. 99—117.

SKUPIŃSKI Jan: Konstytucyjne prawo do obrony [Constitutional Right to Defence]. *Studia Prawnicze* No. 2/3 pp. 195—210.

STAŃCZYK Janusz: Permissibility of Intervention under Article 62 of the Statute before the International Court *Polish Yearbook of International Law* 1987 (1989) vol. 16 pp. 121—142.

STAŃCZYK Janusz: Równość stron przed Międzynarodowym Trybunałem Sprawiedliwości w sprawach dotkniętych niestawieniem się strony pozwanej [Equality of Parties in the Proceedings before the International Court of Justice in Cases of the Defendant's Absence]. *Studia Prawnicze* No. 1 pp. 163—194.

STAŃCZYK Janusz: Wniosek o interpretację wyroku wydanego przez Międzynarodowy Trybunał Sprawiedliwości [Application for Interpretation of a Judgement of International Court of Justice]. *Przegląd Stosunków Międzynarodowych* No. 1/2 pp. 47—65, summary in English.

STRABURZYŃSKA-GABRYELSKA Barbara: Uprawnienia państw śródlądowych w konwencji Narodów Zjednoczonych o prawie morza [Competence of Landlocked States in UN Convention of the Law of the Sea]. *Prawo Morskie* No. 3 pp. 145—151.

SUNDBERG Jacob: Human Rights and the United States Constitution. In: *Konstytucja Stanów Zjednoczonych Ameryki w perspektywie nauk historycznych i prawnych*. Toruń: Towarzystwo Naukowe w Toruniu 1988 pp. 88—100.

SUTOR Julian: Przywrócenie instytucji konsula honorowego do praktyki konsularnej PRL [Réintroduction of a Honorary Consul Institution into Polish Consular Practice]. *Nowe Prawo* No. 5/6 pp. 127—134.

SYMONIDES Janusz: Contiguous Zone. *Polish Yearbook of International Law* 1987 (1989) vol. 16 pp. 143—154.

SYMONIDES Janusz: Swoboda żeglugi w cieśninach międzynarodowych [Freedom of Navigation in International Straits]. *Sprawy Międzynarodowe* No. 2 pp. 75—88.

SZAFARZ Renata: Obowiązkowa jurysdykcja Międzynarodowego Trybunału Sprawiedliwości na podstawie klauzuli fakultatywnej [Compulsory Jurisdiction of International Court of Justice in the Light of Optional Clause]. *Państwo i Prawo* No. 2 pp. 57—63.

SZAFARZ Renata: Obowiązkowa jurysdykcja Międzynarodowego Trybunału Sprawiedliwości wynikająca z postanowień traktatowych [Compulsory Jurisdiction of International Court of Justice Arising from Treaty Norms]. *Państwo i Prawo* No. 4 pp. 81—87.

SZNAJDER Andrzej: Współczesna strategia międzynarodowej kooperacji przedsiębiorstw [Contemporary Strategy of International Cooperation of Commercial Enterprises]. *Handel Zagraniczny* No. 6 pp. 15—17.

SZUMAŃSKI Andrzej: Umowy międzynarodowej kooperacji produkcji w ramach RWPG [Agreements of International Coproduction in CMEA Practice]. *Państwo i Prawo* No. 8 pp. 82—91.

TRAWCZYŃSKI Jacek M.: Uprawnienia morskie konsula [Prerogatives of a Consul with Respect to Maritime Activities]. *Prawo Morskie* No. 3 pp. 103—109.

TRZCIELIŃSKA-POLUS Aleksandra: Problematyka narodowościowa w polityce RFN wobec państw socjalistycznych (ze szczególnym uwzględnieniem lat 1949—1966). [Minorities Issues in Politics of FRG with Respect to the Socialist Countries (1949—1966)]. *Przegląd Stosunków Międzynarodowych* No. 4 pp. 83—96, summary in English.

TRZCIŃSKI Krzysztof: Regulowanie sporów międzynarodowych w konwencji o prawie morza 1982 r. [Settlement of International Disputes in 1982 Convention of the Law of the Sea]. Prawo *Morskie* No. 3 pp. 89—102.

TYMECKI Bogusław: Czynności notarialne konsulów PRL według ustawy z 13 lutego 1984 r. [Notarial Acts of PPR Consuls according to the Law of 13 February 1984]. *Nowe Prawo* No. 2/3 pp. 73—89.

WAJDA Stanisław: Zagadnienia ekologii jako płaszczyzna współpracy Wschód — Zachód w Europie [Ecological Issues as a Base of East — West Cooperation in Europe]. *Przegląd Stosunków Międzynarodowych* No. 1/2 pp. 67—84, summary in English.

WIECZOREK Paweł: Strefy bezatomowe w Europie [Nuclear-Free Zones in Europe]. *Sprawy Międzynarodowe* No. 9 pp. 51—64.

WIERUSZEWSKI Roman: Skargi indywidualne jako środek międzynarodowej kontroli przestrzegania Paktu Praw Obywatelskich i Politycznych [Individual Claims as Means of International Verification of Observance of the Pact of Civil and Political Rights]. In: *Państwo — prawo — obywatel.* Wrocław: Ossolineum, Instytut Państwa i Prawa pp. 657—671.

WIERZBICKI Bogdan: Ewolucja pojęcia "uchodźca" w prawie międzynarodowym [Evolution of the Term "Refugee" in International Law]. *Państwo i Prawo* No. 11 pp. 47—55.

WYCIECHOWSKA Iwona: Internacjonalizacja a internalizacja w polityce państw [Internationalization and Internalization in Politics of States]. *Sprawy Międzynarodowe* No. 12 pp. 117—124.

WYROZUMSKA Anna: Metody wprowadzania prawa międzynarodowego w porządek krajowy [Methods of Implementation of International Law in National Legal System]. *Acta Universitatis Lodziensis, Folia luridica* No. 41 pp. 45—56, summary in English.

ZAJADŁO Jerzy: Godność jednostki w aktach międzynarodowej ochrony praw człowieka [Dignity of a Person in Acts on International Protection of Human Rights]. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* No. 3 pp. 103—117, summary in English.

ZIELIŃSKI Maciej: Wolność publikacji i jej ograniczenia w Europejskiej konwencji praw człowieka [Freedom of Publication and Its Limitations in European Convention on Human Rights]. *Sprawy Międzynarodowe* No. 2 pp. 89—102.

Private International Law

BOOKS

DOMAŃSKI Grzegorz: Umowa ramowa (na tle prawa niektórych państw EWG i Polski [Skeleton Agreement (Comparing Law of some EEC States and Poland]. Warszawa: Wydawnictwo Prawnicze 103 pp., bibliography, summary in English.

KRUCZALAK Kazimierz: Zagadnienia nowelizacyjne morskiego prawa prywatnego międzynarodowego [Issues of Amendment of the International Private Law of the Sea]. Gdańsk: Instytut Morski 56 pp.

PAJOR Tomasz: Odpowiedzialność deliktowa w prawie prywatnym międzynarodowym [Tort Liability in the International Private Law]. Warszawa: Państwowe Wydawnictwo Naukowe 286 pp.

POPIOŁEK Wojciech: Wykonanie zobowiązania umownego a prawo miejsca wykonania. Zagadnienia kolizyjnoprawne [Execution of a Contractual Obligation and *Lex Loci Actus*. Competence Issues]. Katowice: Uniwersytet Śląski 163 pp., bibliography, summaries in French and Russian.

ZACHARIASIEWICZ Maria AJ Prawo właściwe dla zobowiązań z czynności prawnych w braku

wyboru prawa w polskim prawie prywatnym międzynarodowym [Law Applicable in Obligations Arising from Legal Acts in Lack of Choice of Law in Polish Private International Law]. Katowice: Uniwersytet Śląski 154 pp.

ARTICLES

CISZEWSKI Jan: Norms of Competence Concerning Competence of Law and Organs in Civil and Family Matters and the Principles of Recognition of Judicial Decision in Agreements Concluded between Poland and Capitalist States. *Polish Yearbook of International Law* 1987 (1989) vol. 16 pp. 155—180.

DALKA Sławomir Rozstrzyganie sporów cywilnoprawnych przez Międzynarodowy Sąd Arbitrażowy dla spraw Żeglugi Morskiej i Śródlądowej w Gdyni [Settlement of Civil Law Disputes by the International Arbitration Court for Sea and Inland Navigation at Gdynia]. *Zeszyty Naukowe Uniwersytetu Gdańskiego, Studia luridica Maritima* No. 1 pp. 83—96, summaries in English and Russian.

DOŁĘGOWSKI Tomasz: Wielonarodowe przedsiębiorstwa żeglugowe [Multinational Shipping Enterprises]. *Handel Zagraniczny* No. 4/5 pp. 36—39.

ERECIŃSKI Tadeusz: Uchylenie przez sąd państwowy orzeczenia wydanego w międzynarodowym arbitrażu handlowym [The Termination of International Arbitration Judgement by the National Court]. In: *Proces i prawo.* Wroclaw: Ossolineum, Instytut Państwa i Prawa pp. 77—96.

GLINIECKA Jolanta: Rachunki dewizowe i kredyt bankowy jako instrumenty oddziaływania na funkcjonowanie "zagranicznych jednostek gospodarujących" [Foreign Currency Accounts and Bank Credits as Instruments of Influence on "Foreign Economy Units"]. *Zeszyty Naukowe Uniwersytetu Gdańskiego. Administracja* 1988 No. 11 pp. 131—161, summaries in English, German and Russian.

KRUCZAŁAK Kazimierz: Miejsce i rola norm kolizyjnych prawa morskiego w prawie prywatnym międzynarodowym [Place and Role of Norms of Competence of the Law of the Sea in Private International Law]. *Zeszyty Naukowe Uniwersytetu Gdańskiego, Studia luridica Maritima* No. 1 pp. 63—81, summaries in English and Russian.

MĄCZYŃSKI Andrzej: Działanie klauzuli porządku publicznego w sprawach dotyczących zawarcia małżeństwa z cudzoziemcem [The Role of a Public Order Clause with Respect to Cases of Marriage with a Foreigner]. In: *Proces i prawo.* Wroclaw: Ossolineum, Instytut Państwa i Prawa pp. 157—167.

MOKRYSZ-OLSZYŃSKA Anna: Wybór prawa dla kontraktu w międzynarodowym prawie prywatnym RFN [Choice of Law for Contracts in International Private Law of FRG]. *Handel Zagraniczny* No. 2 pp. 28—30, 32.

NOWICKA Aurelia: Umowy o korzystanie z cudzych rozwiązań technicznych w obrocie pomiędzy krajami RWPG. W świetle praktyki przedsiębiorstw w latach 1981—1987 [Agreements on Exploitation of Technical Solutions in Transaction among CMEA Countries. In the Light of Practice in 1981—1987]. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* No. 2 pp. 65—86, summary in English.

PAZDAN Maksymilian: Prawo właściwe dla umowy stron z arbitrem (arbitrami) w międzynarodowym arbitrażu handlowym [Law Applicable in a Contract with Arbitrator (Arbitrators) in International Commercial Arbitration]. In: *Proces i prawo.* Wroclaw: Ossolineum, Instytut Państwa i Prawa pp. 183—192.

PAZDAN Maksymilian: Przyrzeczenie publiczne w polskim prawie prywatnym międzynarodowym [Public Promise in Polish International Private Law]. *Państwo i Prawo* No. 1 pp. 6&—77.

PAZDAN Maksymilian: W poszukiwaniu prawa właściwego dla licencji patentowych [In Search for the Proper Law on Patents]. *Prace Naukowe Uniwersytetu Śląskiego. Problemy Prawne Handlu Zagranicznego* No. 13 pp. 20—63, summaries in Russian and French.

POCZOBUT Jerzy: Uwagi w sprawie projektu konwencji UNIDROIT ^ międzynarodowym leasingu finansowanym [Remarks on UNIDROIT Draft Convention on International Financial Leasing]. *Prace Naukowe Uniwersytetu Śląskiego. Problemy Prawne Handlu Zagranicznego* No. 13 pp. 86—113, summaries in Russian and English.

Projekt konwencji o międzynarodowym leasingu finansowanym [Draft Convention on International Financial Leasing]. *Prace Naukowe Uniwersytetu Śląskiego. Problemy Prawn? Handlu Zagranicznego* No. 13 s. 133—138.

Przegląd ważniejszych aktów normatywnych dotyczących handlu zagranicznego wydanych w okresie od 1 I do 31 XII 1987 r. Elaborated by Katarzyna Wieczorek [Survey of Tmportant Normative Acts Relative to International Commerce 01 1 1987—31 12 1987]. *Prace Naukowe Uniwersytetu Śląskiego. Problemy Prawne Handlu Zagranicznego* No. 13 pp. 146—158.

RAJSKI Jerzy: Kierunki rozwoju międzynarodowego prawa handlowego w niektórych państwach socjalistycznych [The Developments of International Trade Law of Selected Socialist States]. In: *Proces i prawo*. Wrocław: Ossolineum: Instytut Państwa i Prawa pp. 213—223.

RAJSKI Jerzy: Umowy kompensacyjne w międzynarodowym obrocie gospodarczym w świetle badań praktyki kontraktowej [Compensation Agreements in International Trade in the Light of Contractual Practice]. *Prace Naukowe Uniwersytetu Śląskiego. Problemy Prawne Handlu Zagranicznego* No. 13 pp. 9—19, summaries in Russian and French.

Regulamin pojednawczy Komisji Międzynarodowego Prawa Handlowego ONZ (C.N.U.D.C.I.) [Rules of Conciliation of the International Commission on Trade Law of the U.N.]. *Prace Naukowe Uniwersytetu Śląskiego. Problemy Prawne Handlu Zagranicznego* No. 13 pp. 139—145.

SOLARZ Sławomir Umowy o transakcje kompensacyjne w międzynarodowej wymianie handlowej [Agreements on Compensation Transaction in International Commercial Exchange]. *Handel Zagraniczny* No. 3 pp. 21—25, 31.

STALEV Zhivko: Enforcement of Specific Performance in CMEA Countries. In: *Prawo i proces*. Wrocław: Ossolineum, Instytut Państwa i Prawa pp. 225—236.

TOMASZEWSKI Maciej: Polish Court Judgments in International Civil Law Cases. *Polish Yearbook of International Law* 1987 (1989) vol. 16 pp. 181—190.

WIECZORKIEWICZ Andrzej: Instytucjonalno-prawne uwarunkowania współpracy kapitałowej z zagranicą [Institutional and Legal Conditions of Capital Cooperation with Foreign Countries]. *Sprawy Międzynarodowe* No. 5 pp. 7—20.

WIŚNIEWSKI Andrzej W.: Awards of the Court of Arbitration at the Polish Chamber of Foreign Trade. *Polish Yearbook of International Law* 1987 (1989) vol 16 pp. 191—195.

Z orzecznictwa Kolegium Arbitrów przy Polskiej Izbie Handlu Zagranicznego w Warszawie [Awards of the Court of Arbitration at the Polish Chamber of Foreign Trade at Warsaw]. *Prace Naukowe Uniwersytetu Śląskiego. Problemy Prawne Handlu Zagranicznego* No. 13 pp. 159—163.

ZACHARIASIEWICZ Maria A.: Zawarcie umowy w konwencji wiedeńskiej o międzynarodowej sprzedaży towarów z 1980 roku [Conclusion of an Agreement in the Light of Vienna Convention on the International Sale of Goods of 1981]. *Prace Naukowe Uniwersytetu Śląskiego. Problemy Prawne Handlu Zagranicznego* No. 13 pp. 64—85, summaries in Russian and French.

Compiled by Marta Jaszczukowa

Książki i czasopisma Ossolineum można nabywać w placówkach własnych Wydawnictwa:

50-106 Wrocław, Rynek 6
50-106 Wrocław Rynek 9 (sprzedaż wysyłkowa)
50-227 Wrocław, ul. Kleczkowska 44 (magazyn hurtowy — sprzedaż)
61-745 Poznań, ul. Marcinkowskiego 3
80-855 Gdańsk, ul Łagiewniki 56 (książki i muzykalia)
70-551 Szczecin, pi Żołnierza Polskiego 1
90-447 Łódź, uL Piotrkowska 181
31-110 Kraków, ul. Św. Jana 28 (sprzedaż detaliczna i hurtowa)

oraz w księgarniach Ośrodka Rozpowszechniania Wydawnictw Naukowych PAN:

50-071 Wrocław, pl. Wolności 7, I p.
00-901 Warszawa, Pałac Kultury i Nauki
31-020 Kraków, ul Św. Marka 22
61-725 Poznań, ul. Mielżyńskiego 27/29
40-077 Katowice, ul. Bankowa 14, paw. D, I p.
20-031 Lublin, pl M. Curie-Skłodowskiej 5
15-082 Białystok, ul. Nowotki 13
90-268 Łódź, ul Piotrkowska 48

Ponadto sprzedaż edycji ossolińskich prowadzą większe księgarnie naukowe, w szczególności zaś: 31-042 Kraków, Rynek Główny 4; 00-068 Warszawa, Krakowskie Przedmieście 7.

Ossolineum zaprasza do współpracy księgarzy, agencje kolporterskie i odbiorców indywidualnych. Oferujemy możliwość zakupu handlowej ilości książek po cenach hurtowych bezpośrednio od Wydawnictwa na następujących warunkach: odbiór następuje własnym transportem lub przesyłką pocztową na koszt odbiorcy, a rozliczenie należności — gotówką lub czekiem potwierdzonym w banku (wpłata bezpośrednio do kasy Wydawnictwa lub przelewem na konto Ossolineum w terminie do 14 dni od chwili otrzymania towaru).

Konto: Wielkopolski Bank Kredytowy IV O/Wrocław, 359209-1078.

OSSOLINEUM — YOUR CHEAPEST AND MOST RELIABLE SUPPLIER OF ACADEMIC BOOKS AND PERIODICALS

Ossolineum Publishing House oilers a wide spectrum of periodicals, serial publications and books covering various fields of contemporary scientific research.

For orders containing more than 10 titles (copies) a rabatę of 15–20% will be granted, by purchase of 50 titles (copies) the rabatę will increase to 40%. For booksellers — 50% rabatę. Subscriptions — 30% rabatę.

The invoice is payable upon receipt. Individual and wholesale orders for books and periodicals published by Ossolineum, should be sent directly to the publishers. Export Department, Rynek 9, 50-106 Wrocław, Poland. Our bank account for foreign currencies: Wielkopolski Bank Kredytowy, IV O/Wrocław, 359209-1078-151-6787.

PRINTED IN POLAND

Zakład Narodowy im. Ossolińskich — Wydawnictwo Wrocław. Oddział w Warszawie 1990 r. Objętość 15 ark. wyd., 13 ark. druk. Warszawska Drukarnia Naukowa, Warszawa ul. Śniadeckich 8. Zam. 320/91.