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Towards All-European International Law¹

RENATA SZAFARZ

Until now the term "European law" and sometimes also the term "international law of Europe" have traditionally been used to denote the law of the European Communities (European Union) and treaties adopted in the framework of the Council of Europe. In fact, until 1989 this law was created by and binding for the Western European States or only some of them. On the other hand, at this time in the Eastern part of Europe some scores of treaties concluded under the auspices of the CMEA were in force. The result was separate international legal orders in the West and East of Europe.

Different factors have contributed to the fact that nowadays it is possible to speak also about all-European international law (i.e. international law of Europe as a whole) in statu nascendi. The origins of the contemporary international law of Europe (as a whole) date back to treaties adopted since the 1950-s under the auspices of the UN Economic Commission for Europe. In 1975, the CSCE process was initiated, in which political and moral norms prevailed, but legal elements were present as well. As of 1989, the Council of Europe and the treaties concluded in its framework have been made available to Central and Eastern European states. In the recent years, a number of other treaties of a basically all-European character have been concluded. As a result, the total number of all-European (Eurocentric) treaties is 222, of which 155 (163)² were adopted within the framework of the Council of Europe, 54 – under the auspices of the ECE, one – within the framework of the CSCE, and four independently of the above institutions. In fact, it is a law which has been established because of Europe and for Europe, and its scope is basically all-European.

The following fields are covered by particular law of a basically all-European character:

- 1) human rights and minorities,
- 2) social matters and health protection,
- 3) culture,

¹ This paper is based on some conclusions presented in my book published in Polish: *Rozwój prawa międzynarodowego Europy. Z problematyki „europejskiej przestrzeni prawnej”* (The Development of the International Law of Europe. Some Problems of the "European Legal Space") (1994).

² Three new Council of Europe treaties concluded since the publication of my book have also been taken into account. The figure given in brackets reflects the fact that some Council of Europe treaties with repeated numbers are additionally marked with letters "A" or "B".

- 4) legal matters,
- 5) environmental protection,
- 6) customs matters,
- 7) road traffic and transport,
- 8) inland navigation,
- 9) peaceful settlement of international disputes,
- 10) military matters,
- 11) financial cooperation.

None of these fields is subject to exclusively regional or particular regulation. With respect to all these fields, there exist treaties of a general scope. However, it must be emphasized that many specific all-European (Eurocentric) treaties are original legal acts, which have no counterparts in the universal system. As a rule, it may be said of all those treaties that they contain some original, often far reaching, solutions.

In general, particular law, including the international law of Europe, is established as a result of two prevailing factors, that is, under the influence of the specific needs of an area, which in this case is Europe, and under the influence of a civilization and cultural community existing in such an area, that is, in Europe. As a result, the particular and regional law is supposed to ensure the efficient functioning of the area as such and the organization of all aspects of life, in accordance with a recognized system of values. With respect to Europe, the first of the above goals may be reached owing to particular treaties concerning customs matters, road traffic and transport, inland navigation and environmental protection. The implementation of the second goal is ensured by treaties relating to human rights and minorities, social matters and health protection, culture, legal matters, peaceful settlement of disputes, as well as military and financial matters.

It is of no coincidence that treaties belonging to the first category were created already during the 1950-s, under the auspices of ECE, because their conclusion did not require the existence of any common hierarchy of values among the cooperating states. Nor is there any coincidence that treaties belonging to the second category were concluded within the framework of the Council of Europe and only after 1989, following the changes in the system of values in Central and Eastern Europe, was their transformation possible from Western European treaties to basically all-European treaties. Finally, there is no coincidence that all-European (Eurocentric) treaties concerning certain military matters and financial cooperation on an all-European scale, have been concluded only recently, that is, in the years 1990–1992; the reason being that the regulation of such matters depends to a special degree on the existence of common values and interests.

The particular international law which is currently being developed in Europe (as a whole) could be referred to as the international law of Europe of a second generation. It is different from the international law of Europe of the first genera-

tion, which has been developing since the 17-th century, and which gave rise to general international law. The law of the second generation is being established alongside with general international law, and will continue to be particular law. Any possible exceptions to this rule have no effect on this basic situation.

The new international law of Europe is complementary to general international law. At the same time, as a law which is basically all-European, it forms only part of the present-day "European legal space".

As has been indicated above, the international law of Europe of the second generation currently consists of the following elements: legal elements of the CSCE process, treaties adopted within the framework of the Council of Europe, treaties adopted under the auspices of the ECE, and a number of specific all-European (Eurocentric) treaties. As for as the European Union's law is concerned, it still continues to be a sub-regional law.

Participation in a number of treaties concluded because of Europe and for Europe, has been made available to individual states from other regions of the world. Usually, this has occurred in the form of consent to accession to the treaties after their entering into force with respect to the European parties. At least one non-European state is a party in the case of 12 treaties of the Council of Europe (out of a total of 155, or rather 163, treaties). With respect to only one such treaty, there are more than three non-European parties. Similarly, at least one non-European state is a party in the case of 17 ECE treaties (out of a total of 54), whereas with respect to only four such treaties there are more than three such parties.

In general, the participation of non-European states in treaties of a European character is an extraordinary feature, and an expression of the "radiation" of the international law of Europe into other regions of the world.

Legal elements of the CSCE process³

The CSCE is at present an international organization in *statu nascendi*. It will become an international organization of full dimensions after it is granted a legal basis, that is, a statute (effective within the framework of international law).

Legal elements of the CSCE process include legally binding elements of the Declaration on Principles contained in the Helsinki Final Act of 1975, the Convention on Conciliation and Arbitration within the CSCE of 15 December, 1992, as well as several particular customary norms of international law *in statu nascendi*.

The principles contained in the Declaration on Principles of the CSCE Final Act of 1975 include legal binding provisions and provisions of a political character, with the former prevailing. The principles of the Helsinki Decla-

³ The detailed analysis of this problem will be presented by this author in the consecutive issue of the Polish Yearbook of International Law.

ration contain numerous provisions binding on states – participants of the CSCE, because they reflect the principles of general international law. In fact, they repeat those principles, confirm them, and strengthen them. "In fact" – because they have been formulated and edited in a specific way. Moreover, the CSCE Decalogue also contains new, strictly political, elements.

The CSCE Declaration of Principles has not had a derogatory effect. The new political elements of the CSCE principles are limited to the supplementing of the contents of binding principles of international law. However, the issue remains open whether, and to what degree, these new political elements of the Helsinki principles could at present be ranked as all-European customary norms.

It may be generally stated that the Helsinki Decalogue constitutes an important part of the legal and political order in Europe, and within the whole area of the CSCE⁴. This is so despite the fact that the Helsinki Declaration, like the whole CSCE Final Act of 1975, is not in itself legally binding.

The Convention on Conciliation and Arbitration within the CSCE of 1992 is, so far, the only treaty adopted in the framework of the CSCE. It appears that the legal solutions contained in this Convention (i.e. compulsory conciliation and, in principle, optional arbitration) constitute the maximum of what at present is acceptable to most states participating in the CSCE.

The Convention under consideration, viewed as a legal document, is a certain turning point in the practice of the CSCE. It appears that the CSCE will be faced with the need to adopt treaties concerning other fields, if the CSCE is to function in the future as a forum of effective settlement of European problems.

As far as European particular customary norms of international law are concerned one could indicate norms concerning democracy and minorities.

Within the CSCE region, the rule that all people should have the right to participate in democratic and free elections in their own states has the nature of a customary norm of international law *in statu nascendi*. Although the opinions are justified that a norm of such contents is also being developed in the universal system, as well as in some other regional systems, it should be underlined that the process of forming of the relevant customary norms is most advanced in Europe. In consequence, it is possible that a particular customary norm relating to the issue in question will be established in Europe (within the area of the CSCE), earlier than its counterpart rule of general international law.

As concerns the present stage of the process of creation of customary norms in Europe (within the area of the CSCE), it seems that at least a standard has been developed, or even perhaps, as cannot be excluded, an *usus*.

Also the CSCE rules relating to the protection of minority rights currently have the status of particular customary norms of international law *in statu*

⁴ On the need of some changes in the Helsinki Decalogue – see my forthcoming paper (cf. note 3 above).

nascendi. At present, they form an European standard, or more precisely, a standard of the CSCE region.

It should generally be noted that the contribution of the CSCE to the creation of the legal order in Europe is not too significant. The CSCE process continues to be virtually political in character. The undeniable merit of the CSCE is that it, among others, has "led" the states of Central and Eastern Europe to the Council of Europe.

Achievements of the Council of Europe in the conclusion of european treaties

The significant turning-point which occurred in European relations after 1989 resulted in the treaties of the Council of Europe, that is, the treaties of Western Europe, becoming part, almost on a day-by-day basis, of the all-European system of international law.

Many out of the 155 (163) treaties of the Council of Europe (i.e. conventions, agreements and protocols) are directly designed to harmonize the internal legal systems of the member states, and at least to ensure their basic mutual conformity. In this way, the treaties of the Council of Europe have become the core of the developing "European legal space".

The treaty regulations of the Council of Europe cover human rights, social issues, culture and legal issues, as well as environmental protection. Strictly political and economic matters are not included.

A significant number of conventions of the Council of Europe have been ratified or acceded to by states. In this respect, conventions and protocols dealing with human rights are particularly prominent.

Relatively few states are bound by conventions of the Council of Europe concerning international law and movement of persons, as well as commercial and civil law. This is quite surprising, as it would seem that especially in the latter fields, states sharing market economy systems should have common interests and aims. Already 15 Central and East European states have been bound by certain conventions of the Council of Europe. It may be expected that the states of this sub-region, which at present are members of the Council of Europe, will in the nearest years accede to many other conventions adopted within the framework of this organization.

There is not doubt that the greatest and most important achievement of the Council of Europe, as far as treaties are concerned, is the treaty regulation of the system of protection of human rights and fundamental freedoms. It is one of the most developed systems, as compared with other analogous systems in the world, both regional and universal.

It seems that in the future the treaty practice of the Council of Europe will develop in the fields of protection of rights of minorities and environmental protection.

Of all the treaties of the Council of Europe signed prior to 1986, 12 have not come into force. It is not anticipated that they will become binding in the future. The conclusion of such treaties, which are considered to be failures, is surprising, especially since those treaties were concluded within a homogenous group of states, and the requirements for their entering into force are not excessive (usually, it is sufficient to deposit three ratification documents).

At present, Poland is bound by 21 treaties of the Council of Europe.

Achievements of the Economic Commission for Europe in the conclusion of european treaties

A total of 57 treaties have been concluded under the auspices of the ECE, including three treaties of a universal scope and 54 basically all-European treaties. Out of the latter, as many as 17 treaties have not yet entered into force. With respect to 12 such treaties, concluded in the period of 1954–1978, it may be expected that they will not enter into force.

The ECE treaties deal with the following issues: commercial arbitration, customs matters, road traffic, transport, navigation and environment.

Until recently, in the treaty practice of the ECE, prevailing were treaties concerning road traffic and transport, and customs conventions. Presently, treaties regulating environmental protection are among the most often concluded. This is a specific mark of time. Conclusion of other treaties in this field under the auspices of the ECE may be expected.

The problems of environmental protection and commercial arbitration are subject to regulation of both ECE, and Council of Europe, treaties.

A significant number of treaties of the ECE and of the Council of Europe provide for the establishment of permanent institutions or mechanisms of control and supervision over the implementation of those treaties. This is a higher level of treaty-based international co-operation.

Among the ECE treaties, most ratification and accessions have been obtained with respect to treaties concerning commercial arbitration and customs matters, as well as some treaties regulating environmental protection. The lowest number of ratifications and accessions was noted with respect to ECE treaties concerning water transport and multi modal transport.

Poland is bound by 25 ECE treaties which are of a basically all-European character. Poland is a party to most of the ECE treaties which have entered into force.

The ECE has a number of historical achievements as the first and, for a long time, the only all-European forum of cooperation. The ECE has created a stable infrastructure of relations in Europe, in the form of treaties. The CSCE has been able to function, in part, owing to the experiences of the ECE. These experiences will be useful also in the present work of the Council of Europe.

In connection with the existence and functioning in Europe of such international organizations as the European Union, EFTA and OECD (the latter,

with the participation of several non-European states), it is not expected that ECE treaty regulations will cover new areas of European economic life. The ECE has limited capacities in this respect.

Other all-european treaties

So far, only three ordinary treaties of a basically all-European character have been concluded, which are not connected with the CSCE, the Council of Europe, or the ECE. These are: the Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region, signed in Paris on 21 December 1979; Treaty on Conventional Armed Forces in Europe, signed in Paris on 19 November 1990; and the Treaty on Open Skies, signed in Helsinki on 24 March 1992.

In addition, one may mention the statute of an international organization: the Agreement Establishing the European Bank for Reconstruction and Development, signed on 29 May 1990. The European Bank for Reconstruction and Development is the first, and so far the only one, institution of a basically all-European character (and independent of the CSCE), established as a result of the changes that took place in Europe in 1989.

In the near future a treaty on stability in Europe (the so-called Balladur's plan) will probably be concluded. On the other hand, the perspectives of transforming the NATO and the European Union into organizations encompassing Western European states and at least some Central and Eastern European states are still remote and unclear. Yet the joining of both these organizations is a primary goal for Poland. This would obviously broaden the area of stability in Europe.

Final remarks

With respect to the effects of changes occurring in Central and East Europe since 1989 on the development of all-European legal links, it must be acknowledged that these effects may be viewed both in numbers and on the quality level. Above all, access to the treaty achievements of the Council of Europe has been opened to Central and East European states. Moreover, in the years 1990–1993 eight treaties of a basically all-European character have been concluded, which could be linked to the above mentioned changes. They concern such new (on the all-European scale) and important fields as: settlement of international disputes (including compulsory procedures), the problem of minorities, certain aspects of environmental protection, disarmament and military co-operation, and financial co-operation. In this context, the following treaties should be mentioned: Convention on Conciliation and Arbitration within the CSCE of 1992; European Charter for Regional or Minority Languages of 1992; Convention on Environmental Impact Assessment in a Transboundary Context of 1991; Convention

on the Transboundary Effects of Industrial Accidents of 1992; Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992; Treaty on Conventional Armed Forces in Europe of 1990; Treaty on Open Skies of 1992; and the Agreement Establishing the European Bank for Reconstruction and Development of 1990.

Although during the years 1989–1990 the future development could be viewed in more optimistic terms, it seems that in the years to come no particularly intensive development of all-European legal ties should be expected. In Europe, the development of political and moral (the CSCE) norms outdistances to a considerable degree the development of all-European law.

The international law of Europe, as a whole, does not, and cannot, constitute an integral legal system. It comes into being as particular law, complementary to general international law. It contains some norms which are parallel to general international law, as well as a number of new norms which go further than this law. On the other hand, some matters regulated by general law will never be the subject of the particular law of the international law of Europe (such as the law of treaties, the law of the sea or the law of outer space).

However, within the international law of Europe it is possible to distinguish two groups of norms which have some features of a system. namely, it is possible to refer to a European system of protection of human rights, and of an European system of settlement of international disputes (in particular within the CSCE).

In general, a person researching European legal problems is struck by a significant number of European procedures of settlement of international disputes, by their variety and comprehensiveness. They include mechanisms ranging from mediation, conciliation, directed conciliation, through arbitration and compulsory jurisdiction of the ICJ. Both political and legal procedures are included (see the following instruments: Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Article 24); European Convention on Peaceful Settlement of Disputes of 29 April 1957; Valletta Provisions for a CSCE Procedure for a Peaceful Settlement of Disputes of 8 February 1991, as modified in Stockholm on 15 December 1992; Convention on Conciliation and Arbitration within the CSCE of 15 December 1992; Provisions for a CSCE Conciliation Commission of 15 December 1992; Provisions for Directed Conciliation (CSCE) of 15 December 1992; as well as compromissory clauses in some Council of Europe's treaties and almost all the ECE treaties.

With respect to the future of Europe, there is no question of creating another procedure of settlement of international disputes, rather the problem arises how to cause the largest possible number of European states to be bound by the CSCE Convention and by the Convention of the Council of Europe for the Peaceful Settlement of Disputes. Naturally, it will also be necessary in practice to take due advantage of the two conventions.

It seems that at present there is a need to co-ordinate activities within the triangle CSCE – Council of Europe – ECE, in order to concentrate all efforts

and increase their effectiveness, and in order to avoid unnecessary doubling of undertakings, legal regulations, etc.

Europe first became a community of culture. Now, it is becoming, to some degree, a political and legal community. However, economic and military unity still seem out of reach. Because of this, despite the integrative role of the present international law of Europe, the creation of a unified Europe seems to be a rather remote goal.

The development of the international law of Europe is a result of over-coming the divisions of Europe. It is, at the same time, a factor strengthening the infrastructure of security and peace on our continent. This fact has also a global dimension.

L'intérêt pour agir en responsabilité internationale

VILENAS VADAPALAS*

Introduction

Pas d'intérêt, pas d'action – dit un vieil adage civiliste. Cet adage s'applique aussi en droit international public dans le domaine des réclamations interétatiques. On pourrait définir sa portée en se rapportant à la conclusion de la Cour internationale de Justice dans l'*Affaire du Sud-Ouest africain* (1966):

„Au moment où ils (les Etats) se présentent devant la Cour, ils doivent, ne poursuivraient-ils même qu'un objectif aussi limité, établir qu'ils ont vis-à-vis du défendeur en l'espèce un droit ou intérêt juridique au regard de l'objet de la demande leur permettant d'obtenir les déclarations qu'ils sollicitent, ou en d'autres termes qu'ils sont des parties devant lesquelles l'Etat défendeur est responsable en vertu de l'instrument ou de la règle de droit pertinents.”¹

La notion de l'intérêt pour agir constitue un élément important du processus de la mise en oeuvre de la responsabilité internationale des Etats. Elle est apparue comme condition principale de la protection diplomatique car en vertu de la règle de la nationalité des réclamations, seul l'Etat national des ressortissants victimes avait l'intérêt pour agir en présentant la réclamation en leur faveur.

Le développement du droit international, suivi par la multiplication des rapports multilatéraux dans la société internationale a changé les structures exclusivement bilatérales de la responsabilité internationale des Etats. Le problème de la détermination des titulaires d'intérêt pour agir est devenu plus complexe à cause de la multiplication des traités multilatéraux, de l'apparition des règles de *jus cogens*, de la protection internationale des droits de l'homme, et, surtout, de l'apparition de la notion du crime international. Dans ses travaux relatifs au Projet d'articles sur la responsabilité des Etats, la Commission du

* L'auteur tient à remercier vivement l'Institut suisse de droit comparé et la Fondation van Calster pour la possibilité d'effectuer des recherches sur la responsabilité internationale qui lui a été offerte à l'Institut suisse de droit comparé, ainsi que les collaborateurs de l'Institut pour l'aide multiple qui lui a été donnée. Il exprime aussi sa profonde gratitude au Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht à Heidelberg et à l'Institut des Hautes Etudes Internationales de l'Université de Paris II, où il a entrepris des recherches sur le même sujet, et plus personnellement à Dr. iur. Christophe Fischer, au Prof. Jochen Abr. Frowein, au Prof. Karl Doebling et au Prof. Pierre-Marie Dupuy.

¹ *CIJ Recueil* 1966, p. 34

droit international de l'ONU a traité cette délicate question de l'intérêt pour agir en déterminant „l'Etat lésé par un fait internationalement illicite.”

1. La notion de l'intérêt pour agir en responsabilité internationale

1.1. Les modalités de la mise en oeuvre de la responsabilité internationale

Sous le terme général de la mise en oeuvre de la responsabilité internationale, on traite des processus permettant d'engager la responsabilité internationale de l'Etat. Selon la Cour internationale de Justice il s'agit des „méthodes habituelles reconnues par le droit international pour l'établissement, la présentation et le règlement de réclamations. Parmi ces méthodes, on peut mentionner la protestation, la demande d'enquête, la négociation et la demande de soumettre l'affaire à un Tribunal ou à la Cour, dans la mesure où son Statut le permet.”² On peut compléter cette définition en mentionnant le recours aux représailles et l'action d'un Etat membre devant les organisations inter-nationales.

Il est évident que, dans la communauté internationale, on ne dispose pas de tous les moyens habituels de la mise en oeuvre de la responsabilité juridique. Cela est certainement dû au fait qu'une cette communauté, fondée sur l'égalité souveraine des Etats n'a pas besoin d'une série complète de moyens judiciaires et exécutifs. Les Etats conservent dans ce domaine une certaine liberté: il arrive souvent que les Etats parties au différend s'entendent par voie diplomatique pour satisfaire la réclamation. Il n'est en outre pas rare que la réparation soit accordée à titre gracieux (*ex gratia*) sans qu'un accord intervienne sur la base de règles strictement juridiques. De même, en l'absence d'une juridiction internationale susceptible de constater chaque violation du droit international et d'appliquer une sanction, la réclamation diplomatique peut fort bien rester sans réponse. De plus, l'Etat lésé, après avoir pesé ses intérêts politiques et économiques ou ses chances, peut s'abstenir de réclamer. D'autre part, les Etats gardent entre leurs mains, comme *ultima ratio*, le recours aux représailles, sorte de justice privée. Enfin, en cas de succès des négociations, celles-ci aboutissent très souvent à une indemnisation forfaitaire, dans laquelle l'évaluation du dommage et l'indemnisation ne correspondent pas toujours à des critères strictement juridiques.

Malgré la faiblesse de certains moyens de la mise en oeuvre de la responsabilité internationale, d'autres éléments et moyens ont atteint un niveau assez développé, tels les négociations, la protection diplomatique, la procédure de la Cour internationale de Justice, les procédures arbitrales, et celles des organisations internationales. En général, les obstacles à la mise en oeuvre de la responsabilité de l'Etat ne se manifestent pas tant dans une absence de moyens, que dans la difficulté de les organiser.

² *Réparation des dommages subis au service des Nations Unies*, avis consultatif du 11 avril 1949. *CIJ Recueil* 1949, p. 177.

Selon le principe général régissant la responsabilité internationale, tout fait internationalement illicite d'un Etat engage sa responsabilité. Ainsi, comme l'écrivait le Rapporteur spécial de la Commission du droit international Roberto Ago:

„C'est, en d'autres termes, à un comportement attribué par le droit international à l'Etat et représentant de sa part la violation d'une obligation internationale que le droit des gens rattache la naissance de ces situations juridiques nouvelles, défavorables pour l'Etat en question, que l'on réunit sous la dénomination commune de la responsabilité internationale.”³

Le fait internationalement illicite se manifeste comme le fait générateur de rapports de la responsabilité internationale, créant des droits et des obligations entre l'Etat auteur d'un fait illicite et l'Etat lésé. Selon les termes de la Cour permanente de Justice internationale:

„S'agissant d'un acte imputable à l'Etat et décrit comme contraire aux droits conventionnels d'un autre Etat, la responsabilité internationale s'établirait directement dans le plan des relations entre ces Etats.”⁴

Pour que le fait internationalement illicite se réalise, il faut que ses éléments constitutifs soient réunis. D'après l'article 3, „Eléments du fait internationalement illicite de l'Etat”, de la première partie du projet d'articles de la CDI:

„Il y a fait internationalement illicite de l'Etat lorsque:

a) un comportement consistant en une action ou en une omission est attribuable d'après le droit international à l'Etat; et

b) ce comportement constitue une violation d'une obligation internationale de l'Etat.”

Toutefois, les deux questions: portant, l'une, sur l'existence d'un fait internationalement illicite et, l'autre, sur la mise en oeuvre de la responsabilité de l'Etat pour ce fait, sont indépendantes. Le fait que les nouveaux rapports de la responsabilité internationale s'établissent dès l'accomplissement de la violation ne signifie pas que les droits et les obligations de l'Etat victime et de l'Etat auteur soient nés. Pour que les droits et obligations découlant d'un fait internationalement illicite (par ex., l'obligation de réparer, le droit de recourir aux représailles, etc.) soient réellement exécutés, il faut que le ou les sujets intéressés (l'Etat lésé, la collectivité des Etats, l'organisation internationale, etc.) mettent en oeuvre, par les moyens à leur disposition, la responsabilité internationale de l'Etat coupable.

³ R. Ago: *Scritti sulla responsabilità internazionale degli Stati*. Tome II, I. Camerino 759 (1986).

⁴ L'arrêt de la CPJI dans l'*Affaire des Phosphates du Maroc* (1938). CPJI, Série A/B; No. 74, p. 28.

En règle générale, c'est à l'Etat lésé qu'il appartient de mettre en oeuvre la responsabilité internationale de l'Etat auteur d'un fait illicite. La Cour internationale de Justice l'a affirmé dans l'*Affaire de la Barcelona Traction, Light and Power Co. Ltd.* (1970):

„Les titulaires de droits ne sont aucunement obligés de les exercer. Il arrive parfois qu'aucun recours ne soit exercé bien que des droits aient été lésés.”⁵

En tous cas, si la naissance de la responsabilité internationale de l'Etat est liée à l'accomplissement de la violation du droit international, sa mise en oeuvre est liée à une condition additionnelle – à un intérêt juridique d'un Etat ou d'un autre sujet du droit international. La responsabilité ne peut être mise en oeuvre que par un Etat ou une autre sujet ayant un intérêt juridique pour agir contre l'Etat coupable. Différents voies sont possibles : l'action peut être intentée soit en présentant la protestation ou la réclamation internationale, soit en agissant dans le cadre des organisations internationales, soit en recourant aux contre-mesures, etc.

1.2. L'intérêt ou le droit pour agir?

Dans la pratique, ainsi que dans la doctrine de droit international public, la tendance est de mettre sur le même plan l'intérêt pour agir et le droit subjectif lésé. La CIJ conclut à ce propos:

„En bonne logique et en droit strict, cette façon de présenter la prétention du Gouvernement belge selon laquelle il aurait qualité pour agir postule l'existence du droit qu'il faudrait précisément démontrer.”⁶

Cette manière de voir l'intérêt pour agir en responsabilité internationale comme le synonyme de droit subjectif violé, était le reflet des rapports traditionnellement bilatéraux de la responsabilité internationale de l'Etat. Une expression de cette bilatéralité apparaît dans la sentence arbitrale relative à l'*Affaire Dickson Car Wheel Company* (1931):

„The relation of rights and obligations created between two States upon the commission by them of an act in violation of international law, arises only among those States subject to the international juridical system.”⁷

La pratique classique de la mise en oeuvre de la responsabilité internationale, limitée à la protection diplomatique, ne pouvait être que bilatérale. Cette bilatéralité découlait de la règle de la nationalité des réclamations en ce

⁵ *CIJ Recueil* 1970, p. 45.

⁶ Arrêt dans l'*Affaire Barcelona Traction*. *CIJ Recueil* 1970, p. 38.

⁷ *Recueil des sentences arbitrales* (ci après: *RSA*), t. II, p. 641.

sens que seul l'Etat national de la victime a le droit de présenter la réclamation contre l'Etat auteur d'un fait illicite. Aujourd'hui encore, en dehors du domaine de la protection des droits de l'homme, la protection des particuliers à l'étranger reste l'affaire de deux Etats dans le cadre de la protection diplomatique.

Les conditions principales de la protection diplomatique ont été réexaminées dans l'Affaire *Barcelona Traction*:

„Un Etat ne peut présenter une demande de réparation du fait de la violation de l'une de ces obligations avant d'avoir établi qu'il en a le droit, car les règles en la matière supposent deux conditions:

„Premièrement, l'Etat défendeur a manqué à une obligation envers l'Etat national, à l'égard de ses ressortissants. Deuxièmement, seule la partie envers laquelle une obligation existe peut présenter une réclamation à raison de la violation de celle-ci.,, (*Réparation des dommages subis au service des Nations Unies*, avis consultatif, CIJ Recueil 1949, p. 181 et 182.)”⁸

Pour résumer la conception classique de l'intérêt pour agir en responsabilité internationale, on peut citer l'option dissidente du Juge Alvarez dans l'Affaire *Anglo-Iranian Oil Co.*:

„D'après le droit international en vigueur, un Etat peut formuler une réclamation contre un autre Etat dans trois cas: a) lorsqu'un de ses droits a été violé par cet Etat; b) pour protéger les droits de ses nationaux, s'ils ont été méconnus ou violés par ledit Etat; c) pour défendre les droits d'un Etat qui lui a confié cette défense parce qu'il ne peut le faire directement, par exemple, s'il rompu ses relations diplomatiques avec l'Etat qui a violé ses droits.”⁹

Le schéma, employé par la Cour internationale de Justice dans l'Affaire *du Sud-Ouest africain* a été résumé par Pieter Van Dijk dans la formule suivante:

„... if no individual right of the applicant States were to be involved, they also did not have the required interest to sue. The Court evidently, arguing backwards, applied the following construction: no right – no action – no purpose to be realized via the instituted proceedings – no interest to sue.”¹⁰

Une approche encore plus restrictive est liée à l'exigence du dommage subi par l'Etat demandeur ou par ses ressortissants – „pas de dommage, pas

⁸ *CIJ Recueil* 1970, p. 32. Il ne s'agit, selon l'arrêt de la Cour dans l'Affaire *Mavrommatis* (1924), que de la protection de droit propre de l'Etat national: „En prenant fait et cause pour l'un des siens, en mettant en mouvement, en sa faveur, l'action diplomatique ou l'action judiciaire internationale, cet Etat fait, à vrai dire, valoir son propre droit, le droit qu'il a de faire respecter en la personne de ses ressortissants, le droit international.” *CPJI*, Série A, No. 2, p. 12.

⁹ *CIJ Recueil* 1952, p. 129.

¹⁰ P. v a n D i j k: *Judicial Review of Governmental Action and the Requirement of an Interest to sue: a Comparative Study on the Requirement of an Interest to sue in National and International Law*. 436 (1980).

d'action".¹¹ La pratique, ainsi que la doctrine contemporaine ne considèrent plus le dommage uniquement sous son aspect matériel, mais invoquent plus souvent le dommage causé à la souveraineté, la paix et la sécurité inter-nationales, etc. Le dommage d'ordre politique ou moral se présente ici comme le synonyme de la violation même de l'obligation de respecter la souveraineté, du non-recours à la force, etc. Le dommage n'est donc pas un élément constitutif distinct du fait internationalement illicite de l'Etat. Toutefois, la réclamation visant à obtenir une réparation est conditionnée par l'existence du dommage exclusivement matériel. D'autre part, le seul fait qu'un dommage a été causé ne suffit pas à engager la responsabilité internationale. Comme le constatait la Cour:

„... la preuve qu'un préjudice a été causé ne suffit pas *ipso facto* à justifier une réclamation diplomatique. Un dommage ou un préjudice peuvent léser une personne dans des circonstances extrêmement variées. Cela n'entraîne pas en soi l'obligation de réparer.”¹²

Il semble que le contenu de l'obligation internationale en cause permet de répondre à „la question de savoir envers qui, ou envers quelle entité il existe en l'espèce une obligation de ne pas agir de manière contraire au droit international”, comme l'a formulé le Juge Sir Gerald Fitzmaurice.¹³

Selon l'article 5, paragraphe 1 de la deuxième partie du Projet d'article de la CDI, „l'expression «Etat lésé» s'entend de tout Etat qui est atteint dans un droit par le fait d'un autre Etat, si ce fait constitue, conformément aux dispositions de la première partie des présents articles, un fait inter-nationalement illicite de cet Etat.” Le commentaire de la Commission souligne qu'on „considère comme acquis qu'à chaque obligation correspond par définition un droit, pour au moins un autre Etat.”¹⁴ Les paragraphes 2 et 3 du même article énumèrent les situations dans lesquelles l'origine et le contenu de la règle violée peuvent déterminer l'Etat lésé.¹⁵

Il apparaît que cette liste de situations dans lesquelles l'Etat peut être considéré comme Etat lésé (la lésion des droits résultant d'un traité bilatéral ou multilatéral, de la décision d'une cour ou d'un tribunal international, de la déci-

¹¹ Voir L. De l e z: „Les principes généraux du contentieux international”. 160 (1962).

¹² *L'Affaire Barcelona Traction, Light and Power Company, Ltd.*, l'arrêt. – *CIJ Recueil* 1970, p. 36.

¹³ Voir l'opinion individuelle du Juge Sir Gerald Fitzmaurice dans l'*Affaire Barcelona Traction*. *CIJ Recueil* 1970, pp. 65 – 66.

¹⁴ *Annuaire de la Commission du droit international* (ci après: *ACDI*) 1985, vol. II, 2-ème partie, p. 25.

¹⁵ „2. En particulier, l'expression „Etat lésé” désigne:

- a) si le droit auquel le fait d'un Etat porte atteinte résulte d'un traité bilatéral, l'autre Etat partie au traité;
- b) si le droit auquel le fait d'un Etat porte atteinte résulte d'un jugement ou autre décision obligatoire relative au règlement d'un différend qui est rendu par une cour ou un tribunal international, l'autre Etat ou les autres Etats qui sont parties au différend et bénéficiaires de ce droit;

sion de l'organisation internationale, la coutume internationale, etc.) doit être complétée par la lésion de droit résultant de l'engagement unilatéral (l'acte unilatéral) d'un Etat.

La corrélation entre l'obligation violée par l'Etat auteur d'un fait illicite et le droit de l'Etat lésé atteint par cette violation dans le cadre de l'article 5 du Projet d'articles ne semble pas fondée sur la conception uniquement bilatérale de l'intérêt pour agir en responsabilité internationale. La plupart des situations décrites aux paragraphes 2 et 3 dépasse le rapport bilatéral: atteinte aux droits résultant d'une décision obligatoire d'un organe international; d'une disposition conventionnelle en faveur d'un Etat tiers; atteinte à la jouissance des droits de chacune des parties de la convention multilatérale; la violation des droits de l'homme; atteinte au droit dans le domaine de la protection des intérêts collectifs dans le cadre d'un traité multilatéral, et, notamment, le cas du crime international. La question qui se pose encore est celle de savoir si l'article couvre toutes les situations dans lesquelles un Etat peut se prétendre Etat lésé, ou, autrement dit, d'avoir un intérêt pour agir en responsabilité internationale de l'Etat coupable?

Pour répondre à cette question, il faut essayer de déterminer la nature de l'intérêt juridique en droit international, bien que ni la pratique, ni la doctrine ne nous donnent de réponse générale à ce sujet. Dans son analyse de la protection diplomatique dans l'*Affaire Barcelona Traction*, la CIJ a constaté:

„La Cour est d'avis que, pour interpréter la règle de droit international général concernant la protection diplomatique, ce qui constitue sa tâche, elle n'a aucun besoin de déterminer le sens du terme intérêts dans les règles conventionnelles, autrement dit

- c) si le droit auquel le fait d'un Etat porte atteinte résulte d'une décision obligatoire d'un organe autre qu'une cour ou un tribunal international, l'Etat ou les Etats qui, conformément à l'instrument constitutif de l'organisation internationale concernée, sont bénéficiaires de ce droit;
- d) si le droit auquel le fait d'un Etat porte atteinte résulte d'une disposition conventionnelle en faveur d'un Etat tiers, cet Etat tiers;
- e) si le droit auquel le fait d'un Etat porte atteinte résulte d'un traité multilatéral ou d'une règle du droit international coutumier, tout autre Etat partie au traité multilatéral ou lié par la règle du droit international coutumier, lorsqu'il est établi:
 - i) que le droit a été créé ou est reconnu en sa faveur;
 - ii) que l'atteinte portée au droit par le fait d'un Etat affecte nécessairement la jouissance des droits ou l'exécution des obligations des autres Etats parties au traité multilatéral ou liés par la règle du droit international coutumier; ou
 - iii) que le droit a été créé ou est reconnu pour la protection des droits de l'homme et des libertés fondamentales;
- f) si le droit auquel le fait d'un Etat porte atteinte résulte d'un traité multilatéral, tout autre Etat partie au traité multilatéral, lorsqu'il est établi que ce droit a été expressément énoncé dans le traité pour la protection des intérêts collectifs des Etats parties.

3. En outre, l'expression „Etat lésé” désigne, si le fait internationalement illicite constitue un crime international (et dans le contexte des droits et obligations des Etats aux termes des articles 14 et 15 *) tous autres Etats.”

* Les avant-projets des articles 14 et 15 proposés par le Rapporteur spécial Willem Riphagen déterminent les droits et obligations découlant du crime international (art. 14) et, plus particulièrement, d'un acte d'agression (art. 15).

d'établir si par ce terme les règles en question indiquent plutôt des droits que de simples intérêts."¹⁶

De même, la doctrine doute de la possibilité d'une détermination générale de l'intérêt pour agir. Ainsi, F. Matscher affirme dans son article „Standing before international courts and tribunals”:

„The question does not lend itself to a general answer, since it depends on how far the relevant provisions may extend the right to file a claim.”¹⁷

On peut également évoquer ici l'article 62 du Statut de la Cour internationale de Justice qui prévoit qu'un Etat est titulaire d'un intérêt pour agir devant la Cour à fin d'intervenir dans une affaire.¹⁸ Quant à l'expression „un intérêt d'ordre juridique”, il faut relever qu'au cours de l'élaboration du Statut de la Cour permanente de Justice internationale, „il s'agissait manifestement d'une sorte de compromis par lequel deux notions (intérêt et droit) étaient réunies dans une formule unique. Pour certains, ce compromis n'est guère satisfaisant car ils estiment que, si l'on sait ce que veulent dire „intérêt” et „droit” séparément, on sait bien moins ce que signifie un „intérêt juridique”.¹⁹ L'article 81, paragraphe 2 du Règlement de la Cour semble indiquer qu'il s'agit de l'exigence d'un intérêt concret.²⁰

L'article 63 du Statut de la Cour prévoit l'intervention d'un Etat au procès dans le cas de l'interprétation d'une convention.²¹ Il est cependant intéressant de relever que le Statut ne mentionne pas dans ce cas d'intérêt, de même que l'art. 82 du Règlement n'exige pas de l'Etat intervenant qu'il indique l'intérêt sur lequel il fonde sa déclaration d'intervention. Il est présumé qu'une partie au traité a un intérêt à l'interprétation de ce traité. L'interprétation du traité peut

¹⁶ *CIJ Recueil* 1970, p. 38.

¹⁷ *Encyclopedia of Public International Law*, Instalment I (1981), 192.

¹⁸ Article 62

1) Lorsqu'un Etat estime que, dans un différend, un intérêt d'ordre juridique est pour lui en cause, il peut adresser à la Cour une requête, à fin d'intervention.

2) La Cour décide.

¹⁹ K. M b a y e: „Intérêt pour agir devant la Cour internationale de Justice”. 209 *RCADI* 289 (1988)..

²⁰ Article 81

(...)

2. La requête indique le nom de l'agent. Elle précise l'affaire qu'elle concerne et spécifie:

- a) l'intérêt d'ordre juridique qui, selon l'Etat demandant à intervenir, est pour lui en cause;
- b) l'objet précis de l'intervention;
- c) toute base de compétence qui, selon l'Etat demandant à intervenir, existerait entre lui et les parties.

²¹

Article 63

1. Lorsqu'il s'agit de l'interprétation, d'une convention à laquelle ont participé d'autres Etats que les parties en litige, le Greffier les avertit sans délai.

2. Chacun d'eux a le droit d'intervenir au procès et, s'il exerce cette faculté, l'interprétation contenue dans la sentence est également obligatoire à son égard.

modifier la situation juridique de chaque Etat partie aux rapports établis par le traité.

L'intérêt pour agir n'est pas nécessairement lié à la violation du droit subjectif. Dans les rapports multilatéraux, l'Etat qui n'est pas la victime directe de la violation, est plutôt atteint dans l'intérêt juridiquement protégé par le droit international général ou par la convention multilatérale, que dans un droit subjectif. En cas de violation d'„obligations des Etats envers la communauté internationale dans son ensemble", relevait la Cour internationale de Justice dans l'*Affaire Barcelona Traction*, „tous les Etats peuvent être considérés comme ayant un intérêt juridique à ce que ces droits soient protégés.”²² Il s'agit ici surtout de l'intérêt général de voir les obligations respectées, mais non d'un droit subjectif à protéger. Les Etats qui ne sont pas les victimes de l'agression ou du génocide de sa population, demandent qu'un principe général soit respecté, bien qu'ils n'aient subi dans un cas d'espèce aucun préjudice direct, et ne demandent ni réparation, ni satisfaction, etc., qui sont des caractéristiques de la protection du droit subjectif violé. De même, dans la protection des droits de l'homme on ne peut pas prétendre que pour justifier son action l'Etat doit établir qu'un de ses droits a été violé par un fait illicite. Par contre, dans les rapports bilatéraux ou dans les rapports qu'un Etat entretient avec un nombre limité d'Etats, il ne peut invoquer un fait illicite que si ce fait a porté atteinte à un de ses droits propres et individuels, c'est-à-dire à un droit subjectif dont il est titulaire.

1.3. Les modalités de l'intérêt pour agir

L'intérêt pour agir en responsabilité internationale dans les diverses hypothèses doit présenter les caractéristiques suivantes: il doit être légitime et juridique, positif et concret, né et actuel, direct et personnel.²³ Si l'exigence de l'intérêt direct et personnel ne concerne que les rapports essentiellement bilatéraux, les autres sont de caractère général.

a) *L'intérêt légitime et juridique* signifie que la réclamation doit être fondée sur les règles du droit international, desquelles cet intérêt dérive. Ce sont, pour ainsi dire, les „sources juridiques” de l'intérêt pour agir, telles que le traité bilatéral ou multilatéral, la coutume internationale, la décision judiciaire ou arbitrale, la décision obligatoire de l'organisation internationale, l'engagement unilatéral de l'Etat. Ainsi, dans l'*Affaire Barcelona Traction*, la Cour a indiqué „que le Gouvernement belge aurait qualité pour introduire une réclamation s'il pouvait établir qu'un de ses droits a été lésé et que les actes incriminés ont entraîné la violation d'une obligation internationale ou d'une règle générale de droit.”²⁴ De même, dans l'affaire plus récente de l'*Applicabilité de la section*

²² *CIJ Recueil* 1970, p. 32.

²³ Voir K. M b a y e: op. cit., 262, 276.

²⁴ *CIJ Recueil* 1970, p. 46.

22 de l'article VI de la Convention sur les privilèges et immunités des Nations Unies, la Cour a constaté:

„La question qui fait l'objet de la demande est une question juridique en tant qu'elle implique l'interprétation d'une convention internationale à l'effet de déterminer son applicabilité.”²⁵

Le Juge Padilla Nervo a d'ailleurs exprimé la même opinion dans l'Affaire *Barcelona Traction*:

„La jurisprudence arbitrale confirme la thèse selon laquelle le droit international n'autorise pas à protéger des intérêts économiques lésés, mais seulement des droits qui ont été effectivement violés.”²⁶

b) *L'intérêt positif et concret* signifie:

„Positif, c'est-à-dire qu'il doit exister et présenter un certain degré d'importance; (...) dire que l'intérêt doit être concret c'est exiger qu'il ne soit pas un intérêt purement théorique.”²⁷ La satisfaction de la demande du réclamant par la juridiction internationale ou même par le défendant lui-même, sans passer par un tribunal, doit avoir des conséquences certaines et concrètes pour la situation juridique du réclamant. L'acceptation de la réclamation va donc changer la situation créée par le fait illicite en restaurant au moins la légalité. Cela, à notre avis, est la caractéristique de l'intérêt pour agir. En revanche, la réclamation purement théorique sans importance pour la protection des droits ou les intérêts des sujets de droit international n'a pas de chance de succès.

„Dans cette affaire, intervention du Gouvernement estonien n'a pour objet la défense d'aucun intérêt public ou national: elle est uniquement motivée par la protection d'intérêts privés contre un acte présenté comme une violation du droit international.”²⁸

On peut également se référer ici, par analogie, à la pratique du droit communautaire. K. Lasok reconnaît que l'intérêt pour agir devant la Cour de la Justice des Communautés européennes doit avoir cette caractéristique:

„The basic requirement is that the action, if successful, will lead to a change in the applicant's position (...). It is enough if the result would bring about the change for the better in the applicant's material position or a return to his original position. (...) Nonetheless, an applicant has no interest in obtaining a judgement which will establish that he was in the right, once the defendant has satisfied the claims made.”²⁹

²⁵ *CIJ Recueil* 1989, p. 187.

²⁶ *CIJ Recueil* 1970, pp. 250 – 251.

²⁷ K. M b a y e: op.cit., 264 – 265.

²⁸ Opinion individuelle des Juges de Visscher et Comte Rostworowski dans l'Affaire de *Chemins de Fer Panevezys-Saldutiskis* (1939). – *CPJI*, Séries A/B, No. 76, p. 24.

²⁹ K.P.E. L a s o k: *The European Court of Justice: Practice and Procedure*. 124 – 125 (1984).

c) *L'intérêt né et actuel*

Comme l'estime le Juge K. Mbaye, „l'exigence de la condition d'un intérêt né et actuel doit permettre de mettre en échec toute demande qui ne peut être justifiée que par un intérêt purement éventuel.”³⁰ Pour justifier la demande il faut que le fait internationalement illicite soit déjà accompli au moment de l'introduction de la demande. La seule supposition que certains actes illicites pourraient être accomplis n'est pas suffisante. Pratiquement, la question d'une menace de violation d'une obligation internationale peut se poser à la suite d'une décision des autorités d'un Etat (la loi, la décision administrative, etc.), dont l'application serait incompatible avec son obligation envers un autre Etat. Il est difficile par avance, sans l'analyse du cas d'espèce, de constater que telle ou telle décision constitue la violation de l'obligation et, par conséquent, crée l'intérêt pour agir. Le principe est qu'il n'y a pas de fait internationalement illicite sans actes ou omissions de l'Etat en violation de son obligation internationale. Comme le souligne la décision de la Commission franco-italienne de conciliation dans l'Affaire *Antonucci* (1963):

„En effet, ce n'est pas l'ordonnance judiciaire qui crée la responsabilité internationale du Gouvernement français, surtout lorsque cette mesure doit être suivie d'une menace d'exécution particulière, mais l'acte d'exécution lui-même contraire au droit international (...)”³¹

d) *L'intérêt direct et personnel*

„Il n'est ni nécessaire ni impératif que dans tous les cas l'intérêt exigé du plaideur soit direct et personnel si ces qualificatifs doivent être compris dans un sens restrictif.”³²

Le problème de l'exigence de l'intérêt direct et personnel a été posé devant la Cour internationale de Justice dans l'Affaire *du Sud-Ouest africain*. La réponse affirmative de la Cour à la question de l'exigence de l'intérêt direct et personnel est bien connue: on n'a pas admis l'*actio popularis* en droit international, „un droit pour chaque membre d'un collectivité d'intenter une action pour défense d'un intérêt public.”³³

La critique à laquelle cette conclusion de la Cour a été soumise, est elle aussi bien connue. Comme l'affirmait le Juge Koretsky dans son opinion dissidente:

„On a signalé depuis longtemps le danger qu'il y avait à transposer sans réserve les principes du droit civil et la procédure civile dans le droit international public et dans la procédure des tribunaux internationaux. Dans ce dernier cas la nature des relations

³⁰ K. M b a y e: op.cit., 270.

³¹ *Répertoire de la jurisprudence arbitrale internationale* (ci-après: *RJAI*), t. III, p. 1099.

³² K. M b a y e: op.cit., p. 273.

³³ *CIJ Recueil* 1966, p. 47.

et des droits est différente et l'on ne peut reprendre les catégories du droit civil. La notion d'intérêt général a une portée beaucoup plus large en droit international."³⁴

Finalement, la Cour internationale de Justice a reconnu l'existence de l'*actio popularis* en droit international dans les affaires *Barcelona* (1970) et *Namibia* (1971), conjointement avec la reconnaissance des obligations internationales envers la communauté internationale dans son ensemble.³⁵

Pourtant, exigence de l'intérêt direct et personnel reste valable en dehors des hypothèses de la violation d'obligations internationales *erga omnes* et de certains traités multilatéraux. Seul l'Etat qui a subi un dommage matériel peut exiger une réparation pécuniaire.

2. L'intérêt pour agir en responsabilité internationale de l'Etat pour la violation d'un traité multilatéral

La pluralité des rapports de la responsabilité internationale est tout d'abord liée aux traités multilatéraux ayant pour objet la promotion des intérêts généraux et communs pour la communauté internationale. Comme l'écrit R. Ago, dans cette catégorie de traités, „les volontés émanant des parties contractantes n'ont pas un contenu distinct, ne visent pas à des buts distincts, ne donnent pas uniquement naissance à des rapports juridiques entre des sujets déterminés; elles poursuivent ensemble un but identique, à savoir la création de règles communes de conduite.”³⁶

Les traités multilatéraux créent en général deux types de rapports: les rapports nés de la multitude des relations bilatérales entre les Etats parties d'une part, et les rapports intégraux liant directement tous les Etats parties d'autre part. Dans la première hypothèse, le traité, même universel, peut être décomposé en une série de relations bilatérales ne liant que deux Etats concernés par les obligations et droits réciproques: tel est le cas, par exemple, de la Convention de Vienne de 1963 sur les relations consulaires. En règle générale, le non-respect des immunités et privilèges consulaires ne touche que l'Etat d'envoi et l'Etat de résidence. Dans la deuxième hypothèse, chacune des obligations conventionnelles est liée si étroitement à l'ensemble qu'elle ne peut être dissociée de tout „ensemble intégral”. Tel est, par exemple, le cas de la Convention de 1976 sur l'interdiction d'utiliser des techniques de modification de l'environnement à des fins militaires ou toutes autres fins hostiles. La violation d'une obligation conventionnelle

³⁴ *CIJ Recueil* 1966, p. 242.

³⁵ Dans l'Affaire *Barcelona Traction*, on constatait l'existence d'„obligations des Etats envers la communauté internationale dans son ensemble” (*CIJ Recueil* 1970, p. 32), dans l'Affaire *Namibia* – l'opposabilité de la présence sud-africaine en Namibie „à tous les Etats en ce sens qu'elles rendent illégale *erga omnes* une situation qui se prolonge en violation du droit international” (*CIJ Recueil* 1971, p. 56).

³⁶ R. Ago: *Scritti*, Tome II, I, p. 782.

constitue dans la même mesure un délit à l'égard de toutes les autres parties.³⁷ Tous les Etats parties à un tel traité multilatéral ont un intérêt commun pour la sauvegarde des ses dispositions. Comme l'indique la Cour internationale de Justice dans son avis rendu dans le cadre de l'*Affaire des réserves à la Convention pour la prévention et la répression du crime de génocide* (1951):

„Dans une telle convention, les Etats contractants n'ont pas d'intérêts propres; ils ont seulement tous et chacun, un intérêt commun, celui de préserver les fins supérieures qui sont la raison d'être de la convention.”³⁸

Il semble que la Commission de droit international a prévu des situations de ce type à l'article 5 de la deuxième partie du Projet d'articles en les décrivant comme l'atteinte au droit résultant d'un traité multilatéral qui „affecte nécessairement la jouissance des droits ou l'exécution des obligations des autres Etats parties au traité multilatéral” (paragraphe 2, alinéa e, II)³⁹ ou quand „il est établi que ce droit a été expressément énoncé dans le traité pour la protection des intérêts collectifs des Etats parties” (paragraphe 2, alinéa f). On peut remarquer certaines analogies entre la première situation et la situation prévue à l'article 60, paragraphe 2c de la Convention de Vienne de 1969 sur le droit des traités concernant le droit de toute partie au traité de le suspendre lorsqu'une „violation substantielle de ses dispositions par une Partie modifie radicalement la situation de chacune des Parties quant à l'exécution ultérieure de ses obligations en vertu du traité.” La seule différence est que le Projet d'articles n'exige ni „la violation substantielle”, ni la modification „radicale” de la situation de chacune des parties au traité pour que chaque partie ait intérêt pour agir y compris pour agir en suspendant l'application du traité.⁴⁰

Il semble que, dans le domaine de l'application des traités, les dispositions du Projet d'articles doivent se conformer aux dispositions de la Convention de Vienne de 1969. Ici, comme l'écrit Paul Reuter, „au titre du droit des traités, une violation non-substantielle laisse le traité en principe intact.”⁴¹ Dans ce cas, si on parle de l'action des autres parties au traité multilatéral contre l'Etat auteur de telle violation, on préfère parler de la réaction collective des Etats parties:

³⁷ Voir – P. R e u t e r: *Introduction au droit des traités*. 39, 160 (1985); S. R o s e n n e: *Breach of Treaty*. 76 – 84 (1985); K. S a c h a r i e w: „State Responsibility for Multilateral Treaty Violations: identifying the „Injured State”. 35 *NILR* 277 (1988).

³⁸ *CIJ Recueil* 1951, p. 23.

³⁹ Cette disposition concerne aussi la violation de „la règle du droit international coutumier”, ce qui nous semble vague et indéterminé; il faut préciser qu'il s'agit d'une règle de *jus cogens*.

⁴⁰ Comme l'écrit L.-A. Sicilianos, cette disposition du Projet „est cependant sensiblement moins exigeante que son „homologue” de la Convention de Vienne puisqu'elle ne mentionne pas la modification radicale de la situation de chacun des Etats concernés quant à l'exécution ultérieure de ses obligations.” – L.A. S i c i l i a n o s: „Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense” 117 (1990).

⁴¹ P. R e u t e r: op. cit., 160.

„Quant à la question de savoir si les Etats parties au traité qui ne sont pas directement lésés par une violation non substantielle peuvent prendre collectivement des mesures, elle peut être discutée. Dans la pratique internationale actuelle existe une tendance qui tend à considérer que certaines violations, même si par leur volume elles ne devaient pas être considérées comme substantielles, pourraient autoriser des réactions collectives, à raison des caractères propres de la règle violée.”⁴²

La deuxième hypothèse de violation du traité multilatéral concerne l’atteinte au droit „expressément énoncé dans le traité pour la protection des intérêts collectifs des Etats parties” (article 5, paragraphe 2f de la deuxième partie du Projet d’articles). Il s’agit évidemment aussi d’un traité multilatéral „intégral”. Le commentaire de la Commission souligne à ce sujet:

„On trouve d’ailleurs un exemple de cet intérêt collectif dans la notion de «patrimoine commun de l’humanité», récemment appliqué aux ressources minérales de la zone du fond des mers et des océans, ainsi que de leur sous-sol, au-delà des limites de la juridiction nationale. D’après la Commission, dans ce domaine l’intérêt collectif n’est pas encore reconnu dans le droit international général, à l’exception des traités multilatéraux, où on le trouve exprimé *expressis verbis*.”⁴³ Ainsi, par exemple, l’article 28, paragraphe 1 de la Convention des Nations Unies sur le droit de la mer prévoit:

„Lorsqu’un navire se trouve volontairement dans un port ou a une installation terminale au large, l’Etat du port peut ouvrir une enquête et, lorsque les éléments de preuve le justifient, intenter une action pour rejet effectué au-delà de ses eaux intérieures, de sa mer territoriale ou de sa zone économique exclusive par le navire en infraction”

„Pour n’invoquer ici que la règle de principe la plus large, posée à l’article 192, lequel dispose simplement: «les Etats ont l’obligation de protéger et de préserver le milieu marin», on pourrait en effet être fondé à penser qu’elle est la contrepartie d’un droit détenu par la communauté internationale dans son ensemble, si l’on constate par ailleurs que des Etats pourtant non directement atteints, dans leur patrimoine propre, par un acte de pollution intervenu dans une zone placée hors de toute juridiction internationale sont fondés à «ouvrir une enquête» et, le cas échéant, «intenter une action», à l’encontre de l’auteur du rejet polluant.”⁴⁴

Certes, la distinction entre les traités multilatéraux avec structures „intégrales”, d’une part, et avec structures „bilatérales”, d’autre part, est assez souple. Une exemple: la violation de l’obligation de l’Etat accréditaire d’assurer les immunités de la mission diplomatique de l’Etat accréditant qui ne concerne par sa nature juridique que ces deux Etats. Dans le cas de la violation grave de cette obligation, comme ce fut le cas lors de la prise des otages américains à Téhéran en 1979, les conséquences ont, en effet, dépassé le cadre des rapports bilatéraux. Comme le constatait la Cour Internationale de Justice, „l’affaire soumise à la

⁴² Ibid.

⁴³ II – 2 *ACDI* 27 (1985).

⁴⁴ R.-J. Dupuy et D. Vignes: „Traité du nouveau droit de la mer”. 1045 (1985).

Cour est unique et d'une gravité toute particulière parce qu'en l'occurrence ce ne sont pas seulement des individus privés ou des groupes des individus qui ont agi au mépris de l'inviolabilité d'une ambassade étrangère; c'est le Gouvernement de l'Etat accréditaire lui-même qui l'a fait. En rappelant donc à nouveau l'extrême importance des principes de droit dont elle est amenée à faire application en la présente affaire, la Cour croit de son devoir d'attirer l'attention de la communauté internationale tout entière, y compris l'Iran, qui en est membre depuis des temps immémoriaux, sur le danger peut-être irréparable d'événements comme ceux qui ont été soumis à la Cour. Ces événements ne peuvent que saper à la base un édifice juridique patiemment construit par l'humanité au cours des siècles et dont la sauvegarde est essentielle pour la sécurité et le bien-être d'une communauté internationale ...⁴⁵

Cette gravité et persistance de la violation des dispositions de la Convention de Vienne sur les relations diplomatiques a transformé la structure „bilatérale” des rapports en une structure multilatérale dans laquelle chacune des parties a acquis un intérêt d'agir contre l'Etat responsable. Ainsi, la Déclaration des ministres des affaires étrangères des neuf Etats de la Communauté européenne du 22 avril 1980 affirme que:

„Les ministres des affaires étrangères des Neuf, profondément conscients du fait que la persistance de cette situation risque de mettre en danger la paix et la sécurité internationales, ont décidé de demander à leurs parlements nationaux, si nécessaire, de prendre immédiatement les mesures pour imposer les sanctions à l'encontre de l'Iran ...⁴⁶

3. L'intérêt pour agir dans les cas de violation d'obligations internationales *erga omnes*

La définition des obligations *erga omnes*, donnée par la Cour internationale de Justice dans l'Affaire *Barcelona Traction*, est bien connue:

„Une distinction essentielle doit en particulier être établie entre les obligations des Etats envers la communauté internationale dans son ensemble et celles qui naissent vis-à-vis d'un autre Etat dans le cadre de la protection diplomatique. Par leur nature même, les premières concernent tous les Etats. Vu l'importance des droits en cause, tous les Etats peuvent être considérés comme ayant un intérêt juridique à ce que ces droits soient protégés: les obligations dont il s'agit sont des obligations *erga omnes*.”

Ces obligations découlent par exemple, dans le droit international contemporain, de la mise hors la loi des actes d'agression et du génocide mais aussi des principes et de règles concernant les droits fondamentaux de la personne

⁴⁵ *CIJ Recueil* 1980, pp. 42 – 43.

⁴⁶ *Bulletin des Communautés européennes*, 1980, No. 4, p. 26.

humaine, y compris la protection contre la pratique de l'esclavage et la discrimination raciale."⁴⁷

La responsabilité internationale de l'Etat pour la violation d'obligations ayant un caractère essentiel pour les intérêts de la communauté internationale se trouve engagée envers tous les Etats, et, donc, chaque Etat est titulaire de l'intérêt pour agir.

Il semble que les obligations *erga omnes* sont celles qui dérivent des règles de *jus cogens*. Si „une norme (est) acceptée et reconnue par la communauté internationale des Etats dans son ensemble en tant que norme à laquelle aucune dérogation n'est permise" (article 53 de la Convention de Vienne de 1969), elle crée des obligations *erga omnes* parce que: premièrement, ces obligations „concernent tous les Etats", et elles ne permettent pas à un Etat d'y déroger, et deuxièmement, chaque Etat peut demander qu'elles soient respectées.

L'autre catégorie analogue concerne les crimes internationaux. Le fait internationalement illicite qui constitue un crime international par sa définition constitue toujours une violation d'une obligation internationale *erga omnes*, parce que, comme l'indique l'article 19 de la première partie du Projet d'articles sur la responsabilité des Etats (voir note 51), „il résulte d'une violation par un Etat d'une obligation internationale essentielle pour la sauvegarde d'intérêts fondamentaux de la communauté internationale." La liste des obligations internationales dont la violation constitue un crime international selon l'article 19 du Projet d'articles (voir note 51) comporte évidemment les obligations „envers la communauté internationale dans son ensemble." On énumère ici les obligations d'importance essentielle „pour le maintien de la paix et de la sécurité internationales" (paragraphe 3a); „pour la sauvegarde du droit des peuples à disposer d'eux-mêmes" (paragraphe 3b); „pour la sauvegarde de l'être humain" (paragraphe 3c); „pour la sauvegarde et la préservation de l'environnement humain" (paragraphe 3d). Toutefois, si chaque crime international est une violation de l'obligation *erga omnes*, dérivant de la règle impérative du droit international, il ne faut pas tirer, comme l'indique la Commission du droit international, des parallèles directes entre chaque violation des règles de *jus cogens* et la violation constituant un crime international. Selon le commentaire de la CDI à l'article 19, „s'il peut être vrai que le manquement à une obligation établie par une règle de *jus cogens* constituera souvent un crime international, on ne peut cependant pas nier que la catégorie des obligations internationales pour lesquelles aucune dérogation n'est admise est plus vaste que celle des obligations dont la violation est nécessairement un crime international."⁴⁸

L'article 19 (voir note 51) ne parle que de quatre catégories de règles de *jus cogens*: du principe de non-recours à la menace ou à l'emploi de la force (paragraphe 3a), du principe de l'égalité des peuples et de leur droit de disposer d'eux mêmes (paragraphe 3b), du principe du respect des droits de l'homme et

⁴⁷ *CIJ Recueil* 1970, p. 32.

⁴⁸ *ACDI* 1976, vol.II, 2-ème partie, p. 111.

des libertés fondamentales (paragraphe c), et du principe de la protection de l'environnement humain (paragraphe 3d).⁴⁹ La violation d'une règle impérative comme, par exemple, l'interdiction d'étendre la souveraineté de l'Etat à la haute mer, ne constitue pas un crime international. Comme l'écrit Roberto Ago, „on ne saurait voir un véritable crime international dans une pratique discriminatoire ou dans une atteinte à la libre utilisation d'un bien commun de l'humanité que si ces faits revêtent une gravité particulière ...”⁵⁰

En se référant à l'article 19 de la première partie du Projet d'articles⁵¹, on peut définir le crime international par rapport à ses éléments constitutifs, qui sont les suivants:

a) le crime international résulte de la violation d'une obligation internationale d'importance „essentielle pour la sauvegarde d'intérêts fondamentaux de la communauté internationale”, ce qui implique aussi que l'obligation en cause est une obligation *erga omnes* découlant d'une norme impérative du droit international général;

b) le crime international découle d'une violation grave d'une telle obligation;

c) cette violation est reconnue comme un crime par la „communauté internationale dans son ensemble”. Il découle d'un tel critère que la qualification de crime international d'un comportement étatique ne soit pas un acte individuel d'un Etat.

Le dernier critère cité, ou pour le moins son interprétation, peut paraître contradictoire avec l'idée générale selon laquelle en cas de violation d'une obligation *erga omnes*, comme l'indique Roberto Ago „tout Etat, même s'il n'est pas immédiatement et directement affecté par la violation, devrait donc

⁴⁹ Comme l'indique la Commission, l'article 19 ne comporte pas de liste des crimes internationaux: „la rédaction d'une liste des obligations dont la violation – dans certaines conditions du moins – représenterait un crime international aboutirait nécessairement à un résultat „rigide”, reflétant la situation d'aujourd'hui et ne permettant pas à la règle qu'on entend établir de s'adapter progressivement à l'évolution future du droit international.” – 2 – II ACDI 110 (1976). On peut invoquer ici pour une exemple de telle évolution la Déclaration sur la prévention d'une catastrophe nucléaire (Résolution de l'Assemblée générale 36/100 du 9 décembre 1981 qualifiant l'emploi des armes nucléaires par Etat agissant le premier „le crime le plus grave contre l'humanité”.

⁵⁰ R. Ago: *Scritti*, op. cit., t. II, 895.

⁵¹ „Article 19. – Crimes et délits internationaux

1. Le fait d'un Etat qui constitue une violation d'une obligation internationale est un fait internationalement illicite quel que soit l'objet de l'obligation violée.

2. Le fait internationalement illicite qui résulte d'une violation par un Etat d'une obligation internationale si essentielle pour la sauvegarde d'intérêts fondamentaux de la communauté internationale que sa violation est reconnue comme un crime par cette communauté dans son ensemble constitue un crime international.

3. Sous réserve des dispositions du paragraphe 2 et d'après les règles du droit international en vigueur, un crime international peut notamment résulter:

a) d'une violation grave d'une obligation internationale d'importance essentielle pour le maintien de la paix et de la sécurité internationales, comme celle interdisant l'agression;

b) d'une violation grave d'une obligation internationale d'importance essentielle pour la sauvegarde du droit des peuples à disposer d'eux-mêmes, comme celle interdisant l'établissement ou le maintien par la force d'une domination coloniale;

être considéré comme justifié à faire valoir la responsabilité de l'Etat auteur du fait internationalement illicite."⁵²

Il est évident que l'exigence d'une certaine institutionalisation des réactions individuelles des Etats contre des faits illicites qu'ils considèrent comme des crimes internationaux se justifie pleinement par le danger que représente la „justice privée” dans les rapports internationaux. D'après la CDI „ce que l'on veut assurer, c'est que le caractère du «crime international» soit reconnu à un fait internationalement illicite donné, non pas seulement par tel ou tel groupe (même majoritaire) d'Etats, mais par toutes les composantes essentielles de la communauté internationale.”⁵³

A cet égard, relevons l'avis consultatif rendu par la CIJ le 29 janvier 1971 concernant les *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité*:

„Quant à savoir exactement quels actes sont permis ou autorisés, quelles mesures sont possibles ou applicables, quelles sont celles qui devraient être appliquées, ce sont là des questions qui relèvent des organes politiques compétents des Nations Unies, agissant dans le cadre des pouvoirs conférés. Ainsi, il appartient au Conseil de sécurité d'indiquer toutes autres mesures devant faire suite aux décisions qu'il a prises en ce qui concerne la question de la Namibie.”⁵⁴

Toutefois, la conclusion générale tendant à reconnaître aux organes de l'ONU la compétence exclusive de déterminer l'intérêt pour agir des Etats contre les violations les plus graves des obligations internationales, y compris les crimes internationaux, ne semble pas tout à fait exacte. L'avis de la CIJ précité doit être considéré comme l'acte d'application de la Résolution 276 (1970) du Conseil de sécurité sans qu'on puisse en tirer des conséquences plus générales.

Il est évident que la codification des règles de la responsabilité internationale de l'Etat pour les violations les plus graves touchent inévitablement à la compétence du Conseil de sécurité de régler „tout différend ou toute situation” dont la prolongation „semble devoir menacer le maintien de la paix et de la sécurité internationales” (article 34 de la Charte). Il est de plus nécessaire d'affirmer ici la suprématie des dispositions de la Charte sur celles objet du

c) d'une violation grave et à une large échelle d'une obligation internationale d'importance essentielle pour la sauvegarde de l'être humain, comme celles interdisant l'esclavage, le génocide, l'apartheid;

d) d'une violation grave d'une obligation internationale d'importance essentielle pour la sauvegarde et la préservation de l'environnement humain, comme celles interdisant la pollution massive de l'atmosphère ou des mers.

4. Tout fait internationalement illicite qui n'est pas un crime international conformément au paragraphe 2 constitue un délit international.”

⁵² R. A g o: op. cit., p. 97.

⁵³ V. note 49.

⁵⁴ *CIJ Recueil* 1971, p. 55.

Projet d'articles, en ce d'autant plus que l'article 103 de la Charte⁵⁵ le prévoit. La compétence exclusive que la Charte confère au Conseil de sécurité n'est cependant pas absolue: „le Conseil de sécurité peut enquêter tout différend ou toute situation” de telle nature (article 34), il „peut décider quelles mesures (...) doivent être prises” (article 41), il „peut entreprendre, au moyen de forces aériennes, navales ou terrestres, toute action qu'il juge nécessaire” (article 42). Mais, aussi longtemps que le Conseil de sécurité ne se saisit pas de l'affaire pour mener une enquête et prendre une décision à son sujet, les Etats peuvent recourir aux mesures conservatoires pour la protection des biens communs, du moment où le Conseil n'est ni en mesure de mener une enquête ni de prendre une décision à cause du „droit de veto”. D'autre part, l'article 34 de la Charte ne couvre pas toutes les conséquences (réaction de l'Etat tiers, assistance des Etats tiers à l'Etat victime, etc.) du fait illicite international.

Relevons encore que le titre pour agir de l'Etat qui n'est pas directement lésé par le crime international ne comporte pas en soi la faculté de recourir aux contre-mesures sans une „reconnaissance collective”, ressortant soit des décisions du Conseil de sécurité, de l'Assemblée générale ou de la Cour internationale de Justice, soit des résolutions des organes compétents des agences spécialisées de l'ONU, ou encore, pour le moins, des actes communs des Etats représentants „les composantes essentielles de la communauté internationale”. En l'absence d'une telle reconnaissance et à l'exclusion des contre-mesures, chaque Etat a cependant la faculté de réagir par la voie des protestations, de la non-reconnaissance comme légitimes des conséquences du crime international ou encore, en fournissant de l'aide à l'Etat directement lésé.

⁵⁵ „Article 103

En cas de conflit entre les obligations des Membres des Nations Unies en vertu de la présente Charte et leurs obligations en vertu de tout autre accord international, les premières prévaudront.”

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The *Lockerbie* Case – some Comments*

WŁADYSŁAW CZAPLIŃSKI

On 21 December 1988, the Pan American Boeing 747 (Flight 103) exploded over the Scottish locality Lockerbie. 259 persons on board and 11 inhabitants of Lockerbie were killed. On 19 September 1988, the UTA No. 772 plane bombing over Niger caused the death of 171 persons. After a 3-year investigation the British intelligence service established that both explosions had been caused by officers of the Libyan secret service.

On 27 November 1991, the governments of the United States and the United Kingdom requested the extradition of the suspected officers, the explanation of all circumstances of the case, and the payment of adequate reparations. One month later, the two governments, and France presented the case at the UN Security Council and the General Assembly. In the meantime, Libya instituted proceedings before the International Court of Justice aiming at the protection of rights deriving from the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, and in particular requested provisional measures.

On 21 January 1992, notwithstanding passionate and towering opposition by Libya, the Security Council passed unanimously Resolution 731 (1992). *Considerans* of the resolution declared that the Council was disturbed by the acts of international terrorism, including those in which States were directly or indirectly involved, and which were directed against innocent people; it indicated also the Council's concern at all acts against international civil aviation constituting acts of terrorism which constituted threats to international peace and security. Finally, it confirmed the right of all states to combat such terrorist acts. Though not mandatory (the resolution *urges* Libya to comply with), resolution 731 condemned the two acts of terrorism, criticizing Libya for the refusal of cooperation in order to clarify all circumstances of the accidents and to establish responsibility, and demanded the changing of position.

As Libya did not comply with resolution 731, the Security Council passed by ten votes in favour, with five abstentions¹ another resolution 748 (1992) on 31 March 1992. This resolution was binding UN member States as it referred

* The research for the present study has been sponsored by the A. von Humboldt-Foundation (Bonn, FRG).

¹ China, Cap Verde, India, Morocco, Zimbabwe. None of these states contested the legality of resolution 748 or the competence of the Security Council.

directly to Chapter VII of the Charter. Its *considerans* pointed out that political terrorism constituted an illegal form of the use of force and it was, therefore, a danger for peace and international security. Under these circumstances, the refusal by the Libyan government to comply with resolution 731 showed that it was not willing to renounce terrorism. Such an attitude constituted a threat to international peace and security. In the operational part of the resolution, the Security Council decided to impose sanctions upon Libya: a breach of air traffic and arms delivery, and a reduction of diplomatic staff. For the first time in the activities of the UN organs acts of terrorism were strongly condemned, in accordance with contemporary postulates of international lawyers.² Libya was given two weeks to comply with the resolution. Although was ready to cooperate to a certain extent with the states sponsoring resolution (e.g. to surrender the suspects to an independent judicial committee or to a third state or international organization), rejected the extradition demand as infringing sovereign rights. The Council was not satisfied with the solution proposed, and sanctions entered into force on 15 April 1992.

In the proceedings Libya demanded the World Court to declare that had fulfilled obligations under the Montreal Convention, that the USA and the UK had breached respective obligations and that both of them should refrain from any action against Libya violating sovereignty, territorial integrity, or the ban on the use or threat of force. On 14 April 1992 the ICJ, by 11:5 majority,³ dismissed Libya's claims and confirmed the *prima facie* legality of Resolution 748; it stated that according to Article 25 of the Charter the states are bound by resolution 748, and, on the basis of Article 103, the obligations derived from the Charter prevail over other international legal obligations. The Court was therefore not entitled to grant to Libya interim protection against measures adopted on the basis of the Charter. However, the proceeding and, in particular, separate and dissenting opinions raised important issues for discussion.

The dispute between Libya on the one, and the USA, the UK and France on the other, raises a number of important questions of international law. We shall consider the consequences of terrorist acts in the field of extradition law, the legality of the acts of the Security Council, and the relationship between the Security Council and the International Court of Justice.

² Terrorist acts have been included in Article 3 of the Draft Code of Crimes and Peace and Security – cf. 6th Report by D. T h i a m: *YBILC* 1988, vol. I, at 62. See: also Y. D i n s t e i n: Terrorism as an International crime, 19 *IsrYBHR* 55 (1989); S. Sucharitkul, Terrorism as an International Crime: Questions of Responsibility and Complicity, *ibidem*, at 247.

It is worth of noticing of noticing that the Draft Code refers to a notion of State Terrorism. The alleged involvement of the Libyan state was the principal argument for the Council to deal with the destruction of the Pan Am and UTA planes 4 years after the events. According to the sponsors of the resolutions, under the present circumstances the fair trial would not be possible in Libya.

³ *ICJ Rep.* 1992, p. 3 and 114, respectively.

The problem of extradition of Libyan nationals by Libya

The extradition (surrender) of agents of the Libyan secret service suspected of having bombed the Pan Am and UTA aircrafts remains a crucial point of American and French requests, as well as of the Security Council resolutions. At the beginning Libya rejected these demands,⁴ and subsequently modified position stating that was ready to surrender both suspected agents either to a third state, or to an international organization. According to Libya statements, the agents could not be extradited to the United States because of a fear that a fair trial before an American court could not be guaranteed.

It is important to stress that according to the dominant view there is no obligation to extradite offenders to a requesting state under international law.⁵ However the principle *out dedere, aut iudicare* has been the most important and effective element of the struggle against acts offences contrary to international law, in particular war crimes and terrorism. According to that principle, all states are under an obligation either to extradite a perpetrator of a terrorist act or to prosecute him. The principle has been introduced into several international conventions,⁶ as well as into the draft code of crimes against peace and security, adopted provisionally by the ILC in 1991. It is not clear whether it has developed into a customary rule; according to some authors it has remained a postulate which has never been fully realized.⁷ It has been emphasized in this context that the element of *iudicare* should be interpreted exclusively as: *bringing an offender to a trial* and not as *to punish*.⁸

However, there is a rule of municipal law which has been widely⁹ accepted according to which no state is obliged to extradite its own nationals to be tried abroad. This rule has found expression in international agreements,¹⁰ consti-

⁴ According to Libya view, the matter was within her internal jurisdiction. The supporters of the resolution maintained that the involvement of the Libyan state in terrorist acts justified the competence of the Security Council.

⁵ Cf. e.g. A. Verdross, B. Simma: *Universelles Völkerrecht* 819 (1986); Oppenheim's *International Law* (eds. R. Y. Jennings, A. Watts) vol. I, 950 (1992), with further references.

⁶ E.g. the 1948 Genocide Convention, the 1949 Geneva Conventions on Humanitarian Law, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the European Convention on the Suppression of Terrorism of 1977, the 1988 Convention against Drugs Trafficking, the 1979 Convention Against Taking Hostages.

⁷ L. Gardocki: *Zarys prawa karnego międzynarodowego*, 163 (1985).

⁸ M. Mohr: *Der Lockerbie-Fall vor UN-Sicherheitsrat und Internationalem Gerichtshof*, *DuR* 306 (1992).

⁹ The United Kingdom, the USA and some other common law states allow the extradition of every person unless there is a contrary treaty provision. In fact, many extradition agreements concluded by these states contain clauses providing for the extradition of nationals of the other state party, but not their own.

¹⁰ Beginning with the Belgian–French extradition agreement of 1834. As to contemporary practice see: Article 6 of the European Convention of 20 April 1959 on legal aid in criminal matters, Article 7 of the extradition agreement between the FRG and the USA of 20 June 1978, Article V of the extradition agreement between the FRG and Canada of 11 July 1977.

tutional provisions,¹¹ nationality laws, and penal codes including the Libyan penal code.¹² It is confirmed also by the practice of states directly involved in the present case.¹³

The extradition of Libyan agents suspected of terrorism was dealt with by several judges of the Court. Judge Sh. Oda declared that Libya had a sovereign right to refuse extradition of her nationals, although should comply with the rule *aut dedere aut punire* in respect of perpetrators of crimes covered under the Montreal Convention. A joint declaration by Judges J. Evenson, N. Tarasov, G. Guillaume and A. Aguilar Mawdsley,¹⁴ stated that prior to the resolution 748, Libya had the right not to surrender her nationals but rather to prosecute them before own courts; on the other hand, the interested states could act in order to obtain the prosecution of the suspects. However, resolution 748 barred the Court from granting interim measures of protection to the fugitives.

We can conclude here that the request by the Security Council to extradite two Libyan nationals accused of having destroyed the planes over Lockerbie and Niger does not possess any international legal foundation. We shall pass, then, to the second problem connected with the *Lockerbie* case.

The problem of legality of the SC resolutions 731 and 748

The issue should be considered first from formal and then from substantive point of view.

Resolution 731 does not mention any legal basis. It is, therefore, important to consider whether it has been based upon Chapter VI of the Charter dealing with the peaceful settlement of international disputes or upon Chapter VII.¹⁵ Predominantly commentators situate this instrument within Chapter VI¹⁶ and put in question its validity on formal grounds: the resolution was passed unanimously, while, according to Article 27 (3) of the Charter, in decisions under Chapter VI parties to a dispute (in the present case the US, the UK and France) should abstain from voting.

¹¹ Article 16 (2) of the German Basic Law of 1949, Articles 145 and 153 of the Constitution of Brazil, Article 23 of the Portuguese Constitution.

¹² Article 493A of the Libyan penal code, Article 118 of the Polish criminal code of 1969; Article 3 (1) of the French Extradition Law of 1927.

¹³ E.O. C a l a t a y u d: La actuación del CS de la ONU en el asunto Lockerbie: paradigma de incontrolable abuso de poder, 44 *REDI* 402 (1992), M. M o h r: op. cit., 306.

¹⁴ *ICJ Rep.*, 137 (1992).

¹⁵ Cf. an analysis by R. S o n n e n f e l d: Resolutions of the United Nations Security Council 80 – 89 (1988), with further references.

¹⁶ So e.g. B. G r a e f r a t h: Leave to the Court What Belongs to the Court. The Libyan Case, 4 *EJIL* 193 (1993); Ch. T o m u s c h a t: The Lockerbie Case Before the International Court of Justice, 48 *The Review of the International Commission of Jurists* 43 (1992); M. P a z A n d r e s S a e n z: De maximis non curat praetor? El Consejo de Seguridad y el TIJ en el asunto Lockerbie, 44 *REDI* 33 (1992), and others.

The adopted procedure also exceeded the framework of Chapter VI, as Resolution 731 has been formulated in very categorical terms. It simply concluded that Libya was at fault and declared responsibility; it did not refer to the parties to the dispute aiming at the settlement of their dispute, but referred exclusively to the addressee. Such wording might be acceptable under Article 37 of the Charter, but this provision was not the basis of resolution 731.

Another argument against validity is that Resolution 731 does not refer either to any particular provision of the Charter, or generally to Chapter VII. However, it should be noted that not all instruments by the SC contain an express reference to the provisions of the Charter — in particular, acts adopted under Article 40 of the Charter (according to the dominant view, acts adopted under this provision are not mandatory as the Council only *calls upon the parties* to comply). The terminology used in the *considerans* (which refers to terrorist acts as threatening international peace and security) indicates more Chapter VII than Chapter VI as the possible basis of the Resolution.¹⁷ Moreover, Resolution 731 did not even mention the existence of any dispute between Libya and the Western states because introducing of this element would inevitably situate the matter within Chapter VI, and imply the competence of the ICJ.¹⁸ The Security Council, in fact, replaced the procedure for peaceful settlement of disputes by the enforcement mechanism of the Charter.¹⁹ Libya was put under great political pressure in order to do something was not obliged to do under international law;²⁰ the Council, by demanding reparation, recognized beyond any doubt that Libya breached international law.

The legal justification for Resolution 748 is clear: it states that the Security Council has acted in the framework of Chapter VII. The question arises as to whether the SC abused its power in this case.

The action of the Security Council in maintaining peace and security within the framework of Chapter VII of the UN Charter is conditioned upon the existence of a *threat to the peace, a breach of peace, or act of aggression* (Article 39). These notions have never been precisely defined; the recent practice shows that the scope of application of Article 39 has been expanded, it has not been limited to the actual use of force but covers different situations.²¹ The Security Council is unfettered in its approach to a situation, as its main task is to ensure peace and

¹⁷ So e.g. F. Beveridge: The Lockerbie Affair, 41 *ICLQ* 908 (1992).

¹⁸ So correctly J.M. Sorel: Les ordonnances de la Cour internationale de justice du 14 avril 1992 dans l'affaire relative à des questions d'interprétation et d'application de la convention de Montreal de 1971 résultant de l'incident aérien de Lockerbie (Libye c. Royaume Uni et Libye c. Etats-Unis), 97 *RGDIP* 701 (1993).

¹⁹ B. Graefrath: op. cit., 198.

²⁰ F. Beveridge: op. cit., at 911 emphasized even that the demands by the Council were unprecedented in the history of application of Chapter VI.

²¹ Cf. Resolutions: 502 of 3 April 1982 concerning the Falkland Islands, 688 of 5 April 1991 concerning Kurds, 713 of 25 September 1991 on the situation in Yugoslavia, 757 of 30 May 1992, 770 and 771 of 13 August 1992 on the situation in Bosnia, and 794 of 3 December 1992 on Somalia.

international security. In order to fulfil it, the Council is entitled to undertake all possible measures which are presumed to be lawful if procedural requirements have been met: the Council must clearly declare the existence of a threat to peace or other situation falling under Article 39 and it must qualify its act as a *decision* within the meaning of Article 25 of the Charter.²² If the acts of the Security Council fulfil these requirements, they enjoy a presumption of legality and should be implemented.²³ As the Security Council is a political organ and not a judicial one, it seems to be free to adopt measures to terminate a conflict. However, in certain situations doubts as to the substantive correctness of SC resolutions can arise.²⁴ It is necessary to consider the question of how to control the legality of the Security Council activities.

The relationship between the ICJ and the SC²⁵

The solution adopted by the ICJ gives rise to a problem which will constitute the most important element in the further stages of the proceedings. Libya denied the competence of the Security Council on the ground that the problem fell entirely within the scope of the Montreal Convention of 1971. However, according to the jurisprudence of the ICJ, it does not by itself preclude an application of other methods of peaceful settlement of disputes including acts by the Council on the basis of Articles 33, 34 and 36 of the Charter.

Though formally the case has concerned the question of interpretation and application of the 1971 Montreal Convention, in fact the most important element of the Order is the possibility of granting protection by the ICJ to the state against whom sanctions based upon Chapter VII of the UN Charter have been proclaimed.

²² The authors are unanimous in respect of these requirements; cf. G. Cohen Jonathan, in: J. Cot, A. Pellet (eds.): *La Charte des Nations Unies* 649 (1985); L. Goodrich, E. Hambro: *Charter of the United Nations* 264 (1949); H. Kelsen: *The Law of the United Nations* 725 (1950); J.A. Frowein, in: B. Simma (ed.): *Charta der Vereinten Nationen* 568 (1991); M. Virally: *L'Organisation mondiale* 453 (1972).

²³ See: the *Namibia* advisory opinion, *ICJ Rep.* 1971, 22 and 53; the *Certain Expenses of the United Nations* advisory opinion, *ICJ Rep.* 1962, 168; the *Lockerbie* case, *ICJ Rep.* 1992, 15 and 126.

²⁴ Cf. in the context of the *Lockerbie* case M. Mohr, op. cit., at 307; B. Graefrath, op. cit., at 194.

²⁵ Among the most important theoretical studies on the topic one can mention E. Klein: *Paralleles Tätigwerden von Sicherheitsrat und Internationalem Gerichtshof bei friedensbedrohenden Streitigkeiten*, in: *Völkerrecht als Rechtsordnung*. Festschrift H. Mosler 467 (1983); E. McWhinney: *Judicial Settlement of International Disputes* 143 – 147 (1991); C. Lang: *L'affaire Nicaragua/Etats-Unis devant la Cour internationale de justice* 177 – 185 (1990); J. Stańczyk: *The International Court of Justice on the Competence and Function of the Security Council*, 15 *PolyBIL* 193 – 216 (1986); M. Bedjaoui: *Du contrôle de légalité des actes du Conseil de Sécurité*, in: *Nouveaux itinéraires en droit*. Hommage à F. Rigaux 69 – 110 (1993).

We shall start by presenting a jurisprudence of the Court confirming a parallel competence of UN organs in the field of peaceful settlement of disputes. In the *Aegean Sea Continental Shelf* case, the Court decided that as negotiations and judicial settlement are both enumerated in Article 33 of the Charter as the methods of peaceful settlement of disputes, the commencement of the judicial proceedings does not bar the parties to look for any other solution, and the negotiations do not constitute any obstacle for the judicial proceeding.²⁶ We should emphasize that at an earlier stage of the proceedings, the Court considered the activities of the Security Council relating to the dispute between Greece and Turkey, and decided that there was no need to deal with the request for interim measures. The competence of the ICJ and the SC to resolve a dispute has been confirmed by the judgment in the *Tehran Hostages* case. The Court emphasized that the US submitted the case to the Court while the matter was still pending before the Security Council. On 4 December 1979, the Council adopted Resolution 457 urging Iran to release American diplomatic and consular staff; the Council decided to remain actively seized of the matter, and to empower the UN Secretary General to deal with it (using his good offices). The order of the Court of 15 December 1979 indicated provisional measures. Two weeks later, the Security Council adopted Resolution 461 referring directly to the order of the Court. In its judgment of 24 May 1980, the ICJ stated that there is no restriction imposed upon the ICJ either by the UN Charter, or by the Statute of the Court to deal with matters submitted simultaneously to it and to the Security Council. The ICJ emphasized that a political solution of a dispute could be arranged by the Security Council, while the Court was competent to deal with legal disputes. *The resolution of legal questions might be important, or even decisive, factor in promoting a peaceful solution.*²⁷ The statement in the *Tehran Hostages* case corresponds with the positions of the Court and of the Security Council in the *Lockerbie* case. Finally, in the *Nicaragua (Jurisdiction)* case²⁸ the ICJ decided that the fact that the matter was treated by the Security Council could not bar the ICJ from dealing with legal aspects of the case, as no international instrument established the separation of powers on the international plane. However, in this case, the Court also rejected an American argument that the issue in question was unjusticiable as *being in effect an appeal to the Court from an adverse decision of the Security Council* (earlier, the Council had rejected Nicaraguan claims because of an American veto).

Let us recall also the position of the International Law Commission with respect to the separation of executive (political) and judicial functions under international law. The ILC dealt with it considering the relationship between the Draft Code of Crimes Against Peace and Security, and the Draft Articles on State Responsibility. During the 1988 Session, a controversy arose concerning

²⁶ ICJ Rep. 1978, 12.

²⁷ ICJ Rep. 1980, 22.

²⁸ ICJ Rep. 1984, 45 – 46.

a definition of aggression and a criminal responsibility for acts of aggression. Two contradictory positions developed. Several members of the ILC emphasized the independence of judicial functions of the ICJ and political functions of the Security Council. Consequently, the definition of aggression formulated in Resolution 3314(XXIX) of 1974 could not be included into the Draft Code because every judge applying it should be free in appreciating facts, in particular in a case of possible paralysis of the SC not taking any decision.²⁹ Other speakers maintained that a court applying international law would be bound by a resolution of the SC declaring the existence of an act of aggression.³⁰ The ILC did not take any decision. The issue was discussed again during the 1991 session in the framework of the work on adopting the text of the Code.³¹ A number of speakers opposed making the jurisdiction of the criminal court dependent upon an earlier decision of the Security Council on aggression, as the Council under certain circumstances could block the decision of the court because of political reasons. The same speakers were ready to accept a rule according to which the positive decision of the SC would be binding upon all competent criminal courts. Such a stance was rejected by other ILC members who consequently presented a view that according to the UN Charter the SC was the only body competent to qualify acts of aggression. One of the speakers was of the opinion that this competence of the SC was based upon the international legal regulation, and its negation would impair many resolutions of the GA dealing with the principles of international law. The separation of competences is not only of legal character but also of a political one. The competence of criminal courts to act *contra* the decisions of the SC would constitute a dangerous precedent.³²

In the end, the ILC decided to leave this problem open, but the Draft Code of 1991 contained two pertinent clauses: Article 5 declared that criminal responsibility of individuals was independent of the responsibility of states, and Article 15 (5) confirmed the rule that the decision of the SC concerning the existence of an act of aggression would bind criminal courts. Finally, Article 15 (6) confirmed that the provisions of the Draft Code concerning aggression do not restrict the scope of application of the UN Charter.

During the following session the ILC considered the relationship between the law of state responsibility and the UN Charter. Surprisingly, it declared itself incompetent to decide on the relationship between the SC and the ICJ, as well as on the scope of application of the law on state responsibility and Article 103 of the Charter, justifying its position by lack of power to interpret the UN Charter. During the discussion, the primacy of the Security Council was emphasized.³³

²⁹ Cf. statement by J.A. Beesley: *YBILC*, vol. I, at 78 (1988).

³⁰ P. Reuter, B. Graefrath, G. Arangio-Ruiz: *ibidem*, at 69, 76 and 111 respectively.

³¹ See: *Report of the ILC, 43rd Session (1991)*, Doc. A/46/10, 230 ff.

³² A.a., 233.

³³ *Report of the ILC, 44th Session (1992)*, Doc. A/47/10, at 91 – 92.

Considering the conclusions of the above discussions within the ILC, it seems that the Security Council should enjoy primacy against the ICJ in executing its functions in the field of maintaining peace and security. However, the ILC has not been able to elaborate a consistent position in respect to this question.

We can conclude that under present international law no international act confers in the ICJ an absolute right to control the legality of acts of other organs of the United Nations in the way of a judicial review. Such a control can only be executed if such a review is demanded by an agency entitled to request an advisory opinion.³⁴ Clear statement on this issue was made in the *Namibia* advisory opinion.³⁵ The issue in the case was somehow similar to the Lockerbie case: South Africa contended that the UN General Assembly acted *ultra vires* when adopting its Resolution 2145(XXI) of 1966 terminating the mandate of South Africa over Namibia. However, the Court emphasized that in fact such judicial control would be the equivalent to denying a political organ of the UN the right to act. It would be inconsistent with the UN Charter, but also it *would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking*. Although this statement concerned the actions of the General Assembly, it remains pertinent to the Security Council, too. However, the ICJ has not rejected its authority to control the legality of the acts *in concreto*.³⁶ The continued proceeding in the *Lockerbie* case can bring important new elements to this field.

The introduction of an abstract judicial control within the UN, suggested by some authors, would require the institutional reform of the UN System, in particular Articles 25 and 39 of the Charter, aimed at the democratisation of the Organization,³⁷ as well as the elaboration of special proceedings at the World Court. Even if it is accepted that the inertia is a normal comport of the SC while dealing with such important questions as world peace and security, it takes time to adopt adequate measures, the emergency proceeding and interim measures can prove insufficient.

³⁴ Cf. lately correctly D. B o w e t t: The Impact of Security Council Decisions on Dispute Settlement Procedures, 5 *EJIL* 101 (1994).

³⁵ *ICJ Rep.* 1971, 33.

³⁶ Cf. the *Lockerbie* case, at 126: *The Court at this stage is not called upon to determine definitively the legal effect of Security Council resolution 748*. Comp. also opinions by Judges M. B e d j a o u i and Ch. W e e r a m a n t r y: *ibidem*, at 44 and 59, and the opinions by Judges G. M o r e l l i and J. B u s t a m e n t e in the *Certain Expenses* case, *ICJ Rep.* 1962, at 217 and 304 respectively. See: also B. G r a e f r a t h: *op. cit.*, at 204, and Ch. T o m u s c h a t: *op. cit.*, at 48.

³⁷ Suggested by Th. F r a n c k: The Powers of Appreciation: Who Is the Ultimate Guardian of UN Legality?, 86 *AJIL* 522 – 523 (1992).

The Polish–Russian Delimitation in Former East Prussia in the Light of the Potsdam Agreement: Interpretation and Implementation as Against Accomplished Facts

TADEUSZ JASUDOWICZ

1. Introductory remarks

The notion *East Prussia* concerns an area of the former Electoral Prussia including Ermland annexed in 1772. After World War the First, according to the peace treaty of Versailles of 28 June, 1919 the area should remain under German sovereignty. However, an attachment of its southern part should be decided by its population in a plebiscite.¹ As the results of the plebiscite were unfavourable to Poland, nearly the whole territory of East Prussia belonged to the Third Reich before World War the Second. It constituted an exclave of the Third Reich, and the treaty of Versailles contained provisions dealing with the freedom of passage between the Reich and East Prussia through Polish territory.²

The problem of the so-called *corridor* of Pomerania, causing numerous conflicts, the long boundary between Poland and East Prussia, and an extreme militarization of East Prussia, constituted potentially a great danger for the security and territorial integrity of the Polish State. It should be recalled that a request to establish an extraterritorial railway and highway through Polish territory played an important role in claims of Germany before World War the Second.³ The experience of the interwar period and of the military campaign of September 1939 proved an enormous danger for Poland connected with the existence of an enemy and militarized area being in the past a *cradle of the Prussian militarism* in its direct neighbourhood.⁴

¹ Cf. Articles 94 – 98 of the peace treaty of Versailles.

² Article 89 of the Treaty of Versailles, in connection with a *pactum de contrahendo* of Art. 98.

³ Cf. the memorandum of the German Government to the Polish Government on the annulment of the Polish–German declaration of 24 January 1934 – cf. L. G e l b e r g (ed.): *Prawo międzynarodowe i historia dyplomatyczna. Wybór dokumentów (International Law and Diplomatic History. Selected Documents)*, vol. II, at 514 – 518 (1958); see also: the speech by A. Hitler at the Reichstag of 28 April, 1939, *ibidem*, at 518 – 521.

⁴ Comp. A. K l a f k o w s k i, Ustawa nr 46 o likwidacji Prus z dnia 25 II 1947 (*The Law No. 46 on the Abolition of Prussia of 25 February, 1947*), (1956).

2. General principles of interpretation

The future of East Prussia should have been decided during the Potsdam meeting of the Three Powers: United States, United Kingdom and Soviet Union. From the beginning of World War the Second there was a general agreement among the member states of the anti-Nazi coalition that Eastern Prussia should not belong to Germany after the war. The problem shall be dealt with later; we remark here only that the conference of Potsdam was preceded by: Polish claims to the territory of East Prussia as a whole, claims by the Soviet Union presented by Stalin during the meeting in Tehran and consequently upheld in following activities of the Soviet diplomacy, and finally a general regulation of the Declaration of Yalta on Poland.

The problem of East Prussia was dealt with by provisions of two chapters of the Potsdam Agreement: VI *City of Königsberg and the Adjacent Area* and IX.B *Poland*, and also indirectly by chapter XIII *Orderly Transfers of German Populations*.⁵

In Chapter VI the three Powers agreed that „*the section of the Western frontier of the Union of Soviet Socialist Republics which is adjacent to the Baltic Sea should pass from a point on the eastern shore of the Bay of Danzig to the east, north of the line Braunsberg–Goldap, to the meeting point of the frontiers of Lithuania, Republic of Poland and East Prussia* (underlines T.J.)”.⁶ This statement was accompanied by the general agreement on *the ultimate transfer to the Soviet Union of the City of Königsberg and the area adjacent to it*. These provisions were complemented by the provision of the Chapter IX.B, according to which *the former German territories (...) including that portion of East Prussia not placed under the administration of the Union of Soviet Socialist Republics in accordance with the understanding reached at this Conference (...) shall be under the administration of the Polish State and for such purposes should not be considered as part of the Soviet Zone of occupation in Germany*.⁷

2.1. The text and context of the Potsdam Agreement

The use of the meaningful terms *frontier of the USSR* and *ultimate transfer* would indicate – even if the notion of *administration* used in the Chapter IX.B of the Agreement is not quite clear – that East Prussia should have been definitely

⁵ Cf. *Official Gazette of the Control Council for Germany*, Suppl., at 13 *et seq* (1946).

⁶ It is rarely remarked that Lithuania survived the Second World War, at least in the wording of the Potsdam Agreement. Taking into account numerous critical opinions as to the use of the name *East Prussia* in the context of the effects of the Second World War, it is important that this name was used also in the Potsdam Agreement. It is understandable, as the decision on the dissolution of the Prussian State was taken later.

⁷ See: comments by K. Skubiszewski: *Zachodnia granica Polski (The Western Frontier of Poland)* 497 (1969).

partitioned between Poland and the Soviet Union, according to the legally binding decision of the Powers. It occurs, however, that the wording of Chapter VI is imprecise and it contains an express statement that they do not constitute a final, binding territorial decision.

In the first alinea of Chapter VI the general description of the boundary line is preceded by an express reservation *pending the final determination of territorial questions at the peace settlement*.⁸ The acceptance by the Powers of the ultimate transfer of the Königsberg area is weakened by the expression *in principle* used in alinea 2. Finally, in the following alinea the acceptance is called *the proposal of the Conference*, to be supported by the government of the United States and United Kingdom *at the forthcoming peace settlement*.

It can be concluded that the Potsdam Agreement did not settle in a legally binding way the problem of the territorial sovereignty in East Prussia. The use of the notions *frontier* or *ultimate transfer* do not justify contrary opinions as to the final character of the regulation. Similarly, an argument referring to *derelictio* based upon a mass evacuation of German population from the territory of East Prussia escaping approaching Soviet troops does not solve the problem of conflicting territorial titles of Poland and the USSR with respect to sovereignty in East Prussia.⁹

Other notions like *north-eastern part of east Prussia with Königsberg as an open port*¹⁰ or *incorporation of East Prussia west and south of the line from Königsberg eastwards to the Curzon line into Poland*¹¹ can be found in a later correspondence between the heads of the Great Powers. More precise provisions can be found in the agreement of 27 July, 1944 between the Polish Committee of National Liberation (the provisional government established in the Polish territory occupied by the Soviet Army) and the government of the USSR on the delimitation of frontier. The parties agreed that *the northern part of the territory of East Prussia passes to the Soviet Union, and the remaining part of East Prussia and the area of Gdańsk including the city and port of Gdańsk passes to Poland* (Art. 2).¹² The frontier was traced (a). *From a village Myczkowce along the rivers Solokiya and Western Bug to Lithuania* (underlined by T.J.) and (b). *west of the coast of the Bay of Gdańsk* (Art. 3). It can be concluded that Soviet claims formulated before the conference of Potsdam cannot

⁸ This formula was agreed during the Crimea Conference – see: the last alinea of Declaration VI Poland.

⁹ See: K. Skubiszewski, *op. cit.*, at 372, 264, 430 and 429, respectively.

¹⁰ *Sprawa polska podczas drugiej wojny światowej na arenie międzynarodowej. Zbiór dokumentów* (The Polish Question during the Second World War. Selected Documents) 471 (1965); oraz *Dokumenty i materiały do historii stosunków polsko-radzieckich* (Documents and Materials on the History of Polish–Soviet Relations) vol. VIII, 35 (1974).

¹¹ *Sprawa polska*, 569; *Dokumenty i materiały*, vol. VIII, 42.

¹² The agreement has been published in Polish in *Polska Ludowa – Związek Radziecki. 1944 – 1974. Zbiór dokumentów i materiałów* (People's Poland – the Soviet Union. 1944 – 1974. Collection of Documents and Materials) 12 *et seq.* (1974). Cf. also a German translation by A. Uschakov in *Internationales Recht und Diplomatie* vol. II, 71 ff (1970).

serve as a basis for precise delimitation of a postulated boundary line between Poland and the Soviet Union in East Prussia.

As to the description of the frontier in the Chapter VI of the Potsdam Agreement, the delimitation is certainly land-oriented which can be deduced from the formulas used *the section ... adjacent to the Baltic Sea and a point on the eastern shore of the Bay of Danzig*, in connection with the direction of delimitation. The delimitation of the Polish-German frontier in the west (*a line running from the Baltic Sea immediately west of Swinemunde*) confirms the opinion that the Parties to the Potsdam Agreement did not intend to delimit maritime areas including the Bay of Vistula. The delimitation of land areas (*north of Braunsberg-Goldap*) is not precise and could not constitute a basis for a demarcation of territorial sovereignty of the two directly concerned states. The parties were fully conscious of insufficiency of the delimitation, as they subjected *expressis verbis* their acceptance of the *ultimate transfer* of the area of Königsberg to the USSR to a very precise condition: *expert examination of the actual frontier*. Such a provision testifies that the parties did not treat these accomplished facts as settling the problem of delimitation in a definite manner. It is to remark that the acceptance by the Great Powers was conditioned not only by the decision taken by Soviet experts but also by the common expert verification of the demarcation of the frontier.

It can be concluded that the decision of Potsdam does not meet the requirements of finality and precision of the postulated territorial settlement. If interpreted in good faith, according to an ordinary meaning of expressions used, in the given context, in the light of its purpose and object, the Potsdam Agreement, and in particular its Chapter VI in connection with Chapter IX.B, is not a definitive, precise, conventional settlement of the territorial sovereignty over East Prussia and of an eventual delimitation of the frontier between Poland and the USSR in this area. The Polish-Soviet agreement of 27 July 1944 mentioned above does not constitute an instrument relating to the Potsdam Agreement which could be treated as the context for interpretation.¹³

2.2. Later agreements and practice connected with the implementation of the Potsdam Agreement

The problem of the delimitation between Poland and the Soviet Union in East Prussia after the Potsdam conference should be considered in order to verify its effects from the point of view of general law of treaties. Two weeks after the conclusion of the Potsdam Agreement, on 16 August 1945 an agreement on the delimitation of the Polish-Soviet frontier was concluded. Its Article 3 provides that *the section of the Polish-Soviet frontier adjacent to the Baltic Sea ... will*

¹³ The parties to the agreement were not competent to dispose neither of East Prussia nor of Danzig; the Polish Committee of National Liberation was not legitimate (did not possess *jus representationis*) with respect of the Nation and Polish State, and could not conclude international obligations binding for Poland.

*pass from the point on the eastern shore of the Bay of Danzig ... to the east, north of Braunsberg–Goldap, to the meeting point of this line with the line provided in Article 2 of the present agreement.*¹⁴

This provision repeated¹⁵ the regulation of Chapter VI of the Potsdam Agreement with all its features: land-oriented delimitation with the vector of delimitation directed up-land, and a general character of the description. However, the politics of *faits accomplis* by the USSR dominates this solution and has changed the concept of the delimitation.

If one evaluates this agreement in its relation to the Potsdam Agreement from the point of view of general law of treaties, one must state that it is not a *subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*. Only one of the parties to the Potsdam Agreement was a signatory to the agreement of 16 August 1945, without any consultation or acceptance of the remaining parties. The other signatory, Poland, was a third state from the point of view of the Potsdam Agreement.

Formally, taking into account the letter of the agreement, the signatories followed the provisions of the earlier agreement. The delimitation was accompanied by the clause *in accordance with the decision of the conference of Berlin* (i.e. with the Potsdam Agreement – T.J.) and was drafted *pending the final determination of territorial questions by the peace settlement*. Therefore, the parties accepted a bilateral *modus vivendi*, on a temporary basis, not infringing formally the Potsdam Agreement.

One can consider whether the conclusion to the contrary is not correct, taking into account the fact that a substantive delimitation took place, i.e. the Bay of Vistula was divided. Subsequently, the USSR made impossible the implementation of the annex to the agreement of 16 August 1945 by establishing the military harbour Baltijsk in the Strait of Pilau connecting the Bay of Vistula with the high sea and proclaiming a prohibited military zone in the northern part of the Bay. Poland did not protest against these acts what made impression of the acquiescence on its part. Did these facts constitute the practice generating legal effects from the perspective of the Potsdam Agreement?

It is unquestionable that these facts cannot be treated as a *subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*.¹⁶ They cannot even be considered as a practice dealing with the interpretation and application of the Potsdam Agreement, as being in fact *contra legem*, and based upon a clear abuse of rights stemming from this agreement by the USSR. The Soviet Union did not fulfil conditions provided by it. The practice was held without any acceptance by the other parties to the agreement and cannot prove any understanding among them

¹⁴ 10 UNTS 193.

¹⁵ It should be emphasized that this provision omits the expressions *Lithuania* and *East Prussia*, and it refers more to the *Ribbentrop–Molotov Pact* rather than to the *Curzon line*.

¹⁶ Art. 31 al. 3 (b) of the 1969 Vienna Convention on the Law of Treaties, codifying customary law.

as to the interpretation of the agreement. It does not even demonstrate the existence of an agreement between the two states directly concerned, as it violates Article 3 of the Agreement of 16 August 1945 and the annex thereto. The argument on acquiescence cannot be accepted because of the total dependence of the People's Republic of Poland on the USSR.

On 5 March, 1957 Poland and the USSR concluded in Moscow an agreement on the delimitation and demarcation of the Polish-Soviet frontier in the area adjacent to the Baltic Sea. It could be expected that after events of 1956 and a common Polish-Soviet declaration of 18 November 1956¹⁷ Poland should have claimed its rights connected with the problem of East Prussia and the Bay of Vistula. In fact, the agreement neither referred to the Potsdam Agreement, nor emphasized a condition of a future peace settlement.

The agreement reversed an earlier philosophy of delimitation. The description of the boundary line begins with the point situated at the farthest east up-land and adopts the sea-oriented vector, tracing the frontier westwards to the precisely defined point on the eastern shore of the Bay of Vistula, expressly dividing a maritime area of the Bay of Vistula and the Spit of Vistula. The parties to the agreement behaved as, if they had full competence to establish and delimitate the territorial sovereignty in former East Prussia.

The agreement did not contain any provision concerning navigation rights of Poland in the area of the Bay of Vistula and Strait of Pilau, referring with this respect to the earlier regulation of 1945.¹⁸ In practice nothing changed: the USSR still kept its huge military harbour of Baltijsk, and the seat of the command of the Baltic Fleet; the Soviet part of the Bay of Vistula was still transformed into the prohibited military zone, and Poland could not enjoy its navigation rights.

It can be stated that neither the Agreement of 1957 nor the practice of its implementation, do not constitute an agreement of the parties concerning the interpretation and application of the Potsdam Agreement. The legal basis established by this Agreement was fully disregarded by both respect of its general considerations, and the detailed delimitation of sovereignty in the territory of former East Prussia.

Four years later, an agreement on the legal relations on the Polish-Soviet frontier, and cooperation, and mutual assistance in the matters connected with the boundary was concluded on 15 February 1961.¹⁹ This agreement contained provisions confirming navigation rights in the Bay of Vistula in favour of Poland, as well as certain other rights (e.g. fishing rights); it treated the Bay of Vistula

¹⁷ In fact, the declaration did not provide for the regulation of this question. In its basis, a status of Soviet forces temporarily residing in Poland was regulated in 1956, and an agreement on the repatriation of the population of Polish origin from the USSR to Poland was concluded in 1957.

¹⁸ The object of these rights cannot be defined simply as a right of innocent passage, as the rights were established exclusively in favour of Poland.

¹⁹ Cf. *Dziennik Ustaw (Official Journal)* 1961, No. 47, Item 253.

and other boundary water areas as *shared national resources*, provided a common exploitation of these resources and created certain bases of international responsibility for damages caused to the other party. The agreement, however, did not introduce any new elements concerning the sovereignty and delimitation in the territory of former East Prussia, and it did not concern directly fundamental problems regulated in the Potsdam Agreement.

From the perspective of the implementation of the rights granted to Poland in the Bay of Vistula, the agreement of 1961 remained a dead letter. The USSR did not change its policy of militarization of its part of East Prussia, and in particular did not resign to treat the Bay of Vistula and the Strait of Pilau as a military zone what fully excluded a practical implementation of Poland's navigation rights.

The USSR and other socialist states used to consider the provisions of the Final Act of the CSCE of 1 August 1975 as a final petrification and legitimation of the existing frontiers. In this sense the principles of the CSCE Decalogue: III – inviolability of boundaries and IV – territorial integrity of states, were interpreted. Perhaps such an attitude was politically justified; however, from the legal point of view such a conclusion could not be drawn from the Final Act, in particular as this instrument is not a treaty and does not bind the parties. It could not replace the peace settlement provided by the Potsdam Agreement. Such an interpretation of the principles III and IV, beyond the context of other principles, is contrary to express provisions of the Declaration of Principles of the Final Act, according to which all principles have a basic and fundamental position, and none of them should be considered separately.

In my opinion, the conference *Two plus Four* could be considered either as a *final settlement* or as a subsequent agreement of the parties regarding the interpretation or application of the Potsdam Agreement. The dissolution of the Soviet Union and establishing of the Russian Federation, separated from the Kaliningrad Area by independent Lithuania and Belarus, could not petrify the Soviet sovereignty over the part of former East Prussia, established in the way of the accomplished facts by the Soviets. On the contrary, it seems that these issues made the problem of the northern part of East Prussia actual again as an object of discussions and international projects.²⁰

2.3. Relevant rules of international law

In any case, certain doubts as to the context of the Potsdam Agreement remain actual. Let us add that according to the law of treaties in order to establish a correct interpretation of the agreement one should take into account *relevant rules of international law applicable in the relations between the parties*.²¹

²⁰ See: a report from the international conference *Kaliningrad – the centre of the Baltic Cooperation*, Svetlogorsk, 27 – 30 May 1992.

²¹ Art. 31 al. 3 (c) of the Vienna Convention on the Law of Treaties of 1969.

The object of the present study could and should be considered from the perspective of fundamental, peremptory, and universally binding principles of international law.²² It is not a place for a detailed analysis. In any case one can state that these principles cannot legalize illegal accomplished facts and do not nullify effects of a general principle *ex iniuria non oritur jus*. The principle of performance of international obligations in good faith guarantees fundamental rights granted to Poland by the Potsdam agreement and by the bilateral agreements with the USSR. The principle of non-interference in domestic affairs of states excludes any acts of coercion by foreign states (including the USSR) which could affect Poland's vital interests. The principle of sovereign integrity and observance of sovereign rights does not exclude a possibility of a peaceful modification of frontiers.

The Polish-Soviet delimitation can be evaluated also from the point of view of the general law of the sea, what is of great importance in the context of the division of the Bay of Vistula and the Spit of Vistula. Analysing the decisions of the Powers and *travaux préparatoires* to the Potsdam Agreement one can conclude that they aimed at the restitution of Poland as the powerful and democratic state, disposing of a large access to the sea being a source of her economic development and growing welfare of her inhabitants. This aim should be realized i.a. thanks to advantages from navigation and trade on the Oder via the port Szczecin-Świnoujście (Stettin-Swinemunde) on the one hand, and by the Vistula and Nogat connected with the Bay of Vistula, and Strait of Pilau on the other hand. In fact, because of the unilateral dictate of the USSR, and because of certain unilateral practices by the GDR in the west restricting the access to the port of Stettin in the 1980-s violating international law, Poland has been deprived of these advantages.

It should be emphasized that the law of the sea does not allow any state to cut off a neighbouring coastal state from its sovereign right to access to the high sea. The general law of the sea has established the rules of delimitation of maritime zones in the areas adjacent to its coast.²³ The dividing of the Bay of Vistula by the USSR is a unique event on a world scale. The proclamation of the military zone in the northern part of the Bay of Vistula which restricts the traffic of Polish ships constitutes a flagrant violation of the law of the sea, or even a crime against the law of the sea, as well as against the interests of coastal population of the Bay of Vistula.²⁴

²² I mean the principles codified in Chapter I *Aims and Principles* of the UN Charter, as formulated in the Resolution 2625 (XXV) of 1970 mentioned above and accepted on a regional level by the CSCE Final Act of 1975.

²³ Cf. Art. 15 of the UN Convention on the Law of the Sea of 10 December, 1982, UN Doc. A/Conf. 62/122 (1982), in connection with art. 12 of the Geneva Convention on the Territorial Sea and Contiguous Zone of 29 April, 1958, 516 UNTS 205.

²⁴ Cf. Art. 7 al. 5 of the 1982 Law of the Sea Convention, in connection with Articles 1 al. 2 of the 1966 Human Rights Covenants, respectively. The Convention on the Law of the Sea attempts to recognize and safeguard special interests of the coastal population.

The reference to the *relevant rules of international law* in order to interpret the Potsdam Agreement emphasizes the illegality of the Soviet actions and the negative effects of the non-implementation by the USSR of an important provision of the Potsdam Agreement: an expert examination of the delimitation by competent and impartial experts. Taking into account the general rules of interpretation, one cannot state that the activities of the USSR (and actually of Russia) in former East Prussia are consistent with the Potsdam Agreement.

3. Supplementary means of interpretation

In order to confirm the above interpretation, one should refer to supplementary means of interpretation, i.e. to the circumstances of its conclusion and to the preparatory work. These methods have just been used in the former part of this study. I have adopted a certain discretion in regrouping them, taking into account historical circumstances of the conclusion of the Potsdam Agreement, as well as connecting the preparatory works with the evaluation of arguments and/or titles supporting these claims. Competing claims of Poland and the USSR have been considered.

3.1. Circumstances of conclusion

Almost immediately after the establishment of the Polish government-in-exile in Paris in September 1939 the idea was expressed that *Future Poland should control East Prussia*, and a representative of the British government agreed that *the security of Poland will require it in the future*.²⁵ Subsequently, in the note prepared by Ambassador Raczyński after the visit of Prime Minister Sikorski in London one reads: *The French pronounce for the incorporation of East Prussia to Poland. The British express serious doubt in this respect, fearing their own public opinion*.²⁶ On 24 February 1940 Ambassador Raczyński after he had investigated the activities of different British official and semi-official circles, reported that from the part of the United Kingdom one presupposes *an incorporation of East Prussia into Poland in one form or another in order to give us a better access to the sea*.²⁷ Polish claims have been accepted by the Americans,²⁸ and even the USSR did not oppose them. Stalin declared during the meeting with Polish Prime Minister Sikorski in early December of 1941 that *East Prussia should belong to Poland and the western boundary should be*

²⁵ See: *Sprawa polska...*, op. cit., 132; K. S k u b i s z e w s k i, op. cit., 23.

²⁶ *Sprawa polska*, 119.

²⁷ Quoted by W.T. K o w a l s k i: *ZSRR a granica na Odrze i Nysie Łużyckiej 1941 – 1945 (The USSR and the Oder–Neiße Frontier 1941 – 1945)* 25 (1965). See also: K. S k u b i s z e w s k i, 23.

²⁸ Cf. a telegram of the American Ambassador Biddle to the Secretary of State of 12 October, 1941, quoted in *Foreign Relations* vol. I, 373 (1941).

based on the Oder.²⁹ The British readiness to recognize Polish claims to East Prussia as a whole was confirmed by the statements by Minister Eden during his meeting with General Sikorski on 9 September 1943, and the letter from Prime Minister Churchill to Minister Eden of 6 October 1943.³⁰ Finally, the Polish territorial program formulated by the resolution of the Council of Ministers of 7 October 1942 read as follows: *Our aim is to incorporate Danzig, East Prussia and Silesia of Oppeln, as well as generally to shift a frontier with Germany, and to vindicate the freedom of the Baltic Sea.*³¹

It can be concluded that the government of Poland clearly formulated its claims to East Prussia as a whole as soon as 1939 – 1943, and the four Great Powers recognized and supported these claims. It was summarized by a common statement of the three Powers during the conference of Moscow on 19 – 31 October 1943, and followed by the proposal of W. Churchill, made during the conference in Teheran: *Poland should receive an equal compensation in the west including East Prussia*, and then repeated that it meant i.a. *the incorporation of East Prussia into Poland.*³² The positive attitude of the Great Powers towards the recognition and support of the Polish claims with respect of East Prussia as a whole was therefore elaborated before the conference of Teheran. The Great Powers were bound by these proposals according to the estoppel rule. The stance of Stalin in Teheran was therefore fully surprising. In reaction to the speech by Churchill, Stalin declared that *Russia would need open ports of Königsberg and Memel, as well as respective part of East Prussia*. He lied that the Russians did not possess any open port in the Baltic Sea and that the territories in question were Slavonic from time immemorial.³³ Stalin treated his new claim as a condition *sine qua non* of the Soviet acceptance of the *formula proposed by Churchill*. Eventually, Stalin convinced Churchill and Roosevelt to recognize temporarily the Soviet claims, though no provision was introduced into official recordings of the conference. From the legal point of view, the decision was not consulted (to say nothing of the acceptance) with Poland as the directly interested state. In fact, the proposed settlement was never announced to the Polish government-in-exile which was not aware of the situation and repeated its claims concerning the incorporation of East Prussia into Poland in 1944.

On the other hand, Stalin constantly presented his territorial claims. His effectiveness in forcing the Western Powers to accept Soviet claims was confirmed during the conference of Quebec on 11 – 15 September 1944, the British–

²⁹ See: *Documents on Polish–Soviet Relations 1939 – 1945*, vol. 1, 274, 365 (1961); W.T. K o w a l s k i, op. cit., 34.

³⁰ *Sprawa polska*, 407; K. S k u b i s z e w s k i, 31.

³¹ Quoted by W.T. K o w a l s k i, 26 – 27.

³² Cf. *The Conferences at Cairo and Teheran 1943* 603 (1961).

³³ *Sprawa polska*, 429. See: also T. J a s u d o w i c z: *Prusy Wschodnie w kontekście II wojny światowej i likwidacji jej skutków (East Prussia in the Context of the Second World War and of the Elimination of its Consequences)* 10 (1991).

American meeting at Malta on 30 January – 2 February 1945, and the Crimean conference on 4–11 February 1945. However, even the documentation of the latter does not lead to equivocal conclusions, as Churchill stated that *the territory of Poland should comprise (...) the territory of East Prussia west and south of Königsberg*, according to the position of the US *Poland should receive compensation in the form of German territories including a part of East Prussia with Königsberg*, and even Molotov after he had agreed the text of an agreement proposed to add a remark on *the restoring of the Poland's old frontiers in East Prussia and along the Oder*.³⁴

According to the Yalta Agreement, Poland should *receive substantial accession of territory in the North and West*, but an American suggestion was accepted that *the final delimitation of the Western frontier of Poland should thereafter await the Peace Conference*.³⁵ The opinion expressed by Eden on 20 February 1945 that the British government in principle did not reject a possibility of the final settlement of this problem during the Crimean conference, without awaiting the future peace conference,³⁶ was therefore not decisive, neither was the Soviet decision accepting the establishment of the Polish administration in the part of East Prussia delimited unilaterally by the USSR.³⁷

Diplomatic documents presented above, evidence that the Great Powers recognized the danger connected with the existence of the East Prussian enclave for Poland, as well as the existence of the *inclin* between the Polish territorial accession in East Prussia and wide, free and economically important access to the sea. Each of the three powers separately, as well as together recognized the Polish claims to East Prussia as a whole, and so did France. Nothing justified the change of the stance of the powers which should be bound by their decision according to the principle of estoppel. The claim presented by Stalin in Teheran was accompanied by the lie, and the claim itself was neither precise, nor explicitly recognized. The historical circumstances of the conclusion of the Potsdam Agreement do not oppose to the conclusion drawn from the text of the agreement that the regulation was provisional and imprecise, and the final settlement of the problem was deliberately left to the future peace conference.

3.2. Travaux préparatoires

I consider under this term not only the documentation of the Potsdam conference, but also earlier meetings of representatives of the Great Powers, and a diplomatic correspondence. Let us be reminded that during the conference of Teheran Stalin presented arguments concerning open ports, security of the USSR, and finally he joined an idea of historic title advanced by Churchill. I compare the arguments of the both claimants.

³⁴ Quoted by W.T. K o w a l s k i, 240.

³⁵ *Foreign Relations of the United States*, vol. VII, 974 (1947).

³⁶ W.T. K o w a l s k i, op. cit., 208 – 209.

³⁷ K. S k u b i s z e w s k i, op. cit., 47.

3.2.1. *Geographical and economic title*

The argument concerning open ports was presented by Stalin earlier during the negotiations on 23 August 1939, when he forced Ribbentrop to contact Hitler and to agree for the shifting of planned demarcation between the *zones of interest* to the northern frontier of Lithuania in order to incorporate open ports of Lipau and Vindau (both in Latvia) into the USSR.

This argument cannot be taken seriously as the USSR has got numerous open ports along her coasts, and at that time the Soviets possessed a powerful fleet of ice-breakers. On the other hand, there is no title to open ports recognized under international law. In fact, no geographic title in favour of the Soviet claim should be considered in the context of the incorporation of East Prussia into the far-removed Russian Federative Soviet Republic. It could only be taken into account in connection with the sovereignty of the USSR over Lithuania integrated with the Soviet Empire³⁸ but cannot be referred to after the dissolution of the USSR when the region of Kaliningrad is separated from Russia by the territories of independent state Lithuania and Belarus.

On the contrary, Polish statesman R. Dmowski emphasized after the end of the First World War that, if the Baltic coast between the estuaries of the rivers Vistula and Nemen (between Danzig and Königsberg) had been left to Germany, it would have isolated it from its Polish hinterland. Consequently, it would remain economically dead and the way to progress would be closed for it. Dmowski suggested that the section of the Baltic coast with the estuaries of the Vistula and Nemen should be incorporated into Poland.³⁹

One must pay attention to the hydrography of East Prussia. Its main navigable waterway is Pregola collecting water from the north and south. Existing artificial connections including the Channel of Elbing and Mazurian Channel link Pregola with the complex of Mazurian lakes and with the system of the Nemen. The existing system could play an important role in the development of the territory. Moreover, East Prussia is connected through the Nogat river with the system of the Vistula and further with the European water network. Taking into account the access to the Baltic Sea through the Bay of Vistula and Strait of Pilau, port tradition of Elbląg (Elbing) and the possible access of big ships to the port of Kaliningrad (Königsberg) through the adapted navigable channel of the Bay of Vistula, we obtain an optimistic image of the potential trade and economic advantages of the water system.

The territory of Poland is the important hinterland for East Prussia than the USSR/Russian Federation, and East Prussia constitutes an economically indispensable bridge from a part of Poland to the Baltic Sea.⁴⁰

³⁸ These territorial rights were based upon the aggression of 15 June 1940, and constituted in fact an illegal occupation.

³⁹ R. D m o w s k i: *Polityka polska i odbudowanie Państwa. Pisma (Polish Policy and the Reconstruction of the State. Writings)*, vol. VI, 357 *et seq.* (1937).

⁴⁰ It is characteristic that the ideological declaration of the communist-oriented Union of

3.2.2. Military and security reasons

According to the Soviet Union, the incorporation of East Prussia was absolutely necessary from the point of view of the security of the Soviet Empire. Was it really necessary as a measure of precaution against the feared German policy of aggression provided in Article 53.1 of the UN Charter, if the USSR disposed of the occupation zone in Germany transformed later in the GDR, and stationed powerful units of the Northern Group of the Soviet Army in the whole territory of Poland?

It was clear that the main object of the action undertaken by Stalin was not the security of the USSR but rather outflanking Poland (despite the establishment of the communist government and the imposing of the Soviet regime) and Lithuania (the resistance against its *liberation* by the Soviets and rein-corporation into the Soviet Empire persisted till 1952). The Soviet sovereignty in East Prussia served the subjugation of Central and Eastern Europe rather than the suppression of the German *Drang nach Osten*.

The dissolution of the USSR, the restoration of independent Lithuania and Belarus, finally shook the Soviet arguments. No one can say in good faith that Russian sovereignty over the Kaliningrad area is indispensable from the point of view of strategic and security needs of the Russian Federation. Moreover, no one can declare that any form of the Russian presence (including a military one) in this area serves well to the needs of security in the Baltic area, and in Europe in general.

On the contrary, the arguments of security support clearly the Polish claims to East Prussia as a whole. Even before the creation of Poland after the First World War, politicians emphasized the risk of being surrounded by German territory from the north and the west. The militarization of East Prussia in the interwar period and the aggression against Poland realized this danger. So the security arguments accompanied the economic arguments presented by Poland with the claims to East Prussia during the Second World War.

Polish experience after the Second World War including the events of 1956 and 1980 – 1981 confirmed these arguments. At present, the potential danger resulting from the existence of the Russian exclave in East Prussia increases as the sense of security after the abolishing of the *iron curtain* grows. It is connected with the stationing of numerous troops and the storage of enormous quantities of arms including nuclear weapons withdrawn from Poland and the former GDR. The area of Kaliningrad has been turned into a huge barrel of pulver, the existence of which constitutes the direct danger for the vital interest of Poland and other states.

It can be concluded that from the point of view of the security and strategic interests the Soviet/Russian title cannot compete with the clear and generally comprehensible interests of Poland.

Polish Patriots in the USSR of 10 June 1943 stated that *East Prussia should become a bridge between Poland and the Baltic Sea*. Cf. *Polska Ludowa*, op. cit., 615.

3.3.3. Historic title

The argument on historic title of the USSR was in fact presented by Churchill, who wrote in a letter to Stalin of 20 February 1944 that he treated the Second World War as the *thirty-year war begun in 1914* and emphasized that East Prussia is a *soil stained with Russian blood*, so that Russians have a *historical and well-founded claim to this German territory*.⁴¹

The reference by Churchill to the boundaries of Russia of 1914 and the notion of the *thirty-year war* recall the *exposé* by Molotov during the 5th Extraordinary Session of the Supreme Soviet of the USSR on 31 October 1939 in which the speaker justified the aggression against Poland.⁴² International law does not recognize any title based upon the stain of blood of any national, and the idea of such a title is inhuman and extremely dangerous.

There was no opportunity to establish any historic title of Russia with respect to East Prussia. In 1758 Russia invaded this territory and subsequently offered it to Poland in exchange of the part of Inflant area.⁴³ In the mid-18th century Russia was therefore not interested in the area of Prussia; probably being fully aware of ties binding Electoral Prussia with Poland. Neither Russia nor the USSR claimed the territory of East Prussia before the conference of Teheran. The historic title of Russia cannot be seriously considered under these circumstances.

Polish ties with the territory of Prussia reach back to the beginnings of the statehood. One can refer to the mission of St. Adalbert in Prussia, to the acceptance by the Pope of the bishopric in Włocławek with the task *to organize missions in Prussia*. Prince Konrad of Mazovia invited the Teutonic Order to Poland in connection with the proclaiming by the Pope of the mission and crusade in Prussia, in order to conquest Prussia for the christianity.

In the 15th century, an important movement in favour of connections with Poland were present in Prussia and the Prussian Orders forced the Teutonic Knights to conclude a treaty in 1435. The Treaty limited the autonomy of the Teutonic Order and assured *the freedom of social and economic contacts between Poland and Prussia, and in particular the freedom of trade*.

This trend was continued by the creation of the Union of Prussian Towns in 1440. The Union renunciated the sovereignty of the Teutonic Order, started an uprising and proposed the Polish King to establish his sovereignty over whole Prussia. The Act of Incorporation of Prussia to the Polish Crown was edited on 6 March, 1454 and referred to the old titles of Polish monarchs to the territories in question. After the thirteen year war, according to the peace treaty of Toruń (Thorn) of 19 October 1466 all Prussian territories – including the part of Prussia

⁴¹ *Sprawa polska*, 476 ff.

⁴² Text published i.a. in L. S z c z e ś n i a k (ed.): *Zmowa. IV rozbiór Polski (The Plot. 4th Partition of Poland)* 181 ff (1991).

⁴³ All historical issues quoted according to *Historia Dyplomacji Polskiej (The History of the Polish Diplomacy)*, vol. I – II, *passim* (1982).

remaining under the administration of the Teutonic Order – were subjected to the sovereignty of the Polish Kingdom.

Subsequently the treaty of 1525 between the Polish king Zygmunt Stary and the Great Master Albrecht Hohenzollern sanctioned the dissolution of the Teutonic Order (the secularization of Prussia). Hohenzollern as the secular prince remained a vassal of the king of Poland *with the title of the prince in Prussia, not of Prussia, as the Polish king was the sovereign of Prussia*.

If these conditions had been kept, the Principality of Prussia should have been incorporated into Poland in 1618. However, because of the support of the Polish claims in Inflant area in 1562 – 1563 Poland accepted the succession of the house of Brandenburg in Prussia. The elector of Brandenburg succeeded in obtaining the Polish acceptance for the investiture of his son Friedrich Wilhelm in Prussia. After his father's death, the latter rallied the power both in Brandenburg and Prussia.

The new prince used an opportunity created by the Swedish aggression against Poland and concluded in a treaty with Moscow in 1656 and two treaties with Poland in 1657. According to the latter, Poland resigned of the Prussian vassalage. Although the treaties of 19 September and 6 November 1657 granted full sovereign rights (*jus supremi domini*) in Prussia to Friedrich Wilhelm and his male descendants, they preserved certain ties between Prussia and Poland. In particular they contained a condition that after the extinction of the male line of the Hohenzollerns Prussia would have returned to Poland.

It is a paradox of the history that this condition was realized after the Second World War through the extinction of the Hohenzollerns, and through the dissolution of the Prussian State by the Law No. 46 of the Control Council for Germany. These events were preceded by precise Polish claims to the territory of East Prussia as a whole. The historic title supported by the Polish claims, and the realization of the condition formulated in the treaties of 1657 could, and should have found support in the loss of a part of territory of the aggressor state (in this case: Germany) as one of the forms of international responsibility for aggression.⁴⁴

Summing up, also from the point of view of the historic title (and in particular from this point of view) the Soviet/Russian claim to East Prussia cannot compete with the Polish title. The Soviet claim was contrary to the estoppel rule and the satisfying of these claim constituted in fact inadmissible gratification of the co-aggressor against Poland of 1939 and therefore violated the principle *ex iniuria non oritur jus*.

⁴⁴ In fact the co-aggressor was not only granted with the title to the territories incorporated illegally in 1939 but received also the northern part of East Prussia with Königsberg.

The Dispute over the Gabčíkovo-Nagymaros Systems of Locks is Drawing to a Close

CESTMIR CEPELKA*

Four years after the dispute concerning the Gabčíkovo-Nagymaros Project along the boundary river Danube began, it has finally been submitted to the International Court of Justice. The relevant special agreement (compromis) which Hungary and Slovakia reached on 7 April 1993, at the headquarters of the European Communities in Brussels, and under their auspices, was subsequently addressed to this judicial organ of the *United Nations* on 2 July 1993.

The *Court* must mainly deliberate and reach a decision on the following two questions of essential character:

(1) whether Hungary was entitled to suspend unilaterally and finally abandon work 'on the Nagymaros Project and on part of the Gabčíkovo Project'; and

(2) whether, on the other hand, the former Czechoslovakia, as predecessor of today's Slovakia, was entitled to proceed, in November 1991, to a 'provisional solution', realized solely on its own territory, which called for the operation of the hydroelectric power station at Gabčíkovo and use of the newly built river canal for shipping traffic as of October 1992.¹

There is no doubt as to the political importance of the fact that both countries have managed to solve their dispute by means of a binding solution. It is well known that the barrage system in question is situated in a region which is also suffering from latent tensions caused by a dissatisfied Hungarian minority which lives in Slovakia.² The awaited judgment by the *Court*³ could greatly mitigate these additional disturbances to the stability in this part of Eastern Europe.

* The English linguistic review of this text was performed by Ms. Antje Westphal, attorney-at-law, counsel, White & Case, Prague. The author would like to express his thanks and gratitude for her kindness.

¹ *Special Agreement between Hungary and the Slovak Republic for Submission to the International Court of Justice of the Differences between Them concerning the Gabčíkovo-Nagymaros Project*, in: 32 *I.L.M.* 1293 (1993).

² Some 11% of the Slovak population (the total population of Slovakia today is approximately 5 million) belongs to the Hungarian minority, *i.e.* nearly 600 thousand people.

³ According to Judge Geza Herczegh (Hungary), member of the *Chamber for Environmental Matters* (see footnote 6 below), the *Court* will be able to hear the case at the earliest in 1996; in: *Lidové noviny* (in Czech), 3 December 1993, p. 4 ('Mezinárodní soudní dvůr').

There are no legal conventions on point to assist the Court in deciding this case in accordance with international law.⁴ Under the given circumstances, it seems to be more appropriate that the Court consider relevant customary law evidencing a 'general practice accepted as law'.⁵

The problem of pertinent normativity in the domain of ecology appears relevant to the first of the two questions.⁶ With respect to the second question, the measures taken by the disputing parties and their qualification are of the greatest interest.⁷ This hypothesis evolves from the argumentation by the Parties themselves as they seek to justify their actions. Whatever decision the Court may make with respect to this conflict, the underlying rationale for its judgment will in any event constitute a remarkable precedent for the interpretation of recent developments, as long as it is based on currently important general customary law regulations.

However, before proceeding to the legal analysis, the pertinent facts as well as the actual development of the dispute in question must be described.

1. Background of the dispute

After nearly 25 years of preparatory work and research, the Czechoslovak-Hungarian *Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks* was concluded on 16 September 1977, and entered into force on 30 June 1978.⁸

The purpose of the Treaty consists in (i) making necessary anti-flood investments necessitated by catastrophic inundation experiences in 1954 and 1965 on both sides of the frontier river, in Hungary as well as in Slovakia, (ii) the improvement of the navigation conditions as required by the Danube Commission,⁹ and (iii) the exploitation of hydro-electric energy.

These three objectives were the impetus for a project involving a whole system of works, installations and equipment, considered to be, in conformity with Article 1 of the said Treaty, a joint investment of an "operational system of

⁴ Cf. *Statute of the International Court of Justice*, Article 38, para. 1.

⁵ The *Special Agreement* (see footnote 1 above) provides for it explicitly stating, in Article 2, para. 1, that the Court "is requested to decide on the basis (...) (*inter alia*) of rules and principles of general international law".

⁶ The *International Court of Justice* has decided to form a special seven-member *Chamber for Environmental Matters* in order to respond to environmental cases under its jurisdiction, cf. *U.N. Weekly*, vol. 9, n° 30 (27 July 1993), p. 9; "Currently, two out of the eleven cases on the Court's docket have important implications for international law on matters relating to the environment. Those cases concern, respectively, certain phosphate lands in Nauru (Nauru v. Australia) and the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)".

⁷ In the specific sense as used by the *Draft articles on State responsibility*, in Articles 11, 12, 13 and 14, elaborated for the codification purpose by the *International Law Commission* (its Drafting Committee), cf. A/CN.4/L.480 (25 June 1993) and A/CN.4/L.489 (14 July 1993).

⁸ See in: 32 *I.L.M.* 1247 (1993), or 1109 *U.N.T.S.* 235 (Treaty N° 17134).

⁹ Special international organ for the regulation of navigation, created by the Belgrade Convention on the Danube (1948), cf. 33 *U.N.T.S.* 197.

works" which is "single and indivisible". The following list represents the main elements of the planned system of waterworks which are most relevant to the controversy at issue:

- a system of locks on the Slovak territory at Gabčíkovo, equipped with a hydroelectric power station of 720 megawatt capacity;
- a dam located between the Slovak village Hrusov and the Hungarian locality of Dunakiliti, the water storage reservoir which had to be situated on the territory of both riparian countries; and
- a system of locks on the Hungarian territory at Nagymaros, with a hydroelectric power station with a 158 megawatt capacity (*i.e.*, compared to the plant at Gabčíkovo, a smaller capacity by more than four and half times).

The deadline for putting the whole system of water turbines into operation was changed twice at the request of Hungary. In 1983 Hungary demanded the postponement of the completion at Gabčíkovo from 1989 to 1993 and from 1990 to 1994 at Nagymaros¹⁰ and, in 1989,¹¹ an acceleration of the project's completion so that at Gabčíkovo all eight aggregates would be ready to supply electricity by 1992, whereas at Nagymaros, located lower down-stream, in the same year only the first of the six planned turbo-generators would be installed.

This shows not only that the former Czechoslovakia was not only much more advanced in its construction of the Gabčíkovo system of locks but also that the then-federal sovereign was, in 1989, placed under an additional obligation to accelerate the completion of the project.

Three months later, on 13 May 1989, the Hungarian Party decided to unilaterally interrupt work on the Nagymaros system of locks in spite of the explicit premise of the Treaty (1977) which deemed the planned system of interconnected barrages as 'single and indivisible' (Art. 1, para. 1). This unexpected situation came at a time when the upper-Slovak system of locks was nearly completed (compared to that of Nagymaros which had scarcely advanced) with Czechoslovak investment reaching some 15 billion CS Crowns (*i.e.*, *circa* 500 million USD). This amount was drawn from public funds.

Several reasons have since been put forward to justify this unilateral Hungarian action of suspending duly assumed international obligations: seismic risk, danger to the Danubian meadow forests and their faunae, and fear of deterioration in the quality of the groundwater. Each one of these environmental concerns has subsequently been retested by scientific experts of both Parties. On 31 October 1989, the Hungarian Parliament decided to halt all work on the Nagymaros system of locks citing as an official reason its concern for the groundwater.

Some weeks earlier, on 20 July 1989, the Hungarian Government refused to finish the work on the dam forming a water storage reservoir between the localities Hrusov and Dunakiliti. This complementary reservoir of water was nece-

¹⁰ According to a *Protocol* signed in Prague on 10 October 1983.

¹¹ According to a *Protocol* signed in Budapest on 6 February 1989.

ssary for the planned operation of the hydroelectric power station at Gabčíkovo, situated nearby down-stream.

This dam, whose construction was already in a very advanced stage, needed only a blocking of the existing river bed with rocky filling material which was already ready for use on the construction site. This blocking was scheduled to be completed by the end of October 1989.

2. Environmental issues

The 1977 Treaty itself provides explicitly for respect for the environment. Its article 19 states that the Contracting Parties shall "ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks".¹²

Nonetheless, despite Hungarian concerns over the quality of the river basin's groundwater, no concrete efforts have been made to perform joint investments in alternative potable water-supply systems, *inter alia* through a watermain conveying needed water from Slovakia, as had been suggested by this northern riverain State.

In fact, it appears that Hungary preferred abandoning the entire project, contrary to the 1977 Treaty, over further expenditures, citing environmental concerns.

2.1. General principles of International Environmental Law

In connection with the interruption of work on the Nagymaros system of locks, the most comprehensively expressed international environmental legal reasoning was presented during negotiations between Hungarian and Czechoslovak government experts on international law which were held in Prague from 18 – 20 September 1989.

The Hungarian delegation argued that "general principles of international law relating to the protection of the environment" require of both Parties, in the event of an ascertained ecological peril,

"a duty to take necessary measures in order to avoid such a peril, including pertinent inquiry and joint appraising of attained issues. (...) If the Parties find it necessary, the constituent Treaty (1977) as well as related documents should be put into compliance with these issues. Throughout the duration of inquiry and until achievement of a joint elaboration of regulations, being in conformity with international law and rational thinking, the Parties must interrupt all building activities so as to avoid undesirable ecological impacts and economic disadvantages, etc. From the above ensues unambiguously that the decision of the Hungarian Government concerning the hold-up of the structure works at Nagymaros has not been in contradiction to rules of international law. Under these circumstances, the Czechoslovak Party is obliged to negotiate *bona*

¹² See: footnote 8.

fide and, until the differences are elucidated, has to be held responsible for works it would continue".¹³

The Czechoslovak experts did not object at all to further ecological tests designed to minimize all environmental concerns. However, they objected to the interruption of work arguing that no joint suspension of the application of the 1977 Treaty could be considered.

Similarly, Czechoslovak authorities believed that consenting to a revision of the primary Treaty could be interpreted as a justification of the Hungarian behaviour and exoneration Hungary from any responsibility for potential damages to Czechoslovakia. The revised version of the Treaty would not only remove the Nagymaros system of locks from the whole project and retain only that of Gabčíkovo with a reduced capacity,¹⁴ but would also require acceptance by the Czechoslovak Party of relevant 'ecological guaranties' demanded by Hungary. In other words, should there be damages caused by the operation (albeit with a moderated capacity) of the Gabčíkovo hydroelectric power station, Czechoslovakia would be responsible for these and, therefore, would be required to provide a substitute source of drinking water.

The former Czechoslovakia's growing reluctance to amend the original Treaty finally caused Hungary to pass a Government decision on 20 July 1989, to exert pressure on the former Czechoslovak Party. It conditioned performance of the completed blockage of the existing river bed, as mentioned above *sub* 1., on acceptance by Czechoslovakia of a required novation of the 1977 Treaty.

2.2. Ecological state of necessity

When it became evident that the former Czechoslovakia was resolved to resist Hungary's pressure to create a 'substitute solution' (see below *sub* 4.) and when, at the same time, three compromise counter-proposals by the former Czechoslovakia¹⁵ were rejected by the Government in Budapest, the Hungarian Parliament finally decided, on 31 October 1989, following a governmental proposal, to definitively stop work on the Nagymaros lock construction.

This physical withdrawal from the 1977 Treaty has been officially justified differently than the previous unilateral suspension of work where 'general principles of international environmental law' had been invoked (as cited above

¹³ *Protocol* of the concerned negotiation of governmental experts, *Annex 2*. (Archives of the Czech Ministry of Foreign Affairs, Prague).

¹⁴ The full output of the Gabčíkovo turbines would risk, with the non-existence of Nagymaros system of locks (having *inter alia* to absorb enormous flushes of water), to wash away the upper filtration stratum in the by-pass canal, in the tail-water canal, and so not only produce an additional deterioration of the subsoil water but also silt up the following bed of the Danube; in this place the river is very shallow and its bed must be continuously dredged up.

¹⁵ Presented during the negotiation of the concerned prime ministers, held in Bratislava on 26 October 1989. The text: *Rudé právo* (in Czech), 31 October 1989.

sub 2.1.). Indeed, the then Prime Minister M. Németh justified the proposal as an 'ecological state of necessity'.¹⁶

The source of this reasoning is apparently Professor Laszlo Valki of the Budapest University who asserts:

"(...) if we continued in constructing the dam (Nagymaros) (...) there would accrue such damages which would give cause for a situation of peril. According to international law, the Hungarian Government has the right to take unilateral action in a situation of necessity which (...) already exists. (...) With things in the state they are in, it doesn't seem that our country would have violated the Treaty. If the Czechoslovak Party refused its revision, there would be a dispute, and a joint arrangement has to be achieved. Two possible solutions are available: either the Parties will reach, *e.g.*, a supplementary agreement or they would demand a third organ to resolve the problem. It might be, for instance, the International Court in The Hague".¹⁷

When the Hungarian Government finally proceeded on 16 May 1992, to the legal termination of the 1977 Treaty, the invocation of an 'ecological state of necessity' was mentioned first, among several international law arguments used to justify its decision.¹⁸

3. Critical evaluation

Although the Hungarian Government invoked an ecologically motivated state of necessity as introduced by Professor Laszlo Valki, the Court can hardly pay much attention to this argument.

It is quite obvious that the concept of 'state necessity', as officially invoked and discussed by scholars (*see above*), is the only one which has been incorporated into the text of a codified draft on the responsibility of States for international wrongful acts, adopted by the International Law Commission¹⁹ in its Chapter V named 'Circumstances Precluding Wrongfulness' (Art. 33). The term 'state of necessity' is used here by the Commission to denote the situation of a State

¹⁶ *Rudé pravo*, 1 November 1989.

¹⁷ From the interview given to *Népszava* (in Hungarian), 3 November 1989.

¹⁸ According to the Hungarian legal opinion expressed in the governmental Declaration, the following reasons (for that matter very unsatisfactory and compiled here in a rather chaotic way) permit to terminate the Treaty in question by invoking:

- (1) the ecological state of necessity,
- (2) the maxim *ad impossibilia nemo obligatur*,
- (3) the principle *rebus sic stantibus*,
- (4) the Czechoslovak material breach of the Treaty in compliance with Art. 60 of the Vienna Convention on the Law of Treaties,
- (5) legitimate countermeasures in respect of the illicitness of the Czechoslovak 'provisional solution' (*see below sub 4.*), these reprisals entitling the termination of the Treaty in question, and
- (6) the rules of general international law on environmental protection taking precedence of the said Treaty; for the full text of the Hungarian Declaration Terminating Treaty, *see*: 32 *ILM* 1260 (1993).

¹⁹ *Cf. Yearbook of the International Law Commission*, vol. II (Part Two), 34 (1980).

whose sole means of safeguarding an essential interest threatened by a grave and imminent peril (a peril not escapable by any other means, even a more costly one that could be adopted in compliance with international obligations)²⁰ is to adopt conduct not in conformity with what is required of it by an international obligation to another State. In our case, this would be the conduct required by the 1977 Treaty of Hungary towards Czechoslovakia.

Indeed, according to the relevant commentary to Art. 33 there are, *inter alia*, foreseen situations of extreme peril, alleged by a given State, consisting in grave danger to "the ecological preservation of all or some of its territory".²¹ However, Hungary appears to be disadvantaged in claiming the benefit of an invoked state of necessity, for reasons provided in paragraph 2, subparagraph (c) of the treated regulation.²² Actually, Hungary has, deliberately or only by negligence, contributed to creating the situation it wishes now to invoke as a justification for its non-fulfilment of the 1977 Treaty.

Professor Laszlo Valki considers the action of the State invoking the necessity as its subjective right, which (conceptually) requires from the State acted against that it not hinder its exercise ('Hungary has the right to take unilateral action in a situation of necessity', *see above*). However, the International Law Commission did not mean to approve wrongful acts. According to the Commission, the State pleading necessity as a circumstance precluding wrongfulness should be required to compensate for material damages caused by its conduct, even if this obligation cannot be described explicitly as an obligation 'to make reparation for a wrongful act'.²³

It is therefore unlikely that Hungary could be successful when arguing that its unwillingness to comply with the 1977 Treaty is justifiable as an ecological necessity. Certainly, the Commission's draft concerning this concept cannot at present be considered as 'hard law', although it authoritatively sets out in precise terms the various conditions that must exist for a plea of necessity, the latter still being governed by rules of general international customary law. Therefore, the Court should not disregard the Commission's legal opinion.

An argument which is more likely to be accepted by the Court is the invocation of general principles of international environmental law. As the principles were referred to (i) by legal experts at the negotiations in Prague in 1989 (*see above* 2.1.), and (ii) in the Declaration Terminating Treaty (1992) when it recalls 'rules of general international law on environmental protection', albeit mentioned in last place,²⁴ one could conclude that there is a constancy in Hungary's legal thinking with respect to the problems surrounding the 1977 Treaty. Indeed, many

²⁰ *Yearbook*..., *see*: footnote 19, (Commentary on Art. 33), p. 49, para. 33.

²¹ *Yearbook*..., *see*: footnote 19, p. 35, para. 3

²² *Yearbook*..., *see*: footnote 19, p. 34: Article 33 "(...) 2. In any case, a state of necessity may not be invoked by a State (...) (c) if the State in question has contributed to the occurrence of the state of necessity".

²³ *Yearbook*..., *see*: footnote 19, p. 51, para. 39.

²⁴ *See*: footnote 18 (*ad* 6).

activities of the United Nations or activities undertaken under their auspices aiming at the elaboration and intensification of environmental legal protection give a very persuasive impression of general acceptance of these principles of international law. The most convincing legal basis for such an argument is offered by the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, which sets forth Principles of the preservation of the environment, including those having a clear international legal importance. For example, 'Principle 21' states that:

"States have, in accordance with the Charter of the United Nations and the principles of international law, (...) the responsibility to ensure that activities within their jurisdiction (...) do not cause damage to the environment of other States (...)."²⁵

Although there are still doubts among respected lawyers as to the legal significance of general principles of international environmental law,²⁶ the continuous deterioration of the world environment indicates a possible change in attitude over the next twenty years.

Thus, the Hungarian experts in international law have obviously embraced the theory that the said general principles are overriding in their legal effects (*see* 2.1. above). The Declaration Terminating Treaty also reflects the view that the general rules of international environmental law

"take precedence over treaty provisions which were adopted earlier or are contradictory to them (*lex posterior derogat legi priori, lex specialis derogat legi generali*)".²⁷

At present, the Hungarian Government is obviously seeking to prove to the Court that the assertion promulgated in the preceding formulation is in fact equal in value and significance to that habitually used for defining peremptory norms of general international law.²⁸ If Hungary were successful, this would not only satisfy the environmentalists, but would also prejudice the second question submitted to the Court in connection with this case. Only when a peremptory norm of general international law exists, *i.e.*, when it has been accepted and recognised by the international community of States as being of essential importance for the safeguarding and preservation of the human environment and in the interest of said community as a whole, will the present Hungarian attitude

²⁵ *Report of the United Nations Conference on the Human Environment*, Stockholm, June 5 – 16, (1972).

²⁶ Cf. M. O g i s o (Japan): "Principle 21 of the Stockholm Declaration was simply a kind of joint policy declaration by the States represented at the (...) (conference), not a statement of an existing principle of international law"; in *Yearbook ... 1982*, vol. I, p. 277, para. 31.

²⁷ 32 *I.L.M.*, 1288 (1993).

²⁸ Cf. Article 53 of the Vienna Convention on the Law of Treaties (1969): "(...) a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted (...)"; in: I. B r o w n l i e: *Basic Documents in International Law* 233 (1972).

towards the 1977 Treaty be legitimated.²⁹ At that time the current Slovak 'provisional solution'³⁰ would be *eo ipso* considered as unlawful.

4. 'Provisional solution'

As mentioned above (*sub* 1.), Hungary's refusal to complete the planned blockage of the existing riverbed in order to create a water storage reservoir near Dunakiliti was perceived by the former Czechoslovak Party as pressure to induce the conclusion of a novation of the 1977 Treaty, in effect creating, with the foreseen abandonment of the Nagymaros system of locks, new legal obligations for the Czechoslovak side.

As stated by the said original 1977 Treaty, the construction of this water storage reservoir was viewed as indispensable for a sufficient water supply for the eight turbines of the hydro-electric plant at Gabčíkovo. For this reason the former Czechoslovakia began to build a substitute reservoir which was finished by its successor Slovakia. The dam is situated near the Slovak locality of Humuliakovo, not far from Bratislava, and is entirely within Slovak territory. In effect, this hydraulic engineering facility is located on a part of the Danube river which does not border on Hungary. This reservoir will likely require the same quantity of river water as approved by the original 1977 Treaty.

According to the Slovak statistics, construction costs of this dam have exceeded 33 million USD. This sum has been factored into the amount which Slovakia plans to demand for damages caused by Hungary's withdrawal from the 1977 Treaty.

4.1. Rationale of Hungary's Protest

Since its first diplomatic note of protest submitted on 1 September 1989, Hungary has argued that the contemplated "provisional solution would lead to serious international legal encounters (...) for which solely Czechoslovakia would be responsible".³¹ Mr. P. Hardi, director of the 'Hungarian Institute of Foreign Affairs' has the following opinion about the 'provisional solution':

²⁹ Cf. Article 64 of the Vienna Convention, see: footnote 28: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates". Although the Vienna Convention as such is not applicable in the present dispute because it entered into force for both countries after 1977, the content of the above-cited provisions is to be applied in the pertinent customary form.

³⁰ The 1977 Treaty has been transmitted to Slovakia automatically (so-called localized treaty), after the dissolution of ex-Czechoslovakia on January 1, 1993, and that by virtue of Article 11 of the Vienna Convention on Succession of States in respect of Treaties (1978): "A succession of States does not as such affect: (...) (b) obligations and rights established by a treaty and relating to the régime of a boundary". For the text: *The Work of the International Law Commission*, 323 (1988).

³¹ Archives of the Czech Ministry of Foreign Affairs, Prague.

"Above all, it would infringe on the treaty of 1976 concerning frontier waters.³² There would be a diversion of frontier waters without Hungary's consent. Secondly, such a solution encroaches upon the 1947 Peace Treaty of Paris.³³ With the originally planned by-pass canal (...) the Hungarian Party once consented, but with the new Czechoslovak substitute 'provisional solution' Hungary disagrees. In both cases there is a transfer of the international navigation way at issue. However, in the first situation it has been gained by mutual agreement, but in the second one it would be without Hungary's consent. And that is to be qualified in no other way than as a violation of international law on the part of Czechoslovakia".³⁴

Professor Laszlo Valki went still further and brought up a frontier problem when stating that the Peace Treaty of Paris

"(...) lays down explicitly that the frontier between these two countries is formed by the (Danubian) main navigation line (...). If the Czechoslovaks built up a new river bed then they would shift the frontier from today's location and that without asking our country. However, this would signify a grave violation of the Paris Peace Treaty".³⁵

The 1992 Hungarian Declaration provides further arguments, and also qualifies the above mentioned 'grave violation of the Paris Treaty'. According to its para. a) and para. b), the 'provisional solution'

"constitutes a breach of sovereignty and territorial integrity of the Republic of Hungary, which is protected by peremptory rules of international law" (*sic*) and "violates the inviolability of the frontiers of Hungary, protected by peremptory rules of international law" (*sic*).³⁶

4.2. Examination of the Slovak Standpoint

Slovakia has adopted the view of its Czechoslovak predecessor. It seeks to legitimate the measures undertaken in an effort to diminish the most damaging consequences of Hungary's non-fulfillment of the 1977 Treaty. Slovakia has primarily sought to decrease, through the 'provisional solution' (called also 'Variant C'), the anticipated indirect losses caused by the non-exploitation of the installed turbines. In addition, the rationale underlying the whole concept of the 'provisional solution' permits the return at any time to the original requirements of the 1977 Treaty and Hungary's renewed commitment to perform its obligations under the 1977 Treaty which Slovakia still hopes will happen.

This reasoning seems worthy of acceptance by the Court only where the Court is also able to deem that Hungary's non-fulfillment of the 1977 Treaty was not required by presumed peremptory international environmental principles

³² This bilateral treaty of the two countries regulates the questions of water management of the boundary rivers, cf. 32 *ILM* 1286, para. c) (1993).

³³ *Ibidem*, p. 1285, para. b).

³⁴ From an interview given to the press, *Rudé právo*, 13 December 1989 (in Czech).

³⁵ From the interview given to *Népszava*, see: footnote 17.

³⁶ Cf. 32 *ILM* 1285 (1993).

not permitting any derogation. The said 1977 Treaty by its content would be just such a derogation (*see above sub 3.*).

The former Czechoslovakia ultimately resorted to countermeasures as an adequate means to induce Hungary, as violator of the 1977 Treaty, to resume performance of its obligations.

The Slovak (and ex-Czechoslovak) embracing of the 'provisional substitute solution' seems to conform to the present interpretation of the International Law Commission. This interpretation entitles the injured State (former Czechoslovakia, now Slovakia) "not to comply with one or more of its obligations towards the State which has committed the international wrongful act (here Hungary), as necessary to induce it to comply with its obligation",³⁷ *i.e., inter alia*, to resume its obligations under the 1977 Treaty.³⁸

The 'provisional solution' in question, proclaimed as a countermeasure by ex-Czechoslovakia and the present Slovakia against the perceived wrongful conduct of Hungary is also consistent with the international legal requirement of proportionality.³⁹ Indeed, ex-Czechoslovakia, and now Slovakia, has repeatedly emphasized that it is ready to restore the status quo ante as soon as Hungary is willing to cease its conduct which violates the 1977 Treaty.

However, the 'provisional solution' embraced as a countermeasure would be unlawful if the Court would agree with Hungary's view that the 'provisional solution' contravenes the peremptory norms of general international law⁴⁰ protecting its 'sovereignty and territorial integrity' as well as the 'inviolability of its frontiers' (*see above sub 4.1.*).

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Regardless of the actual judgment of the Court, a broad readership interested in international law is impatiently looking forward to a further enrichment of the judicially proven existence of peremptory norms,⁴¹ namely those having an impact on both heatedly discussed topics of (i) the presumed peremptory rules of international environmental law and (ii) the continuously contested resorting to countermeasures in today's international legal order.

³⁷ Cf. A/CN.4/L.480 (*see: footnote 7*), Article 11: 'Countermeasures by an injured State'.

³⁸ According to Article 6 (Cessation) of the *Draft articles on State responsibility*, Part Two, in: *Report of the International Law Commission on the Work of its Forty-First Session* (1989), Document A/44/10, p. 192, para. 229.

³⁹ Cf. the document cited in footnote 37, Article 17 (Proportionality): "Any countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State".

⁴⁰ Cf. footnote 37, Article 14 (Prohibited countermeasures) "An injured State shall not resort, by way of countermeasures, to (...) e) any (...) conduct in contravention of a peremptory norm of general international law".

⁴¹ The International Law Commission, when forming the rule codified in Article 53 of the Vienna Convention on the Law of Treaties (*see: footnote 28*), decided "(...) to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals"; cf. *Yearbook ...1966*, vol. II, p. 248, para 3.

Soft Law?

CHRIS INGELSE

States adopt legally non-binding instruments, such as declarations and codes of conduct, that nevertheless have some legal scope. Some authors classify them under 'soft law', connoting an unclear borderline between law and non-law and, consequently, a gliding bindingness. But, can law be soft? This article contrasts soft law with international law. It suggests that international law maintains this borderline in order that it may credibly regulate international society. Furthermore, soft law instruments can be classified either inside or outside its sphere. The concept appears superfluous. However, it may reveal contradictions, inherent to change of law and tensions between legality and legitimacy.

1. Introduction

In the course of the last decades states have increasingly become aware of a benefit to be derived from cooperation. Nowadays states are cooperating in many areas of mutual interest, such as economic development, environmental protection, arms control and human rights. Consequently, they have increasingly become dependent on one another in these areas. At the same time, though, because of this intensification and frequency of relations, differences and conflicts between states have come more and more to the fore. States have tried to manage this dialectic¹ by adopting instruments containing obligations, that leave a wide freedom for action. By accepting such 'obligations' in codes of conduct, declarations, general principles and guidelines (often couched in resolutions of international organizations) states retain a degree of discretion over the interpretation and performance of the 'obligations'. Such instruments may soften and postpone potential clashes of interests until the reasons for these clashes have become irrelevant or non-existent.² The instruments are generally not considered as bin-

¹ Weil points to this dialectic between sovereignty and difference on the one hand, and relations and cooperation, on the other. P. Weil: „Towards a Relative Normativity in International Law?” 77 *AJIL*, pp. 413 – 442, at 420 (1983).

² For further motives and reasons for the development of these instruments, see: P. Birnie: „Legal Techniques of Settling Disputes: The 'Soft Settlement' Approach”, in: W. Butler (ed.): *Perestroika and International Law*, pp. 177 – 195, at 178 – 179 (1990); C.M. Chinkin: *The Challenge of Soft Law: Development and Change in International Law*, 38 *ICLQ*, pp. 850 – 866, at 860 (1989); O. Schachter: „Towards a Theory of International Obligation”, 8 *Virginia Journal of International Law*, pp. 300 – 322, at 302 – 303 (1967); I. Seidl-Hohenveldern: „International Economic Soft Law”, in: 163 *RCADI*, pp. 169 – 238, at 173 (1979).

ding as a matter of law, at least not like regular instruments of international law. Nevertheless, they exert, like instruments of international law, a certain influence on states' behaviour.

One would be inclined to consider such regulations as mere politics, but it is claimed by several legal scholars³ that, since these instruments perform a function comparable to law, they are more than regulations on the political level. However, they should not be considered as law either, because "[...] something is missing in the legal or binding nature of law as we know it from daily life and even international life."⁴ The traditional sources of international law do not seem to cover these phenomena.⁵ Therefore, some scholars have submitted that these instruments should not be examined from a purely legal perspective, and that a sharp distinction between law and non-law should not be made. The term and concept of soft law was introduced.⁶ One encounters difficulties even addressing this concept, because of the illusive and ambivalent character of soft law and its inherent contradictions (soft and also law?).

In this study I will contrast the soft law approach with international law. The objective is to examine how far the two conflict and to appraise the consequences of the soft law approach for international law. Furthermore, I will analyze whether the concept of an intermediate level between law and non-law is indispensable to understand the characteristics and legal meaning of instruments of alleged soft law.

³ See e.g.: Birnie, *supra* note 2 and R. Bierzanek: „Some Remarks on 'Soft' International Law", 17 *PYIL*, pp. 21 – 40 (1988); Chinkin, *supra* note 2, R.J. Dupuy: „Declaratory Law and Programmatic Law: From Revolutionary Custom to 'Soft Law'", in: R.J. Akkerman, P.J. van Krieken, G.O. Pannenburg (eds.): *Declarations on Principles, a Quest for Universal Peace*, pp. 247 – 257 (1977); T. Gruchalla-Wesierski: „A Framework for Understanding 'Soft Law'", 30 *Mc Gill Law Journal*, pp. 37 – 88 (1984); R.Y. Jennings: „What is International Law and How Do We Tell It When We See It?", 37 *ASDI*, pp. 60 – 80 (1981); O. Schachter: „The twilight existence of non-binding international agreements", 71 *AJIL*, pp. 296 – 304 (1977); Seidl-Hohenveldern, *supra* note 2, A.J.P. Tammes, „Soft law", in: *Essays on International and Comparative Law in Honour of Judge Erades*, pp. 187 – 195 (1983), II. Thierry: „L'Évolution du Droit International. Cours Général de Droit International Public", in: 186 *RCADI*, pp. 70 – 76 (1990); G.J.H. van Hooft: *Rethinking the Sources of International Law*, p. 181 (1983); M. Virally: „La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique (à l'exception des textes émanant des organisations internationales)", in: *AIDI*, pp. 328 – 352 (1983), Tome I.

⁴ Tammes, *supra* note 3, at 187.

⁵ For attempts to reach solutions, see: van Hooft, *supra* note 3, at 181 – 187. See also: O. Asamoah: *The Legal Significance of the Declarations of the General Assembly of the United Nations*, 35 (1966).

⁶ The term soft law has first been proposed by Lord McNair Dupuy, *supra* note 3, at 181. It was reintroduced by Dupuy at a colloquium of the The Hague Academy on the Protection of the Environment and International Law in 1973. R.J. Dupuy: „General Round-up and Prospects for the Future", in: A.-C. Kiss (ed.): *Protection of the Environment and International Law*, pp. 618 – 627 (1975).

2. The concept of soft law

The soft law approach suggests that there is a gliding scale of bindingness between the black of non-law and the white of law.⁷ Instruments of soft law are located in the 'grey area' between the black and white, right on this gliding scale. Apparently, this school of thought does not intend to delimit the law from the non-law. Not in the least, inherent in the very concept of soft law is the uncertainty and vagueness of the watershed between law and non-law and the legal ambiguity of these instruments.

On the basis of various characteristics authors include various international instruments under the concept. Some authors decide upon a possible soft law character of a given instrument on the grounds of the form of the instrument: thus a joint declaration or a resolution is soft and a treaty is always hard.⁸ Others rather examine the substance of an instrument to decide whether one actually has soft law at hands (For example, the provision in a treaty: 'Parties should ...' (etc.) is soft.). Still others maintain that the term soft law may apply to both.⁹ Nevertheless, the instruments that have been argued to be of a soft law character can be labelled by identifying one paramount denominator, mentioned by all authors: since parties to an instrument of soft law do not want to be at fault, they intend that these instruments on face value, *at the time of adoption*, do not contain rights and duties that can be sanctioned and enforced in a legal sense. They avoid creating legal responsibilities. This may be achieved by drafting vague texts that are flexible and leave a wide margin of appreciation, by engaging in codes of conduct or political agreements, or by combining both methods. Because of the fact that the intention of parties is to create instruments that are apt to define their future conduct, but not as legal regulations, these instruments are, what is generally referred to as 'soft law', meaning 'infralegal', 'sub-legal' or *droit mou*.

Notwithstanding this prudence, parties may ascribe (explicitly, implied, deliberately¹⁰ or undecidedly) the possibility of a legal scope (*portée juridique*¹¹) to such an instrument. That's the other argument for scholars of international law to label an instrument soft law, meaning *pré-droit*¹² or *droit vert*. The term *droit vert* points to the future. It expresses that the potential character of law depends on a certain lapse of time. The instrument may, for example, call upon parties to develop the instrument into law, it may contribute to the formation of customary law or there may be another *portée*. As far as such legal scope is

⁷ Van Hooft, *supra* note 3, at 187.

⁸ Virally, *supra* note 3, at 352.

⁹ J. Sztucki: „Reflections on International Soft Law”, in: *Festschrift Till Lars Hjerner*, pp. 549–575, at 550–551 (1990).

¹⁰ R.R. Baxter: „International Law in 'her infinite variety'”, 29 *ICLQ* 549–556, at 557 (1980); Virally, *supra* note 3, at 354.

¹¹ Virally, *supra* note 3, at 334–336.

¹² *Id.* 344.

intended at all it is left uncertain and dependent upon future interpretation and actions by parties.

It goes without saying that it is possible that an instrument can be characterized as *droit mou*, without having or attaining a so-called *droit vert* character. Of course, an instrument can grant (non-legal) directives to states, without having a legal impact or developing into 'hard law'. Vice versa, however, *droit vert*, without having a *droit mou* character, would not be likely.

It is my impression that the term soft law has been used by various authors because parties to such instruments intend to invest them with the former (*droit mou*) or both (*droit mou* as well as *droit vert*) characteristics.¹³ This distinction is made because I intend to examine these instruments from a purely legal perspective on the basis of this very distinction. It may facilitate opening up the soft law approach.

For the time being, I will stick to the term soft law as a short indication, as it is widely seized upon, despite (or thanks to) its vagueness, to include a whole range of international instruments with the former or both of the afore-mentioned characteristics. Since the term will be subject of discussion, I will come back to the term below.

3. Narrowing down the 'grey area'

A state's will to be bound, which appears from its consent (acceptance, approval, acquiescence, implied consent) to submit to an international obligation, is the force that makes international law, and as such it is the test for deciding whether a particular rule is a rule of international law or not. The criterion to distinguish international law from non-legal rules thus is, whether a state considers, *at the time of creating an obligation*, that it is an obligation under the law, and whether parties intend it to be that way, feeling that positive action is required by law. This is the very basis of international law.¹⁴

It may sometimes be difficult to discern a clear intention on the side of states, especially since they interpret their intentions and thus international law and the borderline between law and non-law themselves. On the one hand, states maintain and emphasize a sharp distinction between the two. On the other hand, the distinction is obscured through the adoption by these very same states of instruments that are considered, according to the soft law approach (which, as already noted, does not make a sharp distinction between law and non-law) as instruments of soft law.¹⁵ Obviously, the state's intention is irrelevant or an unclear intention on the side of parties submitting to these so-called soft law instruments is taken for granted.

¹³ As discerned by Dupuy. See: R. J. D u p u y: „Droit Déclaratoire et Droit Programmatore: De la Coutume Sauvage à la 'Soft Law'", in: *L'élaboration du Droit International Public* 132 – 148, at 140 (1975).

¹⁴ See: M. A k e h u r s t: *A Modern Introduction to International Law* 4 (1987).

¹⁵ W e i l. *supra* note 1, at 415 – 417.

Of course, there has always been this 'grey area' of uncertainty whether there is actual law or not, but that is not to advocate a further blurring of the watershed. In this respect, it is submitted that, in order that international law may be able to execute its regulating function, it should be clear, certain, consistent and recognizable.¹⁶ Van Hoof quite rightly observes that the effective functioning of international law demands that the 'grey area', where these characteristics are jeopardized, be as narrowly delimited as possible. An expanding 'grey area' or an expansion of the traditional sources in order to encompass these new phenomena would devalue the concept of law as a clear and consistent regulating device.¹⁷ It would become questionable whether a certain instrument is law or not if such instruments as 'almost law', 'a bit of law' or 'hardly law' are said to have emerged. States could claim law or 'mere political commitments' at discretion and neutrality of international would be lost. Therefore, in order to reduce vagueness and strengthen normativity, one should attempt to discern the intention of the parties to be bound as a matter of law, however difficult.¹⁸

Thus, in principle, there should either be law or non-law; law is not soft. It would be a *contradictio in terminis*. Consequently, taking a legal perspective, instruments of so-called soft law should be examined in a way that is consistent with international law.

3.1. Criteria of international law

Since the state's intention is the constitutive element of international law, it is thus a question of discerning it in its manifestations.¹⁹ Article 38 of the Statute of the International Court of Justice is a well established clue: international conventions and international custom are the sources of international law, through which a state's intention manifests itself. Yet, article 38 "[...] is simply a sort of standing directive to the Court as to what it is to apply in deciding cases brought before it [...]"²⁰ Article 38 is not to be considered as an exhaustive article on manifestations of international law.²¹

In this regard Meyers and Van Hoof offer further guidance by which to narrow down the 'grey area' and to examine instruments of alleged soft law in a way

¹⁶ Van Hoof, *supra* note 3, at 27.

¹⁷ *Id.* 179.

¹⁸ M. Lachs: „The Threshold in Law-making“, in: *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte* 493 – 500, at 499 (1983); Weil: *supra* note 1, at 415 – 417.

¹⁹ Van Hoof: *supra* note 3, at 71 – 82. He discerns three meanings of sources (or levels on which the sources are to be analyzed): (1) 'source' designating the binding force of international law, (2) 'source' indicating the constitutive element for rules of international law being the criterion by which one can decide whether or not a suggested rule is indeed a rule of international law (will/consent) and (3) 'sources' representing the relevant manifestations on the basis of which the presence or absence of the constitutive element can be established (art. 38 Statute ICJ).

²⁰ Sir G. Fitzmaurice: „Some Problems Regarding the Formal Sources of International Law“, in: *Symbolae Verzijl* 153 – 176, at 173 (1958). Quoted from M. Bos: *A Methodology of International Law* 55 (1984).

²¹ Bos, *supra* note 20, at 55 – 56.

that is consistent with international law. Van Hoof offers a kind of checklist of indications of consent to be legally bound, which supplements the traditional sources. Reference can be made to a set of five manifestations in the process through which rules may become rules of international law and from which eventual consent (or dissent) can be detected. These manifestations are: (1) abstract statements (statements made in a context other than specific law-making efforts), especially declaratory resolutions; (2) *travaux préparatoires lato sensu*, i.e. manifestations specifically aimed at making rules; (3) the text itself. For example, the formulation 'have agreed' in the text of a treaty is generally much stronger than the formulation 'have adopted'. 'Should' is much weaker than 'shall'. (4) Follow-up procedures may further affect the normative status of the rule. (5) Finally, subsequent practice may have such influence.²² Thus, Van Hoof's approach to decide upon a possible legally binding character of a rule is not a snap-shot situation. To decide on legally (non)-bindingness is rather a matter of checking the whole process, as elaborated in (1) to (5), for manifestations of consent.²³ The results in the classes (1) to (5) may contribute to a legally binding (or non-binding) character of a rule. Note that the results in one class of manifestations may affect the results in another class. Again, the process-approach does not suggest a 'grey area' of uncertainty. On the contrary, the approach is taken to narrow down this 'grey area'.

Meyers offers a theoretical framework for understanding the development of international law.²⁴ He discerns three formal stages which have to be passed before a rule is a rule of international law, whether in the form of treaties or in the form of customary international law. First, a rule has to be created by states. The rule must be appropriate to define their future conduct. Secondly, the will must be formed by a sufficient number of states to actually make this rule a rule of law from the moment when a sufficient acceding number of states has been reached and the third stage has been passed. This is the psychological element in law-making, the consent to become bound as a matter of law or *opinio iuris*. Thirdly, the fact that a sufficient number of states has made known a combined consent to become bound to the rule as a matter of law, must be made known to all states for whom the rule will be in force as a rule of law. The stages as compared to practice may be artificial, but this step-by-step approach should only be applied as a tool. As to law-making in the form of treaties, the three stages quite clearly appear in the Vienna Convention on the Law of Treaties.²⁵ As to customary international law the stages are harder to discern and may coincide and overlap. It may be exemplified by a number of declarations adopted by the

²² Van Hoof: *supra* note 3, at 205 – 278.

²³ *Id.* 206 – 207.

²⁴ H. Meyers: „How is International Law Made? The Stages of Growth of International Law and the Use of Its Customary Rules“, 9 *NYIL* 3 – 26 (1978).

²⁵ Stage 1: art. 9 (adoption of the text) and art. 10 (authentication of the text). Stage 3: art. 12 (means of expressing consent to be bound) and art. 24 (entry into force). Stage 2, the formation of *opinio iuris*, is an internal matter.

General Assembly of the United Nations,²⁶ most notably the Universal Declaration of Human Rights. Although not binding as a matter of law at the time of adoption it can be said that parts of the Declaration have become binding as a matter of law through *opinio iuris* and constant rule confirming conduct by a sufficient number of states.

Both Van Hoof's as Meyers' approach may help in searching for the state's intention in international instruments, consequently to discern a possible legal character of alleged soft law instruments and to narrow down the 'grey area'. At a certain point in the process it can and it must be determined whether a particular rule has become binding as a matter of law or not.

4. Criteria of international law applied to instruments of alleged soft law

This section will apply the criteria as elaborated in section 3 to alleged soft law. First I will examine the instruments on face value, i.g. their character at the time of adoption. The sub-legal or alleged *droit mou* character as discerned in section 2 will be situated either inside or outside the realm of law (4.1). In the second place, I will deal with the possible legal effects of alleged soft law and its susceptibility to change into a rule of law or to further materialize as a rule of law, the *droit vert* character as discerned in section 2 (4.2.).

4.1. *Droit mou*, the sub-legal character

Instruments with a soft law character seem to play cat and mouse over and with the borderline between law and non-law. Whenever there is a 'hard' treaty, the substance appears to be 'soft' ('legal soft law'). Whenever there is a substantial agreement, the softness may be inferred from the form of the instrument ('non-legal soft law'). Form is a pivotal indication of the legal character of an instrument. It has to be admitted that it is sometimes quite difficult to identify the form from the substance of the instrument, especially if there are several agreements in one joint declaration or communication or in one final act of a conference, which are given different legal scope by the parties.²⁷

Virally is of the opinion "[...] que tout engagement inséré dans un traité est, par nécessité, un engagement juridique."²⁸ Even vague treaty obligations are ruled by the Vienna Convention on the Law of Treaties. If an agreement is concluded in the form of a treaty the intention is to create legal rights and duties.²⁹ It may very well be possible that these rights and duties are drafted in vague and unclear wording, resulting in unenforceable rights and duties, but that does not

²⁶ See below: section 4.2 and section 5. See also: note 54 and 61.

²⁷ Virally, *supra* note 3, at 339 – 340.

²⁸ *Id.* 352. But see: Schachter, *supra* note 3, at 298.

²⁹ See also: Van Hoof, *supra*, at 248 and n.1014, citing W. Wengler: „Rechtsvertrag, Konsensus und Absichtserklärung im Völkerrecht“, 31 *Juristenzeitung* 193 – 197, at 194 (1976).

prejudice the legal character of the agreement. The rule can be more firmly established and become more enforceable through further interpretation or a follow-up procedure. In this respect, recourse can be had to articles 31 and 32 of the Vienna Convention on the Law of Treaties, dealing with interpretation. Special attention should be paid to article 31(3) sub b: subsequent practice of states may be taken into account to determine the substance of the treaty. Article 31(3) sub b of the Vienna Convention thus refers to future conduct. A party to a treaty, through its actions, makes its own obligation clearer, more enforceable.³⁰ This effect may also, reciprocally, occur, if a party demands or even advises another party to act in a certain manner. Apparently, it would act the same way.³¹

Joint declarations, communications, resolutions of international organizations and final acts of conferences are generally regarded as political or normative commitments. This does not prejudice the possibility that states may intend the subject-matter to be subject of an intention to be legally bound. There may "[...] be elements of 'agreement' in the technical sense, that is one governed by international law [...]"³². Such intention then has to be inferred from the wording and circumstances.³³

In short, the form of the instrument is a very strong, and in the case of treaties a decisive indication of an intention of parties to create a legal obligation. Soft arrangements in a legal form are simply law. In these cases, therefore, the term soft law is not appropriate.

If states intentionally leave the form of a given instrument vague or state that it is not legal, its non-binding nature as a matter of law is obvious. Apparently, states, at the time of adoption of that type of instrument, did not intend to place themselves on the legal level. A legal binding character cannot be inferred from it. Giving these non-legal phenomena the term 'law', however 'soft', carries the danger that law devalues. Soft law is not an appropriate term for soft arrangements in a non-legal form. Of course, an intention to be legally bound may come into being later. This will be dealt with in section 4.2 below.

4.2. *Droit vert*: expressing *lex ferenda*

Instruments of alleged soft law do not necessarily lack any legal significance. The following section will deal with the place of soft law in the law-making process, *de lege ferenda*.

Birnie cites the negotiation-process at the Third United Nations Conference on the Law of the Sea resulting in the 1982 United Nations Convention on the Law of the Sea (UNCLOS III) as a perfect example of developments outside the

³⁰ On interpretation see: Gruchalla-Wesierski, *supra* note 3, at 70 – 79.

³¹ *Id.* 74 – 75.

³² S. Rosenne: *Practice and Methods of International Law* 116 (1984).

³³ See e.g.: Ihlen: „Declaration“, in: *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, 1933 P.C.I.J. Rep. (Ser. A/B, No. 53); see also: *Aegean Sea Continental Shelf Case*, Judgment, 1978 I.C.J. Rep. 3, at 40 – 44.

realm law having an effect in the realm of law. Even before the conclusion of the UNCLOS III, states justified otherwise unlawful acts with the provisional text of the Convention. In this respect Birnie observes that the burden of 'dis-proof' shifted on to states rejecting the text, which again encourages conformity.³⁴ As an example the delimitation of the continental shelf may be mentioned. States began to act in conformity with the text of the Convention before its conclusion. This demanded the recognition, or, at least, the non-challenge, of this action by other states.³⁵ Consequently, these actions on the basis of the provisional text of the Convention were reciprocally endorsed. It is not possible to oppose another party's conduct which is comparable to one's own.³⁶ Furthermore, a state cannot accept a principle in the Convention – even before its conclusion – and then act in a way contrary to it.³⁷

An example in the field of human rights is the acceptance, notwithstanding the prohibition of article 2(7) of the Charter of the United Nations to intervene in the internal matters of states, of human rights as embodied in the Universal Declaration of Human Rights as a matter of international concern. Concern of states and the United Nations Organization with the treatment of individuals and resulting international pressure were more and more accepted by states. The argument that the way in which states treat their nationals is a domestic affair and the argument that pressure exerted by states or the United Nations Organization with respect to this treatment is an illegal interference in domestic affairs can no longer be upheld.³⁸

In short, an instrument that is not legally binding may through subsequent state conduct become a rule of international law. International law cannot ignore whatever occurs outside its ambit.³⁹ If this were not so law would be static and the possibility, for example, of the development of custom into customary law would be denied.

The following principles may apply in a given case and be submitted as an argument that a legal bond has crystallized: first, 'non-legal soft law' may have become a rule of law, and second, 'legal soft law' may be more narrowly interpreted and become more enforceable.

4.2.1. *Internationalization of domestic matters*

In the first place, from the fact that a certain subject-matter has been the object of international negotiation, it follows that the argument that the 'subject-matter is in my exclusive domestic jurisdiction' can no longer be upheld. If this

³⁴ Birnie, *supra* note 2, at 182 – 183.

³⁵ Schachter, *supra* note 2, at 301. Tammes describes this process as participation in a practice simultaneously amounting to consent by conformational conduct and the setting of precedent. Tammes, *supra* note 3 at 194. Cf. Meyers, *supra* note 24.

³⁶ Schachter, *supra* note 3, at 301; see also: Tammes, *supra* note 3, at 194.

³⁷ Seidl-Hohenveldern, *supra* note 2, at 196.

³⁸ See below: section 4.2.1.

³⁹ See also: Virally, *supra* note 3, at 345 – 348.

were so then why would one have brought it up for international negotiation in the first place? The right to invoke the domestic jurisdiction exception, or rather, the legal argument *fin de non-recevoir*,⁴⁰ has been lost through negotiation and the eventual conclusion of an international instrument. The interference can, on that account, no longer be considered as illegal. This argumentation stems precisely from the tautologous character of the domestic jurisdiction exception: matters within the competence of a state under international law are said to be within the exclusive domestic jurisdiction of states. From this it follows that as soon as a matter is of international concern, it can no longer be *essentially* within the exclusive domain of the state.⁴¹ In this respect, Schachter observes that other states may make representations in order to check on the execution of the commitment, however soft it may be.⁴²

4.2.2. *Good faith*

Some qualify good faith as a legal concept, applying to legal commitments and consequently to alleged soft law in a legal form.⁴³ Bothe contends that basing respect for non-legal obligations on a legal concept would not seem appropriate.⁴⁴ On the other hand, Virally suggests that as to both political as legal commitments good faith seems to fulfill the same function.⁴⁵ As to alleged soft law, the freedom of action of parties is large and the expectation of compliance is less than as to law. Nevertheless, there is some, however modest, justified expectation that should not be thwarted. It could be pleaded that it is against good faith if a soft agreement has been concluded and consequently one of the parties would (deliberately) act in a way contrary to it.

If good faith were merely a legal concept then this does not mean that matters in the realm of non-law could be ignored. If good faith were a non-legal concept, then still, through this principle non-legal rules may actually be complied with and consequently may enhance the potential to become a rule of law. As such, good faith is a basic principle in the development of international law, serving as a bridge between law and non-law.⁴⁶

4.2.3. *Estoppel*

Complying with a non-legal or vague rule can result in a legal obligation through estoppel.⁴⁷ The *Temple of Preah Vihear* Case is the principal case on

⁴⁰ *Id.* 347 and 356.

⁴¹ I. Brownlie: „Principles of Public International Law” 291 (1990). *Interpretation of Peace Treaties*, Advisory Opinion, 1950 *I.C.J. Rep.* 65, at 70 – 71; see also: *Nationality Decrees Issued in Tunis and Morocco*, 1923 *P.C.I.J. Rep.* (Ser. B No. 4, 24).

⁴² Schachter, *supra* note 3, at 304.

⁴³ Gruchalla-Wesierski, *supra* note 3, at 62.

⁴⁴ Bothe: „Legal Norms and Non-legal Norms: A Meaningful Distinction in International Relations?”, 11 *NYIL* 65 – 95, at 95 (1980).

⁴⁵ Virally, *supra* note 3, at 336 – 338.

⁴⁶ *Id.* 345.

⁴⁷ Schachter, *supra* note 3, at 301.

estoppel. Thailand had tacitly acquiesced in French sovereignty over a disputed area.⁴⁸ The Thai government was therefore precluded by conduct from claiming that the area was contested. Thus, the following two conditions must be met. There must be conduct inducing another state to take a certain position and prejudice to another state must have arisen, because it has reasonably changed its position.⁴⁹ Estoppel may go as far as holding a state to a declaration or a course of conduct which is in contradiction with its intention at the time of making the declaration or taking the course of conduct.⁵⁰ A legal commitment comes into being through the conduct of a state inducing another state to act in such a way as to suffer unjustified wrong if it were decided that the state in question was not kept to the obligation which the other state could reasonably assume to exist.⁵¹ In such cases, the legal effect, therefore, does not directly or explicitly come from the intention of parties.

4.2.4. Equity and equitable principles

Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task it is by definition to administer justice is bound to apply it. In the course of history of legal systems the term 'equity' has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirement of justice.⁵²

Equity and equitable principles may be evidenced by the existence and development of mere political and normative, not legal, instruments.⁵³ The International Court of Justice or an international arbitrator, in deciding a case, may take these principles into account, whenever confronted with soft norms that leave a wide margin of appreciation. Then equity may fill the gap.

⁴⁸ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, 1962 I.C.J. Rep. 6, at 32.

⁴⁹ See also: *North Sea Continental Shelf Cases, Judgment*, 1969 I.C.J. Rep. 3, at 25 – 26. And *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, 1984 I.C.J. Rep. 392, at 411 – 415.

⁵⁰ *Brownlie*, *supra* note 41, at 161 and 640.

⁵¹ See also: *Virally*, *supra* note 3, at 343.

⁵² *Continental Shelf Case (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, 1982 I.C.J. Rep. 18, at 60. Cited from *Rosenné*, *supra* note 32, at 71.

⁵³ *Birnie*, *supra* note 3, at 182; see also: *Icelandic Fisheries Jurisdiction Case (UK v. Iceland)* 1974 I.C.J. Rep. 3. The International Court of Justice "[...] was aware of the UNCLOS III negotiations and would not have wished to give a judgement that was out of tune with the developments there." *Chinkin*, *supra* note 3, at 864.

5. Inherent contradictions

As I have stated in section 3 a line of distinction between law and non-law is and should be present. States maintain and emphasize it. On the other hand, though, some states claim that some rules of so-called soft law have acquired legal force, have become rules of law.⁵⁴ Apparently there is disagreement on the character of these rules. The claims could imply that so-called soft law has either changed into law or that the very sources of international law have changed: a change in the criteria by which to distinguish law from non-law and by which to qualify soft law itself. Accepting this position carries the danger of a continuous expansion of the grey area. As pointed out above, the task of international law is exactly to narrow down this grey area.

The confusion and contradiction especially comes to the fore as regards reservations to traditionally non-legally binding instruments. A reservation is usually made to a treaty in order to avoid becoming bound as a matter of law to the provision for which the reservation is made. Non-legal commitments do not need to be reserved, since they are not legally binding anyway. Still, they are made. As to such reservations made to the Charter of Economic Rights and Duties of States⁵⁵ Dupuy remarks: "It is evident that the formulation of reservations tends to demonstrate the obligatory nature of the resolution in the eyes of the majority of states, the esculatory clauses being meaningless otherwise."⁵⁶

The foregoing considerations could, in general, give rise to two seemingly opposite conclusions. First, since states deliberately choose a certain instrument to avoid a legal commitment or at least leave the value vague, it should be presumed that it is not legal. Insisting on the borderline between law and non-law, they, in these cases, do not intend to create obligations as a matter of law. Secondly, on the other hand, if and since they obscure the borderline between law and non-law by exactly adopting these instruments with a vague intention as to its legal purport, they – since the question of what a rule of international law is, remains a question of state practice – also obscure the issue of the status of soft law instruments themselves. This conclusion does not seem satisfactory.

Therefore, it has been suggested that the sources of international law "[...] may have been affected by the same developments which partly also have

⁵⁴ See e.g.: UN General Assembly Res. 1803 (XVII) (1962); Permanent Sovereignty over Natural Resources; see also: Charter of Economic Rights and Duties of States (UN General Assembly Res. 3281 (XXIX) (1974).

⁵⁵ E.g. the reservations made by the United States, Germany, United Kingdom *et.al.* to the Charter of Economic Rights and Duties of States. See: 28 *Yearbook of the United Nations* 394 – 401 (1974).

⁵⁶ Dupuy, *supra* note 3, at 253. Reservations to soft obligations show concern by states that it will be claimed that the obligations represent international law. In this way they appear to try to avoid the momentum of the development of law. One could wonder, however, if these kinds of reservations would rather give the development of law added momentum and even enhance the legal value of these instruments.

prompted the emergence of new phenomena belonging to the soft-law category".⁵⁷ This is the concept of soft law in so far as it purports to change traditional international law while not resolving conflicts over the desirability of such change. By adopting instruments of soft law this conflict is put off for the time being.⁵⁸ Here we are in danger of becoming entangled in contradictions. I could avoid it, by addressing the instruments of alleged soft law as I did. I stuck to the existing traditional framework in sections 3 and 4 and examined whether instruments of alleged soft law are law at all, whether there are any international legal aspects to it or whether they could give rise to international law. In this way I tried to meet some important requirements of international law: in order that it may perform its functions as a regulating device for states international law should be clear, certain, consistent and recognizable.

But, if international law is to perform these functions a substantial requirement must also be met: sufficient attention must be given to the link between law and society. Van Hoof has emphasized that if international law becomes detached from international society, it could no longer fulfill its very function as a regulating instrument.⁵⁹

In this respect it must be noted that many developing countries regard international law as exploitative and in the interests of western states. Can recently emerged states be bound by law in which they did not participate in its creation? The basic requirement of the existence of an international obligation, a state's will or consent, may be cast into doubt, since one might argue that newly emerged states did not consent, but were necessitated.⁶⁰ This in mind, it is not surprising that some instruments in the international arena purport to seek change. This change may go as far as to affect the purity of the 'traditional' sources of international law. It has especially come to the fore in the demands by the developing countries for a New International Economic Order as submitted in resolutions by the General Assembly of the United Nations.⁶¹

To open up the deadlock, Dupuy has suggested to accord more weight to the requirement of *opinio iuris* to decide whether a rule of international law has emerged.⁶² Of course, if attempts are made to change the law, state practice will not be appropriate to evidence the existence of an inchoate rule, because of the very fact that there is no rule to be evidenced. At least, an inchoate rule cannot be upheld in the face of third parties not supporting such change. Rather, change occurs in the mind, thus giving more weight to *opinio iuris*. Therefore, primacy of consciousness over fact is submitted. States not supporting such change would

⁵⁷ Van Hoof, *supra* note 3, at 190.

⁵⁸ Chinkin, *supra* note 2, at 855.

⁵⁹ See: Van Hoof, *supra* note 3, at 281 – 282.

⁶⁰ *Id.* 119. See also: F.V. Garcia Amador: „Current Attempts to Revise International Law A Comparative Analysis”, 77 *AJIL* 286 – 295, at 288 – 291 (1983).

⁶¹ See: *supra* note 55 and 56.

⁶² Dupuy, *supra* note 3, at 249 – 251.

not, of course, support such a view and accord more weight to state practice.⁶³ In this regard, it may be questionable whether soft law instruments that 'reconcile' but not settle clashes of interest, can enhance the development of international law. On the other hand, as may be illustrated with the Conference on Security and Cooperation in Europe, it is possible that while shelving problems, future events may make reconciliation possible or even irrelevant.

There seems to be a fundamental dialectic between legality, the formal requirements on how law is made, on the one hand, and legitimacy, the substantial link between law and society, on the other. It comes to the fore at the General Assembly, where "[...] new or future norms are submitted as legitimate on the basis of democratic and egalitarian imperatives which nobody would dream of contesting [...]"⁶⁴ The norms are accepted, at least not contested, before the eyes of the world. But, since many of these norms are not acted upon, the acceptance of the norms at the General Assembly does not, apparently, mean that these norms have become rules of international law. Dupuy quite rightly observes that this situation may lead to two conflicting legalities.⁶⁵ Disagreement and uncertainty about international law may persist. These problems cannot be handled with 'traditional' international law.

The soft law approach has indicated this dialectic between legality and legitimacy. Soft law instruments may be regarded as devices that bridge the gap between legality and legitimacy. The instruments soften conflicts of interest, postpone a final settlement over these conflicts but include the possibility (and desirability) to reach such settlement and bridge the gap.

6. Conclusion

In the first place, it has been shown that, in order that international law may perform its function as a regulating mechanism, it is necessary to make a clear distinction between law and non-law. International law should not take uncertainty for granted, at least, it should not start with scholars of international law. Rather, international law should reduce uncertainty and examine when the threshold of law has been crossed.⁶⁶ In this respect, the soft law approach conflicts with international law.

In the second place, if one addresses the phenomena as proposed, then the phenomena may be classified as being inside or outside the ambit of international law. In this regard, Virally⁶⁷ is of the opinion that it would be better to reserve the term soft law for rules that are, from a substantial point of view, imprecise and not really compelling (legal soft law; for example vague stipulations in a treaty), since sub-legal obligations (non-legal soft law; for example resolutions,

⁶³ Van Hoof, *supra* note 3, at 114.

⁶⁴ Dupuy, *supra* note 3, at 251 – 252 and 254.

⁶⁵ *Id.* 254 – 255.

⁶⁶ Lachs, *supra* note 18, at 498.

⁶⁷ Virally, *supra* note 3, at 336.

Helsinki Final Act, Stockholm Declaration on the Human Environment) are neither soft law, nor hard law, they are simply not law at all and thus should not be classified under that category. In my view the term soft law is not appropriate to alleged legal soft law either, since this kind of ruling is not soft, semi-or non-law, it is simply law.⁶⁸ This leads to the conclusion that, from a legal point of view, the term soft law is as such nonsense, because, these instruments can indeed be classified. Other appropriate terms that include the codes of conduct, gentlemen's agreements and resolutions regulating states' behaviour, may be suggested: soft settlement⁶⁹ or soft norms. Referring to *droit mou* of section 2, they do not carry the connotation of law.

Instruments that have no legal binding character may nevertheless fulfill a function as international law-in-the-making. Some are on the verge of becoming law or are appropriate or susceptible to become law. This was provisionally called *droit vert*. It connotes the same as the well-known term *lex ferenda*. Although not properly *lex*, *lex ferenda* is a more appropriate term to address these phenomena, because the term, expressing that law is apt to take shape, has been widely accepted for so long.

This criticism of the term soft law does not imply that uncertainty and vagueness in international law are non-existent. Difficulties persist. The soft law approach has indicated contradictions, inherent to change in international law, especially coming to the fore in the demands made in the General Assembly of the United Nations for change of the international (economic) order. These contradictions relate to the tension between legality and legitimacy and as such relate to two mainstays of international law as a credible regulating device: clarity, certainty and consistency, on the one hand, and a sufficient link between law and society, on the other. Exactly because of this tension resort is had to instruments from which no direct legal obligations can be deduced.⁷⁰ In such cases it proves especially difficult to maintain a sharp borderline between law and non-law; if instruments of alleged soft law purport to change 'traditional' criteria by which to distinguish law from non-law, law can no longer be distinguished from non-law.

Yet, new rules can only be legitimized through the consent of states,⁷¹ which is still the basis of international law. No superior authority capable of adopting new rules or legitimizing new situations exists. States decide what the law is, whether it should be changed and even whether more weight should be accorded to the requirement of *opinio iuris* to decide whether a rule of law exists. They cannot be forced against their will to accept a norm as being a legal one.⁷²

⁶⁸ See also: W e i l, *supra* note 1, at 414 – 415.

⁶⁹ B i r n i e, *supra* note 3, at 183.

⁷⁰ D u p u y, *supra* note 3, at 247.

⁷¹ A. C a s s e s e: *International Law in a Divided World* 27 (1986).

⁷² W e i l, *supra* note 1, at 427, 434 and 441. He raises objections against approaches like the soft law approach, submitting that these imply that states are forced to accept an instrument as an instrument of law.

In this respect, one should be cautious not to sanction possible vagueness on the side of states by adopting a soft law approach. States might use such uncertainty for their own interests, claiming law or mere politics as they see fit. Neutrality and credibility of international law would wane. Therefore, consent of states should always be detected as the basis to determine the existence of international law. Yet, lack of legitimacy should continuously be pointed out, but this should not go so far as to blur the distinction between law and non-law in order to smuggle vague, however legitimate, rules into the realm of law.

La responsabilité en dehors de l'illicite en droit international économique

PAVEL ŠTURMA

Introduction

Le droit international est un système ouvert qui s'étend toujours à des domaines nouveaux tout en se précisant et en s'approfondissant davantage.¹ En droit international contemporain il subsiste toujours, en dépit des progrès considérables en matière de codification, des zones d'ombre où il n'est pas évident de savoir si certains comportements sont licites ou non, si des comportements sont couverts par le droit ou gardent un caractère factuel ou extra-juridique (la liberté des actions, *freedom of action*). La Commission du droit international (CDI) a pris à sa charge (à la demande de l'Assemblée générale des Nations Unies) la tâche de combler une de ces zones d'ombre lorsqu'elle a inscrit à son programme (en 1974) et examiné depuis 1978 le thème de "La responsabilité internationale pour les conséquences préjudiciables découlant d'activités qui ne sont pas interdites par le droit international".²

Les problèmes énormes auxquels doit faire face le Rapporteur spécial Julio Barboza qui a remplacé son prédécesseur R.Q. Quentin-Baxter, décédé en 1984, résultent non seulement du fait que l'on est davantage en présence d'un développement progressif du droit international que de la codification (*stricto sensu*) de normes coutumières préexistantes.³ Cette tâche est d'autant plus compliquée que la Commission s'est décidée à élaborer un projet d'articles général (type "convention-cadre") et donc susceptible de couvrir des domaines différents d'activités licites ou bien non interdites par le droit international, qui néanmoins causent ou peuvent causer des dommages factuels et à encourager l'établissement ultérieur de régimes conventionnels plus concrets.⁴

¹ Voir D. C a r r e a u : *Droit international* 34 – 35 (1988) , qui désigne le droit international comme „un système juridique imparfait et incomplet”. Quant aux conséquences de ce caractère du droit international (par. ex. les mesures de rétorsion), cf. aussi E. Z o l l e r : *Peacetime Unilateral Remedies: An Analysis of Countermeasures* 6 (1984).

² Cf. II-1 *YILC* (1980) 247 – 266; (1981) 103 – 123; (1982) 51 – 64; (1983) 201 – 225; (1984) 155 – 173 (pour les rapports de Quentin-Baxter) et II-1 *YILC* (1985) 100 – 101; (1986) 149 – 166; (1987) 49 – 58; A/CN.4/413 (1988); A/CN.4/423 (1989); A/CN.4/428 (1990); A/CN.4/437 (1991) (pour les rapports de Barboza).

³ Cf. P.M. D u p u y : „Le fait générateur de la responsabilité internationale des Etats”, 188 *RCADI* 76 (1984/V); J. B a r b o z a : La responsabilité „causale” à la Commission du Droit International”, 34 *AFDI* 515 (1988).

⁴ Cf. II-1 *ACDI* 157, § 37 (1986).

Bien que conformément la idée originale, exprimée par le premier Rapporteur spécial, "les obligations visées par le sujet ... ne se bornent à un domaine particulier de droit positif",⁵ le projet d'articles actuel est pratiquement limité aux seuls problèmes de l'environnement. Il semble que ce soit surtout pour une raison d'opportunité, à savoir simplifier et donc accélérer les travaux de la Commission. Mais des raisons liées à l'économie du travail de la CDI ne doivent pas empêcher la doctrine du droit international de se poser la question de savoir s'il existe aussi une responsabilité (dite "causale" ou "objective" – *international liability*) pour les dommages découlant d'activités économiques qui ne sont pas interdites par le droit international. En répondant par l'affirmative, quels seraient alors les traits spécifiques de cette responsabilité en droit international économique?

La question est autant plus légitime que les travaux sur le projet d'articles de la CDI sont d'ores et déjà bien avancés, certains problèmes conceptuels restant néanmoins posés. Ceci provoque la réaction d'une partie des membres de la CDI et de la doctrine qui remettent parfois en question la conception même dudit projet.⁶ Etant donné que la littérature concernant le projet de la CDI⁷ ainsi que la responsabilité internationale pour les dommages à l'environnement est relativement abondante,⁸ cette étude sera consacrée aux problèmes qui n'étaient traités que marginalement jusqu'à présent et qui se trouvent à la limite du droit international public et du droit international économique.

1. Les problèmes généraux de la responsabilité en droit international économique

1.1. La licéité et l'illicéité aléatoire en droit international économique

La question de savoir si certaines activités sont licites ou illicites s'inscrit dans la nature même du droit international économique qui englobe non seulement

⁵ II-1 ACIDI 155, § 134 (1980).

⁶ Cf. par ex. les membres de la CDI P. Reuter (I ACIDI/1980/239 – 240, §§ 24 – 27); Sir Francis Vallat (ibid., 236, §§ 36 – 38); N.A. Uchakov (ibid., 1981, 211, §§ 28 – 30; (1982) 248, § 47; (1984) 210, § 7). Cf. aussi I. Brownlie: *System of the Law of Nations. State Responsibility, Part I* 49 – 50 (1983); A.E. Boyle: „State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?“, 39 *ILCQ* 22 – 24 (1990); J. Combacau: „Aspects nouveaux de la responsabilité internationale: deux approches contradictoires?“ 8 *RIDC* (No spécial: Journées de la Société de législation comparée) 192 – 194 (1986).

⁷ Symposium on State Responsibility and Liability for Injurious Consequences arising out of Acts not Prohibited by International Law, 16 *NYIL*, (1985); D.B. Magraw: „Transboundary Harm: The ILC's Study of „International Liability“, 80 *AJIL* 305 – 330 (1986); K. Zemanek: „La responsabilité des Etats pour faits internationalement illicites, ainsi que pour faits internationalement licites“, in: „Responsabilité internationale“ (1987), et les ouvrages y cités.

⁸ Voir P.M. Dupuy: *La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle* (1976); P. Šturma: „A propos des problèmes théoriques de la responsabilité internationale pour les dommages à l'environnement“, 23 *Studie z mezinárodního práva*, 69 – 94 (1990), et les ouvrages y cités.

des normes du droit international "dur" (*hard law*) parfaitement obligatoires, mais aussi des règles d'un caractère juridique différent, qui ne sont pas strictement obligatoires (*soft law*). Cette dernière notion est utilisée dans deux acceptions différentes. Selon la première, le contenu de la norme (la règle du comportement) n'est pas assez précis pour qu'elle puisse réglementer les relations entre les sujets du droit. Selon la seconde, c'est la forme de la norme qui est imparfaite. En conséquence, ces normes ne sont pas susceptibles de faire naître la responsabilité des Etats.

Or, quant au fondement de la responsabilité en droit international général, le fait illicite de l'Etat suppose à la fois le comportement attribuable à cet Etat et la violation d'une obligation internationale.⁹ Généralement, l'attribution d'un comportement à l'Etat ne soulève guère de difficultés. Bien que les principaux opérateurs économiques soient des personnes morales privées, le droit international économique est un "droit cadre",¹⁰ qui réglemente surtout les conditions générales des échanges internationaux: il s'agit directement ou indirectement des actes de puissance publique, c'est-à-dire de l'organe étatique (*largo sensu*) qui peuvent être attribués, d'après le droit international, à l'Etat.¹¹

En ce qui concerne l'obligation violée, celle-ci peut être d'origine coutumière, conventionnelle ou découlant d'un acte unilatéral.¹² Il est douteux, cependant, que l'on puisse raisonnablement élargir la portée des obligations internationales – pour les fins de la responsabilité des Etats – aux engagements non contraignants (quel que soit leur nom) ou encore aux contrats mixtes entre des Etats et des personnes privées (dits contrats d'Etat), parce qu'ils ne relèvent pas du droit international.¹³

Un contrat d'Etat peut être réglementé par plusieurs ordres juridiques, surtout nationaux, ou même internationaux, mais il s'agit en définitive d'un choix du droit dans le contrat, le droit international n'étant pas automatiquement applicable. D'ailleurs, même les sentences arbitrales fondées sur le concept de contrat "internationalisé" et certains auteurs, qui en sont partisans, ne vont pas jusqu'à confondre le contrat d'Etat avec le traité international, même s'ils en assimilent les effets.¹⁴

⁹ Cf. l'art. 3 du projet de la responsabilité des Etats; II ACIDI 182 (1973).

¹⁰ Cf. D. C a r r e a u et al.: *Droit international économique*, 3^e éd., 46 (1990).

¹¹ Cf. les articles 5 à 10 du projet de la CDI, notamment l'art. 5 et l'art. 6; II ACIDI 194 – 201 (1973).

¹² II-2 ACIDI 74 (1976).

¹³ Cf. D.W. B o w e t t: "State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach", 59 *BYIL* 54 (1988): "In fact, however, the claimed analogy is no analogy at all. The investment contract between a State and a private entity not only is not a treaty but cannot even be regarded as analogous to a treaty". Cf. aussi O. S c h a c h t e r: "General Course on Public International Law", 178 *RCADI* 309 (1982-V): "... a breach of a contract by a State in itself is not a violation of international law".

¹⁴ Voir la sentence R.J. D u p u y dans l'affaire *Texaco-Calasiatic c/ Gouvernement Libyen*, Sentence arbitrale du 19 janvier 1977, in: 1977 *JDI* 356, n. 269: "Il ne semble donc pas que l'on puisse établir de distinction, à cet égard, entre le traité international et le contrat interna-

Cela ne veut pas dire que les instruments non-contraignants (certaines résolutions de l'ONU etc.), ou les contrats d'Etat soient nécessairement dépourvus de toute valeur juridique en droit international. Mais ces instruments, bien qu'ils soient valables, ne représentent pas des obligations juridiquement parfaites du droit international, dont la violation entraîne toutes les conséquences de la responsabilité. C'est pourquoi les Etats choisissent d'autres solutions que la responsabilité pour faits illicites dans leurs relations internationales économiques.

1.2. L'activité licite comme fait générateur de la responsabilité en droit international économique

Bien que la responsabilité des Etats soit réservée pour les activités illicites qui en constituent le fait générateur, il reste, néanmoins, une large catégorie d'activités licites soit non interdites par le droit international, soit éventuellement dont l'illicéité est incertaine et contestable. Il est évident que le concept d'activité licite (non-interdite) est à la fois trop large et insuffisant pour être le seul fait générateur de la responsabilité internationale pour les conséquences préjudiciables d'activités qui ne sont pas interdites par le droit international, dite aussi la responsabilité causale ou "strict liability". Ces derniers termes reflètent, en effet, la notion qui, en théorie, est à la base du projet de la CDI.¹⁵

La responsabilité "causale" est, cependant, impossible sans trois éléments: (1) l'activité licite, (2) le dommage et (3) le rapport causal entre (1) et (2). En conséquence, l'activité licite n'est un fait générateur de la responsabilité qu'en combinaison avec les autres (pour le problème du dommage voir *sub* 1.3.). C'est la première limite de la portée de ce concept, qui reste, toutefois, encore trop vague. La seconde limite consiste dans les définitions (plus ou moins précises) des activités auxquelles s'appliquent les conséquences de la responsabilité "causale", prévues par les régimes conventionnels spéciaux.

Ces activités économiques sont très diverses quant au lieu (*ratione loci*), aux personnes lésées (*ratione personae*) et, bien sûr, aux objets (*ratione materiae*). Trois domaines typiques de ces activités seront examinés plus tard (voir *sub* 2). Si l'on ne peut pas définir *a priori* l'activité économique non interdite par le droit international qui donne lieu à la responsabilité pour ses conséquences préjudiciables, il est, en revanche, tout à fait concevable de généraliser les conséquences juridiques desdites activités, dans les domaines choisis, ou, autrement dit, déterminer les caractéristiques de la responsabilité "causale" en droit international économique.

Il résulte de la nature même du fait générateur (une activité licite)¹⁶ que certaines caractéristiques se rapprochent de celles de la "responsabilité inter-

tionalisée". Cf. aussi le commentaire critique de B. Stern: „Trois arbitrages, un même problème, trois solutions", *Revue de l'arbitrage*, 17 – 18 (1980); A.A. Fatouros: „International Law and the International Contract", 74 *AJIL* 136 (1980).

¹⁵ Cf. par. ex. J. Barboza: op. cit., 516, 519 et passim.

¹⁶ Avec la réserve qu'il s'agit d'un fait générateur circonstanciel et pas indépendant qui repose sur le critère aléatoire et incertain de la licéité. Cf. P.M. Dupuy: op. cit. 3, 61 – 77.

nationale pour les conséquences préjudiciables découlant d'activités qui ne sont pas interdites par le droit international" selon le projet de la CDI. Trois caractéristiques au moins de la responsabilité "causale", assez générales et donc valables pour le domaine de l'environnement (voir le projet de la CDI), ainsi que pour le droit international économique, et résultant de la nature licite (ou non interdite) des activités en question, peuvent être dégagées:

(A) Il s'agit des *obligations primaires*. Or, sans un acte illicite, on ne peut pas parler de règles "secondaires" prévoyant les conséquences juridiques de la responsabilité des Etats. De ce point de vue la différence entre les obligations "primaires" de compensation et celles de prévention n'est pas essentielle, parce que c'est seulement après leur violation que la responsabilité de l'Etat pour fait illicite peut être mise en jeu.

Cette qualification est d'importance primordiale. Vu la flexibilité du droit international économique, la conséquence juridique prévue par les normes primaires respectives ne doit pas être forcément celle de la compensation classique, mais les autres formes de rétablissement de l'équilibre des intérêts sont aussi bien possibles. De même, l'obligation "primaire" ne signifie pas automatiquement une obligation conventionnelle. Bien que les obligations coutumières bien établies et incontestables soient assez rares en droit international économique, on ne peut pas les exclure *a priori*.¹⁷

(B) Ces obligations "primaires" permettent la *poursuite des activités dommageables moyennant paiement de l'indemnité correspondante*. Il s'agit là d'activités qui ne sont pas interdites par le droit international et la responsabilité "causale" ne peut pas prévoir la cessation d'un acte illicite qui est, en revanche, une obligation liée à la responsabilité des Etats pour fait illicite. La possibilité donnée à l'Etat de "racheter" la poursuite d'une activité, qui est importante pour lui, évoque ainsi le *résultat équivalent* existant souvent pour les *obligations de résultat*.¹⁸ Dans les deux cas la responsabilité de l'Etat pour son fait internationalement illicite semble donc résulter d'un manquement à son obligation alternative.

Mais cette distinction, introduite par le Rapporteur spécial (à l'époque) de la CDI Roberto Ago, est-elle correcte et pertinente en l'espèce? D'après l'analyse théorique faite par Jean Combacau et Jean Salmon, la situation semble être plus complexe.¹⁹ J. Salmon distingue trois cas de figure possibles là où le rapport de la Commission parle des obligations de résultat qui donnent à l'Etat la possibilité de remédier *ex post facto* aux effets d'un comportement initial ou de s'acquitter de son obligation par un résultat de rechange. Il s'agit des obligations *simples*, *alternatives* et *conjonctives*.²⁰

¹⁷ Cf. S. Z a m o r a : „Is There Customary International Economic Law?", 32 *GYIL* 9 – 42 (1989).

¹⁸ Cf. II-2 ACIDI, 20 (1977).

¹⁹ Voir J. C o m b a c a u : „Obligations de résultat et obligations de comportement. Quelques questions et pas de réponse", in: „Mélanges offerts à P. Reuter", 181 – 204 (1981); J. S a l m o n : „Le fait étatique complexe: une notion contestable", 28 *AFDI* 709 – 738 (1982).

²⁰ Voir J. S a l m o n : op. cit., 19 : 728 – 732.

Par exemple le cas d'expropriation licite d'un étranger (qui retiendra spécialement notre attention dans cette étude) n'a pour conséquence qu'une obligation *simple* de lui verser une indemnité adéquate.²¹ En effet, s'il n'existe pas une obligation de ne pas exproprier en droit international général, on ne peut pas parler d'une obligation *alternative*.

La situation visée par le projet de la CDI sur la responsabilité "causale" caractérisée par la double obligation: celle de prévention et celle de compensation est bien différente. En droit international économique l'aspect de prévention n'est pas toujours pertinent pour qu'on puisse le qualifier de caractéristique de la responsabilité "causale". Or, "il convient d'analyser chaque fois les dispositions conventionnelles ou coutumières et déterminer si l'indemnisation est prévue ou non comme conséquence de la violation d'une obligation primitive".²² Bien entendu, le but de cette étude est d'analyser l'hypothèse de la compensation des conséquences des activités licites prévue par l'obligation "primaire". Cela n'exclut pas la possibilité d'une structure complexe de ces obligations (simple ou alternative). En revanche, la possibilité de remédier *ex post* au manquement initial à l'obligation de type compensatoire en droit international économique l'assimile aux obligations de résultat.

Le parallèle tracé entre notre sujet et le projet de la CDI d'une part, et les obligations de résultat (en général) de l'autre, n'est pas dû au seul fait du hasard, car il découle toujours de la formulation souple d'une obligation "primaire".

(C) La responsabilité "causale" vise la *compensation* du dommage, ainsi que la *distribution équitable des coûts* entre l'Etat de l'activité et sa victime. Cette caractéristique n'est pas seulement la conséquence logique du caractère licite des activités et des deux caractéristiques précitées. Elle reflète également la généralisation de la pratique des Etats (aussi ambivalente qu'elle soit), d'un côté, et certaines idées avancées par les tenants du concept du Nouvel Ordre Economique International, de Vantre.²³

Cette institution juridique est bien différente de la responsabilité des Etats pour faits illicites, dont le contenu est la *restitutio in integrum*, c'est-à-dire l'obligation d'"effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé, si ledit acte n'avait pas été commis".²⁴ Cette différence a, cependant, deux aspects.

En ce qui concerne les formes de la responsabilité "causale", il faut dire – malgré certaines hésitations du Rapporteur spécial dans le cadre du projet de la

²¹ Cf. *ibid.*, p. 730 avec l'exemple cité de l'art. 21 § 2 de la Convention américaine relative aux droits de l'homme.

²² J. S a l m o n: *op. cit.* 19), 731.

²³ Voir par ex. les principes de l'équité et de la solidarité de „ILA Seoul Declaration”; cf. J. M a k a r c z y k: *Principles of a New International Economic Order* 178 – 180 (1988). Cf. aussi P. P e t e r s et al.: „Responsibility of States in Respect of the Exercise of Permanent Sovereignty over Natural Resources”, *NILR*, 286 – 294 (1989); M.C.W. P i n t o: „Reflexions on international liability for injurious consequences arising out of acts not prohibited by international law”, 16 *NYIL* 45 (1985).

²⁴ Cf. l'Affaire de l'Usine de Chorzów, *CPJI*, 1928, Série A, No. 17, 47.

CDI²⁵ – que le paiement d'une indemnité n'est qu'une forme possible, notamment en droit international économique. La prestation d'autres avantages négociés avec l'Etat lésé est tout à fait concevable (voir *sub* 2.1. et 2.2.).

La différence principale consiste, toutefois, dans la portée (le montant) de l'indemnité. Dans l'hypothèse de la responsabilité des Etats, l'indemnité pécuniaire, qui peut substituer la restitution *in natura* impossible ou difficile, doit prendre en compte tout dommage causé, la perte réalisée (*damnum emergens*) comme le gain manqué (*lucrum cessans*).²⁶ Par contre, dans l'hypothèse de la responsabilité "causale" le montant de la compensation est indéterminé (et même indéterminable *a priori* par une formule générale), mais moins élevé que la réparation entière. Le calcul fait toujours l'objet de négociations entre l'Etat de l'activité et ses victimes. L'article 9 du projet d'articles de la CDI (à savoir de son Rapporteur spécial J. Barboza) semble donc être suffisamment général et approprié afin de couvrir les situations en droit international économique:

"Dans la mesure où cela est compatible avec les présents articles, l'Etat d'origine doit réparer le dommage appréciable causé par une activité visée à l'article premier. La réparation est déterminée par voie de négociation entre l'Etat d'origine et l'Etat ou les Etats affecté(s), qui en principe se fondent sur les critères énoncés dans les présents articles et tiennent compte en particulier du fait que la réparation doit viser à rétablir l'équilibre entre les intérêts rompus par le dommage".²⁷

Il en va de même dans l'hypothèse d'adoption du texte modifié et précisé de l'article 9 sous le titre "Prestations de l'Etat d'origine" où le terme "réparation" a été remplacé par celui d' "indemnisation".

1.3. Le concept de dommage en droit international économique

Le concept de dommage est une des notions clé dans la théorie de la responsabilité en droit international (pourtant souvent discuté sans avoir une connotation simple et généralement acceptée).²⁸ On distingue d'abord et surtout entre le *dommage* au sens *juridique* ou encore le *dommage légal*, d'une part, et le *dommage* dans le sens extra-juridique (réel), de l'autre. Une des conséquences de cette distinction, introduite par le Rapporteur spécial R. Ago et ensuite adoptée par la CDI dans le commentaire de l'article 3 du projet sur la responsabilité des Etats,²⁹ est la répartition de la matière de la responsabilité en deux sujets: la responsabilité des Etats pour faits illicites et la responsabilité interna-

²⁵ Note 24, 47 – 53.

²⁶ Op. cit. 24), 47 – 53.

²⁷ A/CN.4/428 (1990), 47.

²⁸ B. B o l l e c k e r-S t e r n: *Le préjudice dans la théorie de la responsabilité internationale* (1973); P. R e u t e r: „Le dommage comme condition de la responsabilité internationale”, *Mél. Miaja de la Muella*, t. II, 837 – 846 (1979).

²⁹ II ACDI (1971) 234 – 235, §§ 73 – 74; II ACDI (1973) 186, § 12.

tionale pour les conséquences préjudiciables découlant d'activités qui ne sont pas interdites par le droit international.³⁰

Bien que quelques auteurs puissent reprocher à R. Ago l'introduction du "dommage légal" et l'"élimination du "dommage extra-juridique" aux fins des fondements de la responsabilité des Etats avec toutes les conséquences déjà mentionnées, ladite distinction n'est pas du tout purement artificielle. Elle repose sur la dichotomie de la normativité (de la réglementation juridique) et de la réalité ou bien du fait juridique et du *fait réel* (factuel).³¹

Dans le premier cas le "dommage" représente des conséquences consistant en l'atteinte au droit subjectif ou à l'intérêt légalement protégé de l'Etat (*a contrario* l'intérêt simple qui n'est pas protégé par le droit international).³² Le dommage de caractère juridique n'est pas donc un fait simple, mais il devient – en vertu de la norme juridique – un fait juridique.

Dans le sens extra-juridique le "dommage" représente toutes les conséquences préjudiciables concrètes causées par l'activité ou le comportement qui a un lien causal avec elles. Au point de vue de la causalité, qui est d'ailleurs une catégorie extra-juridique *per definitionem*, la qualification juridique du dommage est une question sans pertinence. Ce préjudice peut être de caractère matériel ou moral. Il ne faut donc pas identifier le dommage moral et le dommage légal et limiter ainsi le concept du dommage de fait causé sans illicéité (*damnum sine injuria*) exclusivement au dommage matériel, bien qu'il soit le plus fréquent.

En droit (c'est-à-dire en droit international général aussi bien qu'en droit international économique) il n'existe pas de concept unique du dommage (même en ce qui concerne le dommage matériel), mais trois situations différentes sont possibles.

(1) D'habitude, le dommage au sens "extra-juridique" (fait simple) se transforme en dommage légal (fait juridique). C'est le cas de la responsabilité des Etats pour faits illicites. Bien que le préjudice ne soit pas le fait générateur de la responsabilité (s'est le fait internationalement illicite), il demeure néanmoins une condition de la mise en oeuvre de la responsabilité.³³

(2) Les problèmes apparaissent à partir du moment où il n'y a plus de corrélation entre le dommage réel et le dommage légal, c'est-à-dire lorsque le préjudice se produit sans illicéité. Il s'agit – au point de vue du droit international général – des dommages de fait (*damnum sine injuria*) irréparables sauf à condition de paiement *ex gratia*.³⁴

³⁰ II ACDI (1970) 190, § 6.

³¹ J. S a l m o n : „Le fait dans l'application du droit international”, 175 RCADI 272 – 295 (1982-II).

³² Cf. H. T h i e r r y, J. C o m b a c a u et al.: *Droit international public*, 4^e éd., 676 – 678 (1984).

³³ Ibid., p. 674; N. Q. D i n h et al.: *Droit international public*, 3^e éd., 694 – 695 (1987); P. M. D u p u y: op. cit., 26.

³⁴ Par ex. dans l'affaire de *Cosmos 954* l'URSS a indemnisé *ex gratia* le Canada; cf. B. R i e d e l : „Damages”, in: *Encyclopedia of Public International Law*, Instalment 10, 72 (1987).

(3) Cependant, même le dommage de cette nature peut devenir le fait juridique en vertu d'une norme visant la compensation. Dans ce cas là, il ne s'agit pas – à la différence du dommage légal (1) – du fait juridique qui conditionne la mise en oeuvre de l'obligation "secondaire" (de responsabilité) faisant partie de la *sanction de norme*, mais du fait juridique qui remplit *l'hypothèse de norme* "primaire" prévoyant (dans son *dispositif*) la compensation d'un dommage.³⁵

La dernière situation fait l'objet de cette étude, car elle peut être réglée par l'*institution* de la responsabilité internationale pour les conséquences préjudiciables d'activités qui ne sont pas interdites par le droit international. Par contre, on peut se demander si les conséquences préjudiciables des activités économiques pourraient entrer dans le champ d'application du *projet* de la CDI limité par deux conditions: "les conséquences physiques" et "les dommages transfrontières".³⁶ Il s'agit toutefois de la même institution juridique bien que le caractère de dommage soit en dehors de la définition proposée par le Rapporteur spécial de la CDI. En effet, chaque instrument doit préciser les activités non interdites et leurs conséquences préjudiciables auxquelles s'applique la responsabilité "causale".

Ce n'est pas par hasard si l'on en vient à examiner le concept de dommage et son développement contemporain surtout en droit international économique. Or, ici les modifications du concept traditionnel connu en droit international général semblent être plus nettes. Pour ce qui concerne l'obligation de compensation dans ce domaine, le dommage joue ici un rôle plus important que dans la théorie de la responsabilité des Etats en droit international général. On peut donc conclure que:

"Dans le cas d'activités illicites, le dommage est un élément souvent important, mais il n'est pas absolument nécessaire pour qu'il y ait responsabilité internationale. Par contre, le dommage est un élément indispensable pour établir la responsabilité dans le cas d'activités licites dommageables".³⁷

Autrement dit, comme L. Boisson de Chazournes l'a bien montré dans son ouvrage sur les contre-mesures dans les relations internationales économiques, "il se peut qu'en cas de manquement à une obligation internationale, le dommage matériel soit présumé. En d'autres circonstances, lorsque la lésion d'intérêts n'est pas accompagnée de la violation d'une obligation internationale, elle doit être démontrée".³⁸

³⁵ Pour la trichotomie logique de la norme juridique internationale (hypothèse – dispositif – sanction) cf. C. C e p e l k a, V. D a v i d: *Uvod do teorije mezinardniho prava* (Introduction à la théorie du droit international) 22, 96 – 97 (1983).

³⁶ Cf. l'art. 1^{er} du projet de J. B a r b o z a; A/CN.4/428 (1990) 42.

³⁷ I ACDI (1974) 7, § 12.

³⁸ L. B o i s s o n d e C h a z o u r n e s: *Les contre-mesures dans les relations internationales économiques* 202 (1992).

2. Les applications de la responsabilité en dehors de l'illicite en droit international économique

Il faut souligner que la grande adaptabilité aux situations particulières rend extrêmement difficile l'établissement de toutes les conséquences juridiques de caractère principalement compensatoire au sens large qui pourraient relever de la responsabilité internationale pour les dommages découlant d'activités qui ne sont pas interdites en droit international économique. Cette étude se limite à trois exemples correspondant aux principaux domaines du droit international économique. Ils ont été choisis parce qu'ils sont représentatifs et parce qu'ils démontrent également la nature assez diverse des activités respectives et de leurs conséquences juridiques.

Il s'agit en premier lieu de deux régimes conventionnels dans les secteurs de la circulation internationale des marchandises et paiements. Dans ce domaine d'activités *per definitionem* transfrontières qui s'effectuent entre les espaces économiques nationaux, les Etats créent plutôt les conditions pour la coopération et l'intégration des économies au vu de leur interdépendance accrue. La souveraineté des Etats est limitée par les accords multilatéraux relativement détaillés et précis (sauf pour le secteur de services). Les organisations internationales économiques (GATT, FMI) jouent ici un rôle très important.

Le domaine de la protection des investissements internationaux retiendra également notre attention, bien qu'il soit moins typique et plutôt ambivalent. Comme ces activités se déroulent sur son territoire, l'Etat exerce sa compétence territoriale sur elles. Ce secteur reste donc dominé par la souveraineté, l'*imperium* étatique.³⁹ En outre des accords bilatéraux, il n'est réglementé que partiellement par le droit international coutumier.

2.1. Le système commercial international

La circulation internationale des marchandises elle-même révèle la possibilité de conséquences préjudiciables causées par l'activité licite à partir du territoire d'un Etat à l'économie nationale d'un autre Etat, vu l'inégalité économique globale, ou dans certains secteurs seulement.

Bien évidemment, cette étude ne peut s'occuper que des problèmes régis par le droit international économique. Il s'agit du point de savoir si le droit international dans ce domaine prévoit une certaine forme de responsabilité en dehors de l'illicite, c'est-à-dire la compensation (au sens très large) des dommages découlant d'activités licites.

Il faut d'abord chercher les traces de cette nouvelle institution dans le droit commun, représenté ici par le régime du GATT; il reste extrêmement intéressant aux fins de la responsabilité internationale en dehors de l'illicite (traitée par la

³⁹ Cf. D. Carreau et al.: op. cit., 87.

CDI) à plusieurs égards: par le caractère "cadre" (complété par des codes), les négociations, la souplesse de la procédure de règlement des différends. Toutefois, les *panels* s'occupent aussi de la question de la violation des règles du GATT. Mais il existe quelques cas, où le GATT même stipule les mesures possibles à envisager comme réponse aux conséquences préjudiciables d'activités licites.⁴⁰

(A) Il s'agit surtout de la procédure de règlement des différends prévue à l'article XXIII,⁴¹ dont le déclenchement est officialisé par le Mémoire du Tokyo Round de 1979 et son annexe qui s'applique indépendamment de toute violation du droit de l'Accord général. "Les textes de codification de 1979 précisent que le différend – susceptible de déclencher la procédure de conciliation de l'article XXIII – peut aussi bien avoir pour origine un acte illicite – violation d'une règle de l'Accord général sur les tarifs douaniers et le commerce – qu'un dommage commercial sans lien nécessaire avec infraction aux règles du GATT". Dans la dernière hypothèse, il suffit que "le différend résultant d'un dommage commercial porte sur une question touchant au domaine du commerce international et qu'il mette en rapport deux parties contractantes du GATT".⁴²

Le rapport, auquel devrait normalement aboutir l'examen de l'affaire par le groupe spécial ou "panel" d'experts, et ensuite les recommandations des parties contractantes aux parties du différend ne traitent pas *expressis verbis* de la question de la responsabilité. Toutefois, elles peuvent autoriser la partie lésée à appliquer des contre-mesures, c'est-à-dire de suspendre en contrepartie certaines concessions, du seul fait de l'existence d'un préjudice en dehors de toute violation de l'Accord.⁴³ Non seulement le déclenchement, pour lequel l'article XXIII § 2 exige que "la situation soit suffisamment grave pour justifier une telle mesure", mais aussi l'exécution de ces contre-mesures sont soumis au contrôle des parties contractantes et sont de nature essentiellement compensatrice.

(B) La seconde catégorie de règles du GATT, qui présentent un intérêt particulier pour notre analyse, sont les clauses de sauvegarde. On pourrait les assimiler *mutatis mutandis* aux circonstances excluant l'illicéité dans le chapitre V du projet de la CDI sur la responsabilité des Etats,⁴⁴ y compris l'article 35

⁴⁰ Cf. T. F l o r y: „Les accords du Tokyo Round du GATT et la réforme des procédures de règlement des différends dans le système interétatique”, 86 *RGDIP* 239 (1982).

⁴¹ „Dans le cas où une partie contractante considérerait qu'un avantage résultant pour elle directement ou indirectement du présent Accord se trouve annulé ou compromis, ou que la réalisation de l'un des objectifs de l'Accord est compromise du fait: ...

b) ou qu'une autre partie contractante applique une mesure, contraire ou non, aux dispositions du présent Accord;

c) ou qu'il existe une autre situation, ladite partie contractante pourra, en vue d'arriver à un règlement satisfaisant la question, faire des représentations ou des propositions écrites à l'autre ou aux autres parties contractantes qui, à son avis, seraient en cause...”. In: Ch. L e b e n: *Sanctions privatives de droits ou de qualité dans les organisations internationales spécialisées* 154 – 155 (1979).

⁴² T. F l o r y: op. cit., 155.

⁴³ Ibid., 156.

⁴⁴ Cf. les art. 29 jusqu'à 34 du projet (II-2 ACDI, 32 (1980)).

("réserve relative à l'indemnisation") qui se réfère à la possibilité de compensation des dommages dans certaines hypothèses de l'exclusion de l'illicéité.⁴⁵

Dans le cadre du GATT, c'est d'abord l'article XIX (clause générale de sauvegarde) qui permet à une partie contractante de recourir à des mesures de protection contre des importations causant un préjudice grave aux producteurs nationaux. Les conditions strictes pour l'application de la clause rappellent celles de l'état de nécessité en droit international général,⁴⁶ car elle ne peut être mise en jeu qu'en cas de "situation de désorganisation du marché" résultante de l'un des éléments:

"soit l'accroissement brutal des importations d'un produit donné originaire d'une ou plusieurs parties contractantes, ou la menace d'accroissement brutal des importations de ce produit; soit l'importation d'un produit donné en provenance d'une ou plusieurs parties contractantes à un prix nettement inférieur au prix de vente par l'industrie nationale de ce même produit".⁴⁷

De plus, ladite situation doit avoir pour effet de porter (ou de menacer de porter) "un préjudice grave" aux producteurs nationaux de produits similaires.

Bien que les mesures de sauvegarde adoptées en application de l'article XIX soient tout à fait licites, elles donnent lieu à des "compensations – sous la forme de concessions additionnelles temporaires négociées – aux pays lésés qui la demanderaient".⁴⁸ L'article XIX paragraphe 2 prévoit aussi la notification préalable de mesures de sauvegarde et les consultations entre les parties concernées. L'analogie avec le projet de la CDI concernant la responsabilité internationale pour les conséquences préjudiciables d'activités non interdites est ici frappante.

Des dispositions similaires sont contenues à l'article XII (et aussi à l'article XVIII B en ce qui concerne les pays en développement), prévoyant „la possibilité de recourir à la menace imminente d'une baisse importante de ses réserves monétaires ou pour mettre fin à cette baisse; ou pour relever ses réserves monétaires suivant un taux d'accroissement raisonnable, dans le cas où elles seraient très basses”.⁴⁹ Les restrictions quantitatives sont ici soumises à un double contrôle institutionnalisé effectué, d'une part, par le Fonds monétaire international, d'autre part, par le GATT. Selon l'article XII paragraphe 4(a), la Partie contractante est tenue d'entrer en consultation avec les parties contractantes du GATT sur "la nature des difficultés afférentes à la balance de paiements (du pays intéressé), les divers correctifs entre lesquels il a le choix ainsi que les répercussions possibles de ces restrictions sur l'économie d'autres parties contractantes".⁵⁰

⁴⁵ Cf. II-2 ACDI 59 (1980).

⁴⁶ Cf. *ibid.*, p. 33.

⁴⁷ D. Carreau et al.: *op. cit.*, 10, 136.

⁴⁸ *Ibid.*, p. 137.

⁴⁹ T. Flory: *Le GATT* 27 (1968).

⁵⁰ *Ibid.*, p. 28.

(C) Le troisième exemple, qui mérite attention dans le cadre de cette étude, est le cas spécial du contrôle du GATT sur les unions douanières et les zones de libre-échange (l'article XXIV du GATT). La licéité de ces accords étant confirmée (l'article XXIV § 4), le GATT prévoit cependant certaines modalités pour ces formes d'intégration régionale. L'obligation générale liée à la constitution d'une union douanière ou d'une zone de libre-échange est de ne pas opposer d'obstacles au commerce d'autres parties contractantes avec ces territoires. La conséquence spéciale de cette obligation se produit dans le cas des unions douanières, où – selon l'article XXIV § 5a) – le tarif extérieur commun ne doit pas, dans son ensemble, être d'une incidence plus rigoureuse que ne l'étaient les réglementations de chaque Etat membre avant l'établissement de l'union. Le tarif commun implique nécessairement des abaissements, mais aussi des relèvements de droits, qui peuvent ainsi porter préjudice aux intérêts des pays tiers. C'est pourquoi la procédure de rénégociation aux buts compensatoires est prévue par l'article XXIV § 6:

"Si, en remplissant les conditions énoncées à l'alinéa a) du paragraphe 5, une partie contractante se propose de relever un droit d'une manière incompatible avec les dispositions de l'article II, la procédure prévue à l'article XXVIII sera applicable. Dans la détermination des compensations, il sera dûment tenu compte de la compensation qui résulterait déjà des réductions apportées au droit correspondant des autres territoires constitutifs de l'union".⁵¹

Il est à noter que le GATT exerce ainsi son contrôle sur la CEE après chaque extension de la Communauté et même dans le cas des accords d'association.

On peut conclure que la responsabilité pour les effets externes de l'exercice de la souveraineté économique d'un Etat:

"does not necessarily lead to an obligation to pay damages which can be enforced by law or to a duty to undo the action (or the lack of action) that caused the damage. A solution might also be found in administrative procedures coming from an international organization, if necessary resulting in countermeasures or compensating measures (cf. GATT procedures to this effect)".⁵²

Le caractère compensatoire (au sens large) des conséquences juridiques analysées étant toujours présent, ces conséquences de la responsabilité ne peuvent être mises en jeu que par voie de contre-mesures économiques qui doivent être autorisées par les parties contractantes du GATT, mis à part le cas où les négociations entre les parties concernées ont abouti aux concessions compensatoires. De ce point de vue, on ne saurait tracer une distinction nette entre les conséquences juridiques de la violation d'un règle du GATT et celles résultant de l'existence

⁵¹ Ibid., p. 280.

⁵² P. Verloren van Themaat: *The Changing Structure of International Economic Law* 243 (1981).

d'une préjudice comme un fait juridique spécial qui déclenche l'obligation compensatoire prévue par le dispositif de l'Accord.

Or, "en dehors des hypothèses prévues par l'Accord général, un Etat ne peut pas contrevenir au respect de ses engagements au titre d'un exercice de contre-mesures à l'encontre d'un autre Etat partie au GATT.⁵³ L. Boisson de Chazournes va encore plus loin en ajoutant que:

"... les possibilités d'exercice de contre-mesures à l'encontre d'un Etat auquel est attribuable un fait générateur qui relève du domaine d'application de l'Accord général sont strictement délimitées et réglementées. Cela rend illicite tout exercice de mesures prétendument contre-mesures qui ne serait pas conforme aux prescriptions de l'Accord général ...".⁵⁴

Ceci semble évoquer la notion de "régime se suffisant à lui même" (*self-contained regime*).⁵⁵ Cependant, l'auteur a admis que le régime du GATT ne pourrait pas, au plan juridique (à cause des clauses d'exception ou encore de la condition de proportionnalité issue du droit international général), être qualifié de régime complètement auto-suffisant.⁵⁶ On ne peut qu'y souscrire tout en ajoutant que le recours au droit international général est toujours possible dans l'hypothèse que le manquement au régime de la responsabilité "causale" (en dehors de l'illicite) aboutit à la responsabilité des Etats pour faits illicites.

2.2. Le système monétaire international

Le second domaine typique d'application de la responsabilité en dehors de l'illicite en droit international économique, choisi pour cette étude, est celui du système monétaire international. Cependant, notre examen va se limiter au Fonds monétaire international, en écartant d'autres institutions internationales monétaires et financières. Comme nous l'avons déjà démontré dans le cas du système commercial international, le rôle des organisations internationales économiques est très important. Il en va de même dans le cas du F.M.I. qui possède des pouvoirs beaucoup plus étendus que le GATT, de faible structure institutionnelle.

La différence est évidente notamment en ce qui concerne les mesures compensatoires (c'est-à-dire la mise en oeuvre de la responsabilité "causale" dans ces domaines). Dans le cadre du GATT ce sont les Etats *uti singuli* qui exercent les "contre-mesures" (bien que ce soit avec l'autorisation des parties contractantes); mais dans le cadre du F.M.I., c'est normalement l'organisation internationale elle-même (le Fonds) qui décide et exerce des "sanctions" ou des

⁵³ L. Boisson de Chazournes: op. cit., 148.

⁵⁴ Ibid., 148.

⁵⁵ Cf. G. A r a n g i o-R u i z: „4^e rapport sur la responsabilité des Etats”, A/CN.4/444/Add.2 12 – 16 (1992).

⁵⁶ Cf. L. Boisson de Chazournes: op. cit., 182 – 185.

remèdes vis-à-vis des Etats membres. Contrairement au GATT, les statuts du F.M.I. ne contiennent "aucune disposition permettant aux pays membres d'introduire des mesures restrictives à l'encontre d'Etat tiers pour des raisons tenant à la sécurité nationale et internationale".⁵⁷ Toutefois, cette lacune a été comblée par une décision du F.M.I. de 1952 qui a reconnu aux Etats membres le droit de recourir à des restrictions sur les paiements internationaux, soumises au contrôle du Fonds.

En général, le F.M.I. dispose d'un large pouvoir de contrôle et de sanctions. On ne peut pas aborder ici les problèmes complexes et techniques des moyens variés de contrôle, mais les sanctions auxquelles le F.M.I. peut recourir en cas d'échec des moyens de contrôle sont d'un intérêt particulier. Or, il n'y a pas de conséquences juridiques de la violation des règles du F.M.I. sauf les sanctions spéciales prévues par les Statuts du Fonds. En revanche, quelques mesures dénommées comme "sanctions" peuvent être appliquées sans nécessité d'établir le manquement d'un Etat membre à ses obligations.⁵⁸

On peut donc se demander s'il ne s'agit pas ici d'un mécanisme spécifique de la mise en oeuvre de la responsabilité en dehors de l'illicite dans le cadre du système monétaire international.

Dans cet ordre d'idées, deux dispositions des Statuts du F.M.I. méritent notre examen: les conséquences des modifications non autorisées de parités (Article IV section 6) et la suspension des transactions sur droits de tirage spéciaux (Article XXIX).

(A) En principe, chaque Etat membre du F.M.I. a la liberté de choix du système de taux de change: fixe, flottant ou autre, mais il a l'obligation de *notifier* au F.M.I. ses dispositions de change, ainsi que leur modifications éventuelles.⁵⁹ Toutefois, selon l'article IV section 6:

"Si malgré l'opposition du Fonds dans un cas où le Fonds est en droit de faire opposition, un membre modifie la parité de sa monnaie, ce membre sera privé de l'usage des ressources du Fonds, à moins que ce dernier n'en décide autrement...".⁶⁰

Dans ce cas, l'Etat membre du F.M.I. devient „inéligible” à utiliser les ressources du Fonds d'une façon automatique (sauf décision contraire), mais "without the stigma of failing to fulfil an obligation".⁶¹

Selon l'avis de Joseph Gold, bien que l'inéligibilité ait un aspect punitif, cette mesure envisage aussi la sauvegarde des ressources du Fonds. Ce dernier but est plus évident quand un Etat membre est déclaré inéligible parce que le

⁵⁷ Cf. D. Carreau et al.: op. cit., 362.

⁵⁸ Voir J. Gold: *Legal and Institutional Aspects of the International Monetary System. Selected Essays*, 149 – 150 (1979).

⁵⁹ Cf. D. Carreau et al.: op. cit., 346.

⁶⁰ Cf. Ch. Leben: op. cit., 193.

⁶¹ J. Gold: op. cit., 159.

Fonds estime qu'il fait "an improper use of the Fund's resources". (Article V section 5).⁶²

(B) Le second exemple est celui de la suspension des transactions sur les droits de tirage spéciaux (D.T.S.). Il y a au moins un point commun avec la sanction en cas de modifications de parités non autorisées, à savoir le pouvoir du F.M.I. de déclarer l'Etat membre "inéligible". Toutefois, il s'agit ici d'une sanction spécifique, car l'Etat participant qui a été suspendu dans son droit d'utiliser les D.T.S. peut toujours effectuer des tirages sur le F.M.I. au titre de son aide traditionnelle et *vice versa*. Cela découle de l'indépendance de fonctionnement du compte de tirage spécial et du compte des ressources générales.⁶³

Le problème d'une suspension éventuelle se pose seulement dans l'hypothèse des tirages de D.T.S. à plus de 100% de la quote-part d'un Etat (des tirages jusqu'à 100% de sa quote-part ont un caractère automatique). Tous les autres tirages sont de nature conditionnelle. La conditionnalité est assurée par la technique de l'"accord de confirmation" (*stand-by arrangement*) qui consiste dans une promesse de crédit dans laquelle sont fixées les conditions et les modalités d'utilisation, débattues au préalable entre le F.M.I. et l'un des Etats membres. Ces conditions sont reprises de l'autre document, la "lettre d'intention" ou le *mémorandum*, adressé au F.M.I. par l'Etat demandeur et précisant les éléments de politique monétaire et économique qu'il entend suivre.

Une question débattue est celle de la nature juridique de cet arrangement. Pour une partie de la doctrine "il s'agit là de véritables accords internationaux et non point seulement de simples décisions internes du F.M.I., dont les termes lient et le Fonds et l'Etat membre intéressé".⁶⁴ En revanche, d'autres auteurs et les représentants du F.M.I. soutiennent la thèse inverse. L'accord de confirmation serait donc "une décision unilatérale par laquelle le F.M.I. autorise un Etat à effectuer des tirages" et la lettre d'intention est dépourvue de caractère obligatoire.⁶⁵ Selon Sir Joseph Gold qui représente aussi la doctrine "officielle" du F.M.I.

"it should be understood that stand-by arrangements and letters of intent do not create obligations, in the legal sense, for a member to pursue particular policies... It is now understood that departures from them are not breaches of agreement but occasions on which it is suitable to discuss the member's program".⁶⁶

Cette constatation est très importante pour la détermination de la nature juridique des remèdes applicables, car les renégociations ne sont pas la seule conséquence de la non-observation de la politique économique imposée par l'Etat concerné.

⁶² Ibid., 160.

⁶³ D. C a r r e a u: *Le système monétaire international. Aspects juridiques* 395 (1972).

⁶⁴ Voir par ex. D. C a r r e a u: op. cit. 10), 379.

⁶⁵ Voir par ex. N. Q. D i n h et al.: op. cit. 33), 917.

⁶⁶ J. G o l d: "The Stand-by Arrangements of the International Monetary Fund", in: B. W e s t o n et al.: "International Law and World Order" 793 – 794 (1980).

Bien que le manquement par un Etat membre aux mesures économiques approuvées par le F.M.I. ne soit pas une violation de ses obligations juridiques, aussi bien qu'en cas de modification de parité, le Fonds peut appliquer les mêmes remèdes ou "sanctions", respectivement suspendre le droit de cet Etat de tirer de D.T.S. ou le déclarer inéligible pour une aide ultérieure.⁶⁷ Toutefois, aucune de ces "sanctions" ne peut être qualifiée comme conséquence de la responsabilité de l'Etat pour faits illicites, car celui-ci exerce tout simplement sa souveraineté en matière économique et monétaire. C'est pourquoi il faut souscrire à l'opinion de G.M. White:

"Accordingly, the situation remains outside the conceptual boundaries of the ILC draft articles on State responsibility, and on international liability for injurious consequences of non-prohibited acts".⁶⁸

2.3. La protection des investissements

Après l'analyse de deux exemples typiques et de la responsabilité en dehors de l'illicite en droit international économique, nous allons examiner un domaine plus complexe. Il s'agit du problème assez classique de l'indemnisation pour les transferts de propriété, notamment les cas de nationalisations, où se pose avec le plus d'acuité la question de la compensation. La question de savoir s'il s'agit d'un véritable exemple de responsabilité pour les conséquences d'activités licites, dépend de la distinction entre la nationalisation licite et illicite.

La nationalisation est en soi licite, car il s'agit d'un *droit de l'Etat souverain*. C'est le point de départ qui a été manifesté par la pratique des Etats, y compris des traités, des résolutions des Nations Unies et des sentences arbitrales. On peut citer à cet égard la sentence *Texaco-Calasiatic cf la Libye (TOPCO)*, dans laquelle l'arbitre unique R.J. Dupuy a rappelé:

"Le droit d'un Etat de procéder à des nationalisations n'est pas aujourd'hui contestable. Il résulte du droit international coutumier, établi à la suite de pratiques concordantes considérées par la communauté internationale comme étant le droit. L'exercice de la compétence étatique de nationaliser est considéré comme l'expression de sa souveraineté territoriale".⁶⁹

Traditionnellement, le droit international semblait subordonner la validité de l'exercice du droit de nationaliser à trois conditions: la nationalisation devait répondre à un motif *d'intérêt public*, ne pas être *discriminatoire*, et être accompagnée d'une *indemnité*.⁷⁰ Aussi la résolution de l'Assemblée générale des Nations Unies 1803 (XVII) de 1962 considérée comme l'expression du droit positif (coutumier) en la matière, reprend ces conditions.

⁶⁷ Cf. J. G o l d : op. cit., 169.

⁶⁸ G.M. W h i t e : „Legal consequences of wrongful acts in international economic law”, 16 *NYIL* 151 (1985).

⁶⁹ Sentence du 19 janvier 1977, *JDI* 367, § 59 (1977).

⁷⁰ Cf. par ex. N.Q. D i n h et al.: op. cit., 615.

Toutefois, sans être abandonnées, les deux premières sont aujourd'hui interprétées de manière très large. En ce qui concerne l'intérêt public, certaines sentences arbitrales (*LIAMCO*, du 12 avril 1977, et *TOPCO*, précitée) ont même affirmé que "le droit international ne s'occupe pas des mobiles"⁷¹. En effet, l'intérêt public est souverainement apprécié par l'Etat qui nationalise et se confond souvent avec les exigences du développement économique.

Le principe de non-discrimination a également une portée incertaine, bien qu'il soit mentionné dans la plupart des conventions bilatérales. Il y a encore la définition classique donnée par la C.P.J.I. dans l'affaire *Oscar Chinn*:

"La discrimination interdite est donc celle qui serait basée sur la nationalité et qui entraînerait un traitement différentiel pour les individus appartenant aux différents groupes nationaux à raison de leur nationalité".⁷²

Toutefois, la jurisprudence arbitrale a admis que les Etats pouvaient procéder de manière progressive et nationaliser par étapes différentes sociétés étrangères, opérant dans une branche économique donnée (voir les sentences *TOPCO*, précitée, et *AMINOIL*).⁷³

Les critères précités (intérêt public, non-discrimination, indemnisation) étant incertains, il ne reste qu'un critère de licéité de la nationalisation qui est tout à fait incontestable. La nationalisation est illicite au point de vue du droit international, lorsqu'elle est exercée en violation d'un traité international contenant la renonciation de l'Etat à son droit d'expropriation ou de nationalisation, ou, autrement dit, selon lequel cet Etat s'engage à ne pas nationaliser. Ainsi en fut-il par exemple dans l'affaire devenue classique des *usines de Chorzów*, soumise à la C.P.J.I., où la Pologne avait pris possession d'une usine d'azote en Haute-Silésie contrairement à la Convention de Genève du 12 mai 1922 relative à la protection des intérêts allemands en Haute-Silésie.⁷⁴

Le véritable problème est celui de l'indemnisation. S'agit-il de la condition de la licéité d'une mesure de nationalisation? La majorité des sentences arbitrales répond par l'affirmative. En revanche, la pratique des Etats exprimée par des accords d'indemnisation forfaitaire ainsi que le langage de la Charte des droits et devoirs économiques des Etats semblent aller vers une position beaucoup moins tranchée. Aussi la sentence *LIAMCO* considère que l'indemnisation n'est pas une condition de validité d'une loi de nationalisation: l'indemnisation ne relève pas du droit, mais de l'équité.⁷⁵

On peut donc conclure que l'obligation d'indemniser est plutôt le corollaire ou la conséquence du droit de nationaliser que sa condition. Dans cette hypothèse,

⁷¹ Cf. *Revue de l'Arbitrage* 163 (1980) et *JDI* 372 (1977).

⁷² CPJI, Série A/B, No. 63 (1934), 87.

⁷³ Cf. *JDI* 372 (1977) et *JDI*, 890 (1982).

⁷⁴ Cf. CPJI, Arrêt du 13 septembre 1928, Série A, No 17; et P. R a m b a u d: „Un arbitrage pétrolier: la sentence *Liamco*”, 26 *AFDI* 289 (1980).

⁷⁵ Voir D. C a r r e a u: op. cit., 698.

la responsabilité en dehors de l'illicite serait le fondement de l'indemnisation. En revanche, la responsabilité des Etats pour fait internationalement illicite n'entrerait en jeu que dans l'hypothèse où l'indemnisation est conçue comme condition de la licéité de nationalisation. Quelle hypothèse correspond mieux à la réalité des relations économiques internationales? Il faut examiner la pratique du règlement des différends nés des mesures de nationalisation pour trouver la réponse.

Il y a deux voies de règlement des différends de nationalisation: le règlement judiciaire où les contentieux ont lieu devant la Cour internationale ou – plus souvent – devant le tribunal arbitral (soit interétatique, soit de caractère "mixte") d'un côté, et le règlement par les accords d'indemnisation forfaitaire (*lump sum agreements*) de l'autre. Parfois la distinction entre règlement juridique et règlement politique est faite, mais il ne faut pas exagérer la portée et le sens de cette distinction.⁷⁶ Il y a des aspects juridiques et politiques dans les deux cas, bien que leur proportion soit différente. Les professeurs R. Lillich et B. Weston ont prouvé tout à fait justement que les accords d'indemnisation forfaitaire ne pouvaient pas être négligés sous prétexte de leur caractère politique. Ces accords sont d'abord des traités internationaux et ils reflètent aussi la pratique des Etats susceptible de créer des normes coutumières.⁷⁷

Il résulte de l'analyse juridique plus profonde que le fondement de l'obligation d'indemniser est le même: il s'agit toujours du consentement de l'Etat duquel découle soit directement, soit indirectement (à savoir par la clause compromissoire) cette obligation "primaire" et non pas "secondaire" (selon le langage de la CDI).

Il y a, bien sûr des différences importantes entre ces deux types de règlement des différends. L'accord d'indemnisation forfaitaire prévoit toutes les modalités, y compris le montant de la compensation, tandis que le résultat de l'arbitrage est plutôt aléatoire. C'est pourquoi les Etats préfèrent les accords d'indemnisation forfaitaire. Les accords négociés entre les Etats étaient fréquents surtout au lendemain de la Seconde Guerre mondiale; leur nombre a atteint 168 accords.⁷⁸ Plus tard, les accords négociés entre l'Etat nationalisant et la victime de la nationalisation ont pris le dessus. Dans la dernière hypothèse, il ne s'agit plus de traités internationaux.

Il semble que c'est un des domaines de l'application possible de la responsabilité internationale pour les conséquences préjudiciables d'activités qui ne sont pas interdites par le droit international, bien que le projet d'articles actuel soit pratiquement limité aux problèmes de l'environnement. Toutefois, l'idée originale exprimée par le premier Rapporteur spécial R.Q. Quentin-Baxter était plus large. La conception selon laquelle:

⁷⁶ Ibid., p. 705.

⁷⁷ Cf. R. Lillich, B. Weston: „Lump-sum Agreements: their Continuing Contribution to the Law of International Claims”, 82 *AJIL* 70 – 71 (1988).

⁷⁸ Ibid., p. 70.

"le droit relatif au traitement des étrangers offre des exemples de situation où l'Etat d'accueil, pour éviter l'illicéité, doit s'acquitter d'une obligation qui consiste à assurer une certaine forme de réparation pour une perte ou un dommage subi comme en ce qui concerne les questions de dommages causés à l'environnement, qui sont maintenant au centre des préoccupations internationales",⁷⁹

a trouvé, elle aussi un bon accueil par certains auteurs.⁸⁰

En effet, il s'agit de la même forme juridique. Les obligations dans le cadre du projet de la CDI sur la responsabilité "causale" (*international liability*) et l'obligation d'indemniser en cas de nationalisation licite sont des obligations "primaires" découlant *ex contractu* et non pas *ex lege* (comme la responsabilité pour faits illicites). Cette analogie est valable aussi en ce qui concerne le montant de la compensation, qui est une question controversée.⁸¹

La compensation en cas de nationalisation licite est *per definitionem* plus restreinte que la réparation pour la nationalisation illicite qui englobe le *damnum emergens* et le *lucrum cessans* dont la somme constitue l'équivalent d'une *restitutio in integrum*. En revanche, la compensation des dommages causés par des mesures licites se limite, selon la solution adoptée dans l'affaire des *Usines de Chorzów*, au *damnum emergens*. Cependant, la détermination du montant de ce dommage est un problème très complexe et technique. La sentence AMOCO du 14 juillet 1987, rendue par le Tribunal des différends irano-américains, a affirmé qu'en cas de nationalisation licite, le *damnum* devrait prendre en compte la capacité de l'entreprise à dégager des bénéfices, qui ne fait pas partie du *lucrum cessans*.⁸²

La sentence LIAMCO a trouvé la question du *lucrum cessans* controversée,⁸³ mais elle a fait appel à des considérations d'équité pour fixer le montant de la compensation, qui correspond à "l'indemnisation équitable".⁸⁴ Les accords d'indemnisation forfaitaire reflètent toujours l'équilibre des intérêts de deux Etats ou d'un Etat et d'une société privée, résultant des *négociations*. Et c'est exactement la même solution que celle du projet d'articles de la CDI sur la responsabilité (*Liability*) en dehors de l'illicite.

Conclusions

Nous avons essayé de présenter les formes spécifiques de responsabilité en dehors de l'illicite en droit international économique. Cependant, notre analyse se situe dans le contexte plus général des problèmes théoriques de la respon-

⁷⁹ II-2 ACDI 155 (1980).

⁸⁰ Cf. par ex. R. L il l i c h (ed.): *International Law Of State Responsibility for Injuries to Aliens* 35 (1983).

⁸¹ Cf. E. L a u t e r p a c h t: „Issues of Compensation and Nationality in the Taking of Energy Investments”, 8 *Journal of Energy & Natural Resources Law* 243 (1990).

⁸² Cf. 27 ILM 1377 (1988) (sentence, § 264).

⁸³ Cf. D.W. B o w e t t: op. cit. 13), 70; P. R a m b a u d: op. cit. 74), 291.

⁸⁴ *Revue de l'arbitrage* 190 (1980).

sabilité internationale. En droit international contemporain, il y a des domaines où la responsabilité des Etats pour faits illicites est exclue par sa nature même: on ne peut pas établir la violation d'une règle de droit international. De plus – et surtout – il existe plusieurs régimes conventionnels dans le cadre desquels les Etats parties n'ont pas repris le contenu des conséquences juridiques de la responsabilité en droit international général, mais ont prévu des conséquences spécifiques.

Face à ce double développement, le projet de la CDI sur la responsabilité des Etats semble être insuffisant, malgré de nombreux aspects du développement progressif dans cette codification envisagée. Mais aussi le nouveau projet de la CDI concernant la responsabilité internationale pour les conséquences préjudiciables découlant d'activités qui ne sont pas interdites par le droit international, conçu pour combler ladite insuffisance du projet précité, risque de devenir trop étroit et ce déjà avant son achèvement.

Or, au stade présent des travaux de la CDI, les articles proposés semblent être liés à un seul domaine d'application (à savoir celui de l'environnement), négligeant d'autres sphères, parmi lesquelles le droit international économique qui nous semble être d'importance primordiale. Bien évidemment, la responsabilité en dehors de l'illicite en domaine économique revêt des formes très variées, parfois même difficilement identifiables en termes classiques de responsabilité. Toutefois, on peut trouver au moins trois caractéristiques valables pour toutes les sphères d'application analysées en droit international économique et communes avec certains traits généraux du projet de la CDI. Il s'agit (1) des obligations "primaires" qui permettent (2) la poursuite des activités dommageables en prévoyant (3) la compensation du dommage (au sens large et sous formes diverses) qui tient compte d'habitude de la distribution équitable des coûts.

En tout cas, le droit international économique nous sert à illustrer les modifications très intéressantes de l'institution du droit international – la responsabilité en dehors de l'illicite – qui est susceptible d'un développement dynamique. Il suscite aussi des questions de caractère théorique. Etant donné que la responsabilité internationale semble avoir définitivement perdu son unité, faut-il reconsidérer également son vocabulaire?

D'un côté, il y a une tendance au sein de la doctrine du droit international pour accepter le terme de "réparation" comme la *restitutio in integrum*, qui peut revêtir une forme "juridique" aussi bien que "matérielle" et faire ainsi "l'objet générique et global de la responsabilité".⁸⁵ Cette *restitutio* englobe – selon le projet d'articles soumis par le Rapporteur spécial pour la "responsabilité des Etats" G. Arangio-Ruiz à la CDI – la "restitution en nature" (art. 7), ainsi que la "réparation par équivalent" (art. 8).⁸⁶

⁸⁵ Voir P.M. Dupuy: „Responsabilité et légalité”, in: „La responsabilité dans le système international”, Colloque du Mans 277 – 178 (1991).

⁸⁶ Cf. les Rapports de la CDI, A.G. Documents officiels: A/43/10 (1988) 205 – 208; A/45/10 (1990) 154 – 166.

D'un autre côté, la notion de "compensation" semble n'avoir plus de lien intrinsèque avec la responsabilité des États pour faits illicites. Il s'agit plutôt d'une obligation "primaire" indépendante. Malgré ses formes diverses, elle ne vise ni la sanction de l'illicite, ni la restauration de la légalité internationale.

Les problèmes de responsabilité et sanctions en droit international économique inciteront sans doute à un examen doctrinal plus approfondi, ainsi qu'à une l'attention accrue de la CDI. Cette étude ne voudrait être qu'une contribution modeste.

On the Specific Character of State Obligations in the Field of Human Rights

CEZARY MIK

Defining character of an international obligation is of fundamental importance for the theory and practice of international law. The character of an obligation has important repercussions for the implementation of rights and obligations by its parties, as well as on character and implementation of their responsibilities. Under classical international law, international obligations resulting from treaties or customary norms bind states, and more rarely, international organizations. They do not concern directly subjects of municipal law, individuals, and legal persons, which generally are not subjects of international law.¹

Traditional international legal obligations are of mutual character. This means that implementation or insufficient implementation of obligations can justify the use of countermeasures within the limits of law and taking into account the principle of proportionality.² Reciprocity is not equivalent to bilateralism of obligations, as it is fully applied with respect to obligations stemming from multilateral treaties and special customary rules. This issue is confirmed by the functioning of reservations and objections to reservations in the law of treaties (Art. 19 of the 1969 Vienna Convention on the Law of Treaties), by the institutions of extinction or suspension of a treaty because of its violation (Art. 60.1 and 60.2(b) and (c) of the 1969 Convention), and finally by the principle *ius facit inter partes* (Art. 34 ff).³ It is highly disputable whether obligations under classical international law are binding exclusively between directly interested subjects of international law, or, if one can speak also of obligations *erga omnes*.

In this context it is worth considering whether the obligations of states in the field of human rights are of a classical nature or if they are of specific nature. The problem will be considered using a cross-section of sources of these obligations, and in particular, of norms defining general obligations of states in

¹ However, the PCIJ declared in the advisory opinion on *Jurisdiction of the Courts of Danzig* of 3 March 1928 that *it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations enforceable by the national court.* PCIJ Publ. Series B, No. 15, at 17.

² S i m m a: Reciprocity, in R. B e r n h a r d t (ed.): *EPIL* Instalment 7, at 400 (1984).

³ 1155 UNTS 331.

this field, the essence of these obligations and their effects in the domain of implementation and responsibility for non-fulfilment. The object of our considerations will be customary law and multilateral treaties – both universal and regional – together with accompanying international judicial practice.

1. The influence of the sources of international law upon the character of obligations in the field of human rights.

1.1. International treaties and customary law are the most important sources of international law. The role of treaties, and in particular of their norms, which constitute the general legal bases of obligations, cannot be questioned in the field of human rights,⁴ and they are of fundamental importance for defining the specific character of obligations.

The International Covenant on Economic, Social and Cultural Rights⁵ of 16 December, 1966 declares in Article 2 that every State Party *undertakes to take steps ... with a view to achieve progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures* (al. 1). This obligation should be carried out without any discrimination (al. 2), including discrimination on grounds of the nationality of the person in question, unless the guarantee of economic rights is impossible for reasons of national economy (al. 3 – this exception exclusively concerns the developing states). Periodic reports by states constitute the form of control of implementation of obligations deriving from the Covenants. At first, the reports were considered by the working groups of the UN Economic and Social Council, and subsequently by the Committee on Economic, Social and Cultural Rights (created in 1985).⁶ According to the Covenant, an individual is not entitled to present any claims before international agencies, and international disputes dealing with the interpretation and application of the Covenant – in the face of its silence on this point – seem to be subject to general rules on the settlement of disputes (Article 33 of the UN Charter). Therefore, it seems that *de lege lata* state obligations resulting from this treaty are of classical character.

The case of the Covenant on Civil and Political Rights⁷ of the same date is different. Its Article 2 states that every State Party *undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without discrimination of any kind* (al. 1). This regulation is strengthened by the obligation *to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant* (al. 2) and the obligation to provide in favour of individuals *an effective remedy* to protect

⁴ All treaties quoted in the present study are reproduced in *Human Rights in International Law. Basic Texts*, Council of Europe (1991).

⁵ 993 UNTS 3.

⁶ Cf. D. Turp: Le contrôle du respect du Pacte international relatif aux droits économiques, sociaux et culturels, in: *Le droit international au service de la paix, de la justice et du développement.*, (w:) *Mélanges M. Virally*, 467 (1991).

⁷ 999 UNTS 171.

their rights (al. 3). The Covenant is accompanied by the additional Optional Protocol of 1966 providing in its Article 1 the legal basis for *communications* to the Human Rights Committee from individuals claiming that their rights have been infringed. Notwithstanding this form of control, the Covenant has introduced also the institutions of reports of states and interstate communications dealing with violations of the Covenant by other Parties (Article 41). Reports and communications are considered by the Human Rights Committee. Communications by individuals and by states are of conditional character, as they depend in the former case on the ratification of the Protocol which is independent of the ratification of the Covenant, and in the latter case on the recognition by the state of the competence of the Committee to consider communications. The obligations of this Covenant seem *prima facie* to be of a different character than the obligations deriving from the Covenant on Economic Rights, as they are directed towards creating an international legal personality of individuals and their violation grants to every other state party the possibility of complaining of violations without having proved any particular legal interest, if the violating state has recognized the jurisdiction of the Committee. In such a way two forms of international legal obligations occur: obligations between individuals subject to the jurisdiction of the state (including aliens and stateless persons, with exceptions defined in Articles 13 and 25) and this state, and obligations of non-mutual character between the states parties to the Covenant.

The tendency towards the recognition of the international legal personality of individuals is stronger in the case of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁸ of 4 November 1950, with 10 additional protocols. In Article 1 it declares that the States Parties *shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*. The Convention also enables individuals to claim violations of their rights before the European Commission of Human Rights and – on the basis of Protocol No. 9 of 1990 (not yet in force) – also before the European Court of Human Rights (Articles 25 and 46 of the Convention). This right depends, however, on the recognition by the State Party of the competence of these organs to deal with individual claims. Moreover, it is possible for States Parties to claim violations of the convention by other states, similarly to the Covenant on Civil and Political Rights (Art. 24 and 46 of the Convention). The competence of the Commission occurs *ex lege* at the time of the ratification of the Convention while the competence of the Court depends on its recognition by the Parties which can subject it to the condition of recognition by the other parties. The obligations stemming from the Convention arise again on two planes: towards individuals (including aliens with exceptions formulated in Article 16, Article 4 of the Additional Protocol No. 4, and Article 1 of the Additional Protocol No. 7) and towards other States-Parties, which can act without proving any legal interest.

⁸ 213 UNTS 221.

Provisions of the European Social Charter⁹ of 18 October 1961, with two additional protocols are less favourable for individuals. The Charter states that States Parties have obliged in particular to *consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means* in order to achieve *conditions in which ... rights and principles may be effectively realised* (Article 20 al. 1, and Part I *in capite*). The States Parties keep a certain flexibility as to the substantive scope of obligations, but are obliged to present reports on the obligations binding and non-binding for them (Articles 21 and 22). These reports are verified by a Committee of Experts and by the Sub-committee of the Governmental Social Committee, and are finally approved by the Committee of Ministers of the Council of Europe (Articles 25, 27, 29). Individuals cannot appeal directly to international organs, but the participation of the so-called social partners (organizations of employers and trade unions) in the procedure is guaranteed. Their rights have been extended by the Additional Protocol of 1991 (not yet in force), and in particular by its Articles 23 al. 1, 24 al. 4, 27 al. 2.¹⁰ The obligations deriving from the European Social Charter similarly to those from the Covenant on Economic Rights, seem to preserve a classical nature.

The American Convention on Human Rights¹¹ of 22 November 1969 contains a provision nearly identical to that formulated in the Covenant on Civil and Political Rights. The States-Parties are obliged *to respect the rights and freedoms recognized herein, and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination* (Article 1.1.). This norm is strengthened by the obligation to adopt *such legislative or other measures as may be necessary to give effect to those rights or freedoms* (Article 2). The Convention guarantees to individuals the unconditional rights to appeal to the Inter-American Commission of Human Rights, but not to the Court (Article 44). States can claim violations by other parties before the Commission, and subsequently before the Court, without proving any legal interest to act but subject to the condition of the recognition of the competence of these organs to deal with international claims (Articles 45, 61 and 62; the recognition of the competence of the Court can be limited by the condition of reciprocity). Therefore, the solution is contrary to that adopted in the European Convention, where the position of state claimants is stronger than that of private ones. The schemata of legal obligations in both conventions and their features are the same.

Another solution has been adopted in the Additional Protocol to the American Convention of 1988, dealing with the protection of economic, social and cultural rights. Its character corresponds with the Covenant on Economic, Social and Cultural Rights. The Additional Protocol in Article 1 declares that the State

⁹ *European Treaty Series* No. 35.

¹⁰ The text reproduced in 13 *Human Rights Law Journal* 179 – 180 (1982).

¹¹ *OASTS* No. 36, at 1.

Parties are obliged to adopt necessary measures ... for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of rights recognized in this Protocol. Article 2 obligates the states to adopt such legislative or other measures as may be necessary for making these rights a reality. State reports constitute the most important form of control of the implementation of obligations (Article 19 al. 1). However, Article 19 al. 6 of the Protocol admits the right to appeal to – particularly – the Inter-American Commission in cases of violations of rights to form trade unions (Article 8 al. 1(a)) and to education (Article 13), providing also for a possibility to extend the scope of application of this provision to other rights recognized by the Protocol (Article 22 al. 1). With respect of the protocol to the American Convention we face not only interstate obligations, *prima facie* of classical character, but also – although in the limited framework – obligations between the state party and the individual.

The African Charter on Human and People's Rights¹² adopted in June 1981 protects political and civil rights as well as economic, social and cultural rights. Its Article 1 provides that the States Parties shall recognize the rights, duties and freedoms enshrined in the present Charter and shall undertake to adopt legislative and other measures to give effect to them. The charter guarantees rights and freedoms without distinction of any kind, in principle (except Article 13) irrespective of the nationality of the individual. The treaty guarantees to individuals the right to appeal to the African Commission of the Human and People's Rights (Article 55) and recognizes the competence of this organ to deal with reports by states and to settle interstate disputes (Articles 47, 49 and 62). It seems that the obligations of the States Parties under the Charter are *pro forma* analogous with those provided by the Covenant on Civil and Political Rights.

Summing up the provisions of international treaties we can state that the obligations of states in the field of the human rights are not of the same character. In particular, there exists *de lege lata* an express division of obligations connected with the different regulation of political and civil rights on the one hand, and of economic, social, and cultural rights on the other. At the contemporary stage of development of international law the obligations dealing with the political and civil rights are of specific character, while the remaining obligations of states seem to be traditional.

It is worth emphasizing that we can see a strong trend towards the uniformity of the character of legal obligations, i.e. the creation of a situation in which the obligations belonging to both categories of human rights would gain the same character. To a certain extent this was visible in the adoption of the additional protocols to the treaties protecting human rights.¹³

¹² Reprinted in 21 *ILM* 59 (1982).

¹³ So in particular Articles 1 and 2 of the Protocol No. 1 to the European Convention, as well as the provisions of the protocols modifying the European Social Charter and the American Convention, mentioned above.

One should also indicate the scientific discussions underway and proposed drafts of further modifications of the existing law. In particular it is useful to refer to the Recommendation of the Parliamentary Assembly of the Council of Europe No. 1168 (1991) of 24 September 1991 with Annex, dealing with the future of the Social Charter.¹⁴ This document provides a complete unification of the protection of social rights with those defined in the European Convention (al. 4). The Annex proposes the recognition of the international legal personality of individuals through the acceptance of the formula according to which *everyone* is entitled to protection, through the establishing of the Committee of Social Rights entitled to deal with *collective complaints* presented by competent subject like international trade union organizations, organizations of employers, or non-governmental organizations possessing consultative status by the Council of Europe (unconditionally) and by national organizations of employers and employees, if the state parties accept the competence of the Committee in this respect, and finally through the right to appeal to an independent inter-national instance in order to settle any dispute dealing with the interpretation of the Charter (Articles 25, 25 bis and Part I of the draft).

These drafts are accompanied by efforts of the authors declaring that at least certain provisions of the treaties protecting social rights could be treated on an equal footing with the political rights¹⁵ and – on the other hand – that there is no reason for the different treatment of the two categories of rights.¹⁶ Therefore, it seems that with the passage of time and when given favourable international relations, treaty obligations in the field of human rights will be uniformed, so that the remarks on the specific character of some of them will equally refer to all treaty obligations.

1.2. International obligations derive not only from international agreements but also from customary law. The customary character of human rights is, however, highly disputable. While one would not question the customary character of human rights as such, the major part of norms contained in the treaties is not a codification but rather a progressive development of international law.¹⁷

The proponents of the customary character of human rights usually maintain that the rights and freedoms defined in the Universal Declaration of Human Rights of 1948 form part of customary law.¹⁸ In order to support this

¹⁴ Cf. 29 *Conseil de l'Europe. Droits de l'Homme. Feuille d'Information (FdI)* 186 – 206 (1992). A draft-protocol to the Covenant on Economic, Social and Cultural Rights allowing petitions by individuals and states is under elaboration – see: *Human Rights Monitor* No. 19, at 12 (1992).

¹⁵ T. van Boven: Les critères de distinction des droits de l'homme, in: K. Vassak (ed.): *Les dimensions internationales des droits de l'homme*, 57 (1978).

¹⁶ N. Vallicós: La notion des droits de l'homme en droit international, in: *Mélanges M. Virally, op. cit.*, at 484 – 485.

¹⁷ Th. Meron: Human Rights and Humanitarian Norms as Customary Law (1989), at 91.

¹⁸ See e.g.: J. Carrillo Salcedo: *Universal Declaration of Human Rights*, in: R. Bernhardt (ed.): *EPIL* Instalment 8, at 306 (1985); W.M. Reisman: Sovereignty and Human Rights in Contemporary International Law, 84 *AJIL* 867 (1990).

view they indicate that *usus* and *opinio juris* can be deduced in particular from the incorporation of the norms of the Declaration into numerous constitutions and other acts of municipal law, from certain decisions of domestic courts referring to the Declaration as the source of additional appreciative standards, and from the reference to the obligation to comply with its provisions and the condemnation of its violations in numerous declarations and resolutions of the different organs of the United Nations.¹⁹

The opinions that human rights have been incorporated into the body of customary law are criticized. The criticism is based on the conviction that the resolutions of international organizations cannot substitute state practice, and their contents relating to the human rights violations seem to confirm that there is no positive state practice in this field. One can also point out that acts of municipal law do not constitute sufficient proof of the existence of the practice as an element of custom, as the mere incorporation of the norms of the Declaration into such acts does not mean that they are obeyed.²⁰

Because of this criticism the opinion on the customary character of human rights has been modified. It is often suggested that certain human rights and freedoms – the fundamental ones only – belong to the body of customary law.²¹ None of the authors is able to define, even approximately, the catalogue of the customary human rights. One refers also to the difficulties connected with the inconsistent practice, and with the lack of information on this practice. Detailed empirical studies are needed.²²

Anyway, such a view corresponds at first sight with the judgement of the ICJ in the *Barcelona Traction* case of 1970 declaring that certain human rights form part of general international law.²³

The incorporation of human rights into customary law is extremely complicated. In particular the resolutions of international organizations and treaties, and not custom, first recognized rights and freedoms. At the same time, such resolutions like the Universal Declaration and the American Declaration of the Rights and Duties of Man of 1948 influenced both international relations and municipal law which lead to the establishment of particular customs of a narrow scale of application. They were object of factual contestation by several groups of states (e.g. socialist or islamic). Because of that reason numerous universal and regional treaties were concluded, of general and special character with respect of the subjects (i.a. the Convention on the Rights of Child) and

¹⁹ Cf. O. S c h a c h t e r: *International Law in Theory and Practice*, 336 (1991).

²⁰ *Ibidem*, at 337.

²¹ *Ibidem*, at 337 – 338. Less optimistically L. H e n k i n: *Human Rights*, in: *EPIL* Instalment 8, at 270 (1985); Th. M e r o n, *op. cit.*, at 91.

²² O. S c h a c h t e r, *op. cit.*, at 338 – 340; Th. M e r o n, *op. cit.*, at 94 – 135.

²³ *Barcelona Traction, Light and Power Company Ltd.*, ICJ Rep. 1970, at 32. Also other decisions of the Hague Court on this question are not clear – see: the case concerning *Military and Paramilitary Activities in and against Nicaragua*, ICJ Rep. 1986, at 134.

protected objects (i.a. International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965).²⁴

These treaties, and to a certain extent, resolutions of international organizations, in particular those adopted after the fall of communism in the USSR and Central and East European states, and democratic changes in Africa, Latin America, and Asia connected with it, influenced to the larger extent international relations and gradually contributed to the development of the customary law of human rights.²⁵ Though dynamic, this process has not yet been accomplished. In effect one can speak of general customary law as the course of international obligations in the field of human rights, except for the narrow group of rights (like the right to life, freedom from torture and inhuman and humiliating treatment and punishment, freedom from slavery and personal servitude, the right to legal personality, freedom from arbitrary punishment, freedom of thinking, conscience and religion) exclusively *de lege ferenda*.

However, it seems that it is easier to accept regional customary law as the source of obligations in the field of human rights. So the Inter-American Court of Human Rights declared in the advisory opinion of 14 July 1989 on the interpretation of the American Declaration that the Declaration produces legal effects even, if it is not an international treaty.²⁶

Customary law is non-significant source of obligations in the domain of human rights. The weakness of this source becomes evident in particular at the contemporary stage since one cannot authoritatively state that it seriously influences the character of state obligations in this field. In particular, it does not generate the stratification of these obligations and does not create the international legal personality of human beings.

1.3. An asymetry of influence of the sources of international law upon the character of state obligations in the field of human rights can be observed. The specific character of these obligations is generated by treaties while customary law plays a subsidiary role, limited to enlarging the scope of the influence of the treaties upon the states non-parties and to assuring possible measures of protection not provided by international agreements.²⁷

The influence of treaties upon the character on obligations depends of the object of the regulation. The specific character of the obligations consists *prima facie* in the coexistence of two kinds of state obligations: towards individuals subject to their jurisdiction (which are unknown in classical international law)

²⁴ 660 UNTS 195.

²⁵ According to the ICJ, *multilateral conventions may have an important role to play in recording and defining rules derived from custom, or indeed in developing them*. Such a treaty should be of the normative character, and its contents should be accepted by the *overwhelming majority of States*. Cf. the *Continental Shelf (Libya v. Malta)* case, ICJ Rep. 1985, at 29 – 30.

²⁶ *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, advisory opinion OC-10/1989, IACHRA, Series A (Judgments and Opinions), further quoted as: IACHRA, at 50 (1989).

²⁷ O. Schachter: *op. cit.*, at 335.

and towards the other state parties to the treaties (including a competence to act without indicating any particular legal interest) concerns – simplifying the issue to a certain extent – *de lege lata* exclusively the obligations derived from the political and civil rights, and only *de lege ferenda* the obligations stemming from the economic, social and cultural rights.

2. Defining the essence of the particular character of international legal obligations in the field of human rights.

The opinion on the particular character of the obligations resulting from the certain human rights norms is confirmed and developed by the practice of international organs implementing human rights. For example, the Human Rights Committee stated in the case *V. Setelich v. Uruguay* of 24 October 1981 that *La thèse selon laquelle le Pacte international ainsi que le Protocole ne vise que les Etats en tant que sujets de droit international et que ces traités ne sont donc directement applicables aux particuliers, est dénuée de fondement juridique dès lors qu'un Etat a accepté la compétence du Comité pour recevoir et examiner des communications émanant des particuliers en vertu du Protocole facultatif*.²⁸ The Committee expressed *implicite* the view that the Covenant on Civil and Political Rights is the source of the interstate obligations and of the obligations between the state and individuals.

The opinion on the particular character of obligations in the field of human rights was formulated in more express way by the European organs. The Commission stated in its decision of 11 January 1961 dealing with the admissibility of claim (case *Austria v. Italy*) that *the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties*.²⁹

The Court declared in the decision of 18 January 1978 in *Ireland v. UK* that *Unlike international treaties of the classic kind, the Convention comprises more the mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a collective enforcement. By virtue of Article 24, the Convention allows Contracting States to require the observance of those obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of their own nationals*.³⁰ The European organs emphasized therefore the role of objective obligations as privileged compared with the interstate ones, stated that they are secured by the collective guarantee, and

²⁸ Comm. 63/1979, *Pacte international relatif aux droits civils et politiques. Comité des droits de l'homme. Sélection de décisions prises en vertu du Protocole facultatif*, CCPR/C/OP/1, vol. I, 107 (1988).

²⁹ *Digest of Strasbourg Case-Law relating to the European Convention on Human Rights*, vol. I, at 6 (1984).

³⁰ 1 *European Human Rights Reports* 103 (1979).

remarked that notwithstanding the passage on *subjective and reciprocal rights* the state is not obliged to show any legal interest in order to be able to act because such an interest is established *ex lege* through the acceptance of the treaty.

In a similar way the Inter-American Court formulated its position on the particular character of the obligations concerning human rights in two advisory opinions 24 of September 1982. In the first opinion the Court said that *it is the purpose of human rights treaties to guarantee the enjoyment of individual human beings of those rights and freedoms rather than to establish reciprocal relations between States*.³¹ In the other opinion the Court remarked that *modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose in the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States*.³² The Court confirmed the remarks made by the European organs and emphasized that the objective obligations are privileged because of the *object and aim* of the treaties, i.e. the protection of fundamental human rights irrespective of the nationality of a person, against their own state, and any other state party to the treaty.

One can conclude on the basis of the human rights treaties and the practice of their implementation that the obligations in this field are of specific character because they can be divided into two categories: objective (on the vertical plane) aimed at the guaranteeing to every human being an effective protection against all states parties to the respective agreements, i.a. through granting international legal personality to the individuals, and subjective (on the horizontal plane) between the states. The latter obligations are *prima facie* of a classical character, but are in a way modified by a presumption, in principle irrebuttable, of having a legal interest in relation with any other contracting party suspected of violations of its obligations (in particular of the objective ones).

These types of obligations are of different importance, though they are mutually interrelated. The former are of priority value because of the *object and aim* of the treaties, while the latter serve to secure their implementation, therefore, being of subsidiary character. The interrelations between both kinds of obligations appear also in the generally unilateral influence of the objective obligations upon the subjective ones. In effect they also become specific (the problem of the legal interest).

The defining of the specific character of the obligations in the field of human rights does not fully reveal all the particularities which can be found while consi-

³¹ *Definition of „Other Treaties” Subject to the Interpretation of the Inter-American Court of Human Rights*, Adv. Op. OC-1/1982, IACHRA, at 41 (1982).

³² *Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Adv. Op. OC-2/1982, IACHRA at 20 – 21 (1982).

dering the effects of the obligations and their influence upon the fulfilment of these obligations and the character and implementation of the responsibility for their violations.

3. The influence of the specific character of state obligations upon their implementation and responsibility for their violations.

3.1. The exclusion of human rights from the exclusive domestic competence of states seems to be the most important reflection of the specific character of the obligations in this field. However, the existence and scope of the exclusion is highly controversial in the international legal writing. The occurring doubts can be explained to a small degree only by the interpretation of Article 2(7) of the UN Charter in connection with Articles 1 al. 3, 55 and 56 (the principle of non-interference in the internal affairs of states in connection with the obligations of states to respect and observe human rights and fundamental freedoms without discriminations on any ground, such as race, sex, language, or religion).

The dispute concerns both the applicability of Article 2(7) of the UN Charter and the possible scope of the application. As to the first question, certain authors maintain that Article 2(7) cannot be applied with respect to Articles 1, 55 and 56 of the Charter (the obligations in the field of human rights are formulated in the purposes and principles of the Charter, so they are not directly effective and states are free in establishing the protection of human rights) while others accept such a possibility. As to the latter question, authors accepting the application of Article 2(7) can be divided into three groups: (1) rejecting any limitation of the competence of the state, (2) accepting the excluding of the competence *in toto*, or in the narrow scope, e.g. with respect of mass, serious and systematic violations of human rights, or with respect of rights belonging to the category of *jus cogens*, (3) leaving the scope of exclusion to state practice.³³

Therefore, there is a confusion as to the exclusion of the domestic jurisdiction of states in the domain of human rights. It results from treating the institution of exclusive jurisdiction of states as legally homogenous. It seems that one can differentiate two aspects of the problem: quantitative and qualitative. The former concerns, if and to what extent human rights do not belong to domestic competence, the latter concerns to what extent human rights are excluded from domestic competence. The former aspect is connected with substantive law while the latter is concerned with procedural law and with the existence of different forms of international control. Both aspects are subject to a gradation and are inseparable.

Under contemporary international law the principle of respecting the domestic competence of states is a mixed conventional and customary rule.³⁴ It forbids in

³³ Cf. the analysis by G. G u i l l a u m e: A commentary to Article 2(7), in: J.P. C o t, A. P e l l e t (ed.): *La Charte des Nations Unies*, 154 – 155 (1991); R. B i e r z a n e k: Ingerencja w sprawy wewnętrzne innych państw (The Interference in Domestic Affairs of other States), 44 *Sprawy Międzynarodowe* No. 12, 51 – 52 (1991).

³⁴ *Nicaragua Case*, ICJ Rep. 1986, at 106.

substance an arbitrary interference into the domestic affairs of states, and in particular the illegal use of armed force.³⁵ One cannot treat such an interference as illegal which is admissible in the light of contemporary international law and which the state accept through the decision to be bound by international law, in particular by a treaty,³⁶ because every state is, according to the ICJ, capable to self-limitation in the framework of its sovereignty.³⁷

Human rights certainly belong to the questions whose very essence concerns the domestic affairs of states. The states concluding such treaties as the UN Charter, International Covenants on Human Rights etc. and accepting the creation of customary law of human rights accept also that international law participates in the formation of their internal life through the mere existence of the objective obligations. One should emphasize that in the qualitative sense the scope of the exclusion is difficult to establish, as, for example, the UN Charter contains the most general clauses on human rights. One could expect that the scope of exclusion will be the largest possible. It occurs, however, that the generality of the provisions limits this scope, and in certain situations it contributes to the rejection of the concept of exclusive competence of states *a limine*. The substantive scope of the exclusion could be defined more precisely with respect to particular treaties in the field of human rights, but even in such a case doubts can occur in connection with e.g. an extensive interpretation of human rights norms by the competent implementing organs. On the contrary, it is difficult to define the scope of exclusive domestic competence of states with respect of customary rules.

The regulation of individual rights and freedoms by international law is the starting point in proving that this subject does not belong to the exclusive competence of states. It is, however, not sufficient, because the matters generally belonging to domestic competence can also have certain international aspects.³⁸ Therefore, it is necessary to consider the qualitative aspect of the exclusion.

It seems that the minimum standard of exclusion is connected with a possibility of discussing the problems of respect for human rights in the particular state in an international forum, in particular by the organs of international organizations, of investigating the situation within the particular state including fact-finding procedures, and of passing resolutions dealing with the violations of human rights by that state.³⁹ The higher standard is connected with the rights to review periodic reports on the implementation of the obligations

³⁵ *Intervention is wrongful, when it uses methods of coercion in regard to such choices, which must remain free ones.* So the ICJ in the *Nicaragua Case*, *ibidem*, at 108; see also: generally 108 – 110.

³⁶ In the case concerning *Elettronica Sicula S.p.A. (ELSI) (USA v. Italy)* the ICJ decided that *Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law.* Cf. *ICJ Rep.* 1989, at 76.

³⁷ So the *Nicaragua Case*, *ICJ Rep.* 1986, 131.

³⁸ See: G. Guillaume, *op. cit.*, 152 – 154.

³⁹ Cf. Articles 13, 62, 68 of the UN Charter, Article 23 of the Covenant on Economic Rights, Article 26 of the European Social Charter, Article 41 of the American Convention, Article 45 of the African Charter.

and to make observations directed towards the particular state and *pro publico bono*.⁴⁰ These standards are irreversible in the sense that they must be accepted together with the acceptance of the treaty. Finally, the highest standard is connected with the right to settle disputes between states and between the state and an individual. This standard can be conditional (depending on the declaration on the recognition of the competence of a control organ which can be subject to certain conditions) and reversible (the declaration can be revoked and not repeated).⁴¹ Within this standard one can indicate the less rigorous version that the decision of the international organ is of conciliatory character (like the procedures in the framework of the United Nations, Covenant on Civil and Political Rights, or African Charter) and the more rigorous one according to which the decision is binding for the parties to the dispute (such a procedure was adopted in the European and American Conventions).

The exclusion of human rights from the domestic competence of states implies that the states lose the freedom of regulation within the scope of exclusion, both in municipal and international relations, and are *eo ipso* subject to international control, accepting in particular the claims directed against them and bearing international responsibility independently of the character of claimant, should it be an individual (national of the state or alien) or another state party to the treaty.

3.2. The loss of the freedom of regulation of the legal order by the state implies the obligation to comply with the international legal norms on human rights within the municipal order. What is the essence of this obligation, in particular as the Human Rights Committee remarked in its General Observation No. 3 of 1981 that in principle Article 2 of the Covenant leaves the states parties the freedom to decide how to implement the provisions of the Covenant within their municipal legal orders, within the framework defined by Article 2 al. 1(1).⁴² It means that international norms at first sight cannot generate direct effect with respect of individuals, i.e. they are not self-executing.⁴³ Is such a conclusion correct?

The practice of international organs often indicates that the main problem does not consist in proclaiming the rights and freedoms but in securing them an effective control in order to avoid them becoming illusory or theoretical. The obligation to secure full real rights to every person subject to the state's juris-

⁴⁰ Cf. Articles 16 ff of the Covenant on Economic, Social and Cultural Rights, Article 40 of the Covenant on Civil and Political Rights, Article 57 of the European Convention, Articles 21 ff of the European Social Charter, Article 42 of the American Convention, Article 19 of the Protocol thereto, Article 62 of the African Charter.

⁴¹ The solutions adopted are characterized by considerable diversity – compare e.g. Article 46 of the European Convention, and Article 62 of the American Convention.

⁴² *Observations générales adoptées par le Comité des droits de l'homme conformément au paragraphe 4 de l'article 40 du Pacte international relatif aux droits civils et politiques*, CCPR/C/21/Rev. 1, at 5 (1989).

⁴³ P. v a n D i j k, G. J. H. v a n H o o f: *Theory and Practice of the European Convention on Human Rights*, 12 – 13 (1990).

diction is what constitutes a particular manifestation of the special character of the human rights obligations.

It does not mean that all states are exclusively obliged to incorporate international legal norms but that they are obliged to construct their municipal law in accordance with these norms. What happens, if the state does not fulfil this obligation? The field is open to apply the concept of self-executing norms. The state should allow (*pati*) that the individual could refer to international norms in the procedure before the state agencies. Therefore, the state can choose between three solutions: either it implements international norms on human rights itself, or it accepts that they are self-executing, or it will bear an international responsibility.

Certain authors present the opinion that in order to be self-executing, the norms must be unconditional, clear, precise and complete.⁴⁴ It seems that with respect to human rights this view is not correct. These conditions are connected usually with the treaties of a very large scope, with the complicated systematization (e.g. the treaties establishing the European Communities). The construction of the human rights treaties is simple and the matters are regulated in one unit. In this context the decision as to an eventual self-executing character of particular provisions is confronted with the fundamental directives of interpretation, it impairs the intention of the parties of the equal treatment of the rights, and it leads towards groundless voluntarism. Even, if the norms are not sufficiently clear, one should remember that they are defined by subsequent practice. Every provision protecting human rights (i.e. formulating substantial norms) is potentially self-executing; this potential can be initiated, if the state remains passive. So the self-executing character of the international human rights norms is the effect of the specific character of the obligations dealing with the individual rights.

3.3. The specific character of the obligations considered occurs also in the process of interpretation of the human rights treaties. It is particularly clear, if one refers to the so-called directive of effectiveness, acting in order to fully realize rights and freedoms. A general statement on this question can be found in the decisions of the Human Rights Committee in the case *C. Améndola Massiotti v. Uruguay* of 26 July 1982. The Committee declared that the aim of the Covenant on Civil and Political Rights, and the Additional Protocol thereto is to supervise the effective control of human rights and to achieve the elimination of their violations.⁴⁵

The interrelations between this principle and the specific character of obligations has been confirmed by the European organs. The European Commission of Human Rights remarked that *The question of applying these and other*

⁴⁴ Cf. J.H. Jackson: *Status of Treaties in Domestic Legal Systems. A Policy Analysis*, 86 *AJIL* 327–329 (1992). On the circumstances favourable and unfavourable to the self-executing norms see: *ibidem*, 322–326.

⁴⁵ Comm. 25/78, *C. Améndola Massiotti v. Uruguay* (1982), *Sélection de décisions* I, at 141.

commonly invoked principles of treaty interpretation to Human Rights Convention should, however, be answered only after taking into account the special nature of this Convention.⁴⁶ The Court stated: *In interpreting the Convention regard must be paid to its special character as a treaty for the collective enforcement of human rights, and fundamental freedoms ... Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective ... In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with „the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society“.*⁴⁷

Finally the Inter-American Court declared that *The object and purpose of the American Convention is the effective protection of human rights. The Convention must, therefore, be interpreted so as to give its full meaning and to enable the system the protection of human rights entrusted to the Commission and the Court to attain its „appropriate effects“.*⁴⁸

The principle of effectiveness inspired by the specific character of human rights obligations is, therefore, the principle of purpose. It follows the object and purpose of the treaties, i.e. the necessity of respecting effective rights and freedoms within the framework of the democratic order. In fact, it is based upon the constant search of just balance between individual and collective interest, with a certain priority for the individual one.

The principle of effective interpretation would not be of special character taking into account that it constitutes a basic element of the teleological interpretation.⁴⁹ It is a specific feature of the human rights treaties that this principle has a priority in the process of interpretation. This principle is accompanied by the peculiar principles of purpose to expand the classical framework of the treaty interpretation. A principle of evolution allows for better adaptation of human rights protection to the changing social conditions, and a principle of autonomy allows the international organs to define the content of particular rights permitting them to gain a special position which is independent of municipal legal orders and travaux préparatoires.⁵⁰

⁴⁶ The *Golder* case, opinion (1973), 1 *Digest* 4 (1984).

⁴⁷ The *Soering* case (1989), 161 *Publications of the ECtHR, Series A: Judgments and Decisions*, 34 (1989).

⁴⁸ *Velásquez Rodríguez v. Honduras, Preliminary Objections* (1987), in: *Annual Report of the Inter-American Court of Human Rights 1987* (1988), Annex IX-A, at 41.

⁴⁹ Cf. Article 31 of the Vienna Convention on the Law of Treaties and e.g. G.I. T u n k i n (ed.): *International Law* 167 (1986).

⁵⁰ Both principles seem to depart from the general rule according to which *a special meaning shall be given to a term, if it is established that parties so intended* (Article 31 al. 4 of the Vienna Convention), as the practice of the human rights organs often exceeds the primary will of the parties. See: P. R o l l a n d: *L'interprétation de la Convention*, 3 *Revue Universelle des Droits de l'Homme* 285 – 287 (1991).

3.4. Objective, interstate obligations also derive from human rights treaties. At first sight it seems that they possess typical features of the classical international obligations. This impression is misleading to a large extent. In particular, the traditional international obligations are reciprocal. On the one hand it means that in the case of serious violations of the bi- or multilateral treaty other states parties to this treaty affected by the breach, can invoke it as a ground for suspending or terminating the application of the treaty, as well as a ground for countermeasures, and on the other hand in the case of a reservation by the state party, other states parties can object to this reservation (Articles 60 and 19 *et seq.* of the Vienna Convention of 1969).

The rule formulated in Article 60 of the Vienna Convention and confirmed by customary law is subject, however, to an important exception. The parties cannot invoke even a serious breach of provisions *relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties* (Article 60 al. 5 of the 1969 Vienna Convention).

Notwithstanding this clause certain authors express the opinion that the human rights treaties generate exclusively reciprocal obligations. For example, B. Simma is of the opinion that the only difference between classical international obligations, and obligations in the field of human rights is that in the case of the latter *the mutual rights of the States parties are not accompanied by any material benefits accruing to them* and that they can be implemented unilaterally.⁵¹

It seems that this view is not fully correct. Article 60 al. 5 of the Vienna Convention clearly modifies the reciprocity making impossible in particular the application of countermeasures by the nationals of state X with respect of the nationals of state Y subject to the jurisdiction of state X even in the case of serious violations of rights of nationals of state X in state Y, whereas countermeasures are a typical reflection of reciprocity. Similarly, in the case of the limitation of interstate relations through a reservation, state X cannot deny conventional guarantees to the nationals of state Y subject to its jurisdiction exclusively on the ground that the relations between both states within the scope of the particular norm have been excluded.⁵² So the modification of reciprocity consists, first of all, of softening its negative effects which could disadvantageously influence the implementation of the objective obligations, and of particular the rejection of the principle *adimplendi non est adimplendum*.⁵³

⁵¹ B. Simma, *op. cit.*, at 401.

⁵² T. Burchett: The Advisory Practice of the Inter-American Human Rights Court, 79 *AJIL* 22 – 23 (1985), and Th. Meron, *op. cit.*, at 25, who states that *Characteristically, states do not object to reservations made by other states.*

⁵³ G. Barile: The Protection of Human Rights in Article 60, Paragraph 5 of the Vienna Convention on the Law of Treaties, in: *International Law at the Time of its Codification. Studies in Honour of R. Ago* (1987), vol. 4, at 4, writes that *the treaties on account of their very nature, must not reflect the dialectic of synallagmatic obligations.*

Further the limitation of the principle of reciprocity means also that states cannot subject the acceptance of the declaration on the recognition of competence of the international control organs to the condition of accepting such declarations also by other states (with exceptions expressly provided in the treaties), and that they cannot formulate such reservations which would be directed against the object and purpose of the treaties, in particular against the minimum of procedural guarantees (e.g. Articles 24, 32 and 57 of the European Convention). Finally, the reciprocity is limited by the prohibition of subjecting the implementation, and observance of international human rights norms to the condition of their implementation, and observance by the other states parties.

The reciprocity is reflected by the fact that states in principle can formulate reservations and objections. They can also claim the observance of international rules by the other states parties including the observance of rights of their own nationals. However, this claim should be based upon the preferential standard defined in the treaty, and not upon the national standard (observe human rights as formulated in the treaty, and not as I observe them). Finally, the states can apply countermeasures exclusively, if they are not contrary to Article 60 al. 5 of the Vienna Convention of 1969 and to international law. So the subjective obligations are to a large extent not reciprocal.

3.5. The most controversial question is whether the obligations of states in the field of human rights because of their specific character belong to the category of the obligations *erga omnes*. The ICJ stated in the *Barcelona Traction* case of 1970 that *an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection, by their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (...); others are conferred by international instruments of a universal or quasi-universal character.*⁵⁴

The judgment of the ICJ is subject to numerous contradictory interpretations and criticism inspired additionally by the recent decisions of the ICJ and the human rights protection organs. The disputes can be presented as a number of dilemmas: (1) what does the formula *obligations erga omnes* mean (who are the parties, should the international community act through its members *ut singuli* or as a whole)?; (2) if obligations *erga omnes* really exist, can they derive exclusively from general international law (conventional or customary), or from particular law as well (e.g. from a multilateral treaty, or regional custom);

⁵⁴ *Barcelona Traction* case, ICJ Rep. 1970, at 32.

who is the party thereto, and what is the difference between the obligation *erga omnes* and the ordinary multilateral obligation? (3) whether obligations *erga omnes* in the field of human rights derive from certain norms only, or from all of them? (4) what is the relationship between obligations *erga omnes*, and *actio popularis*? It is hardly possible to answer all these questions in an exhaustive manner. However, one can present some remarks.

It results from the *Barcelona Traction* decision that the obligation *erga omnes* is the obligation of the state towards the *international community as a whole*, which means that *all states can be held to have a legal interest in protecting it*. According to the Court, the parties to the obligation are the state, and the international community as a whole, and the latter subject qualifies the character of the obligation, it seems that it does not constitute the personification of the simple sum of states but it represents the existence of the collective interest of the international community (which is emphasized by the expression *as a whole*), and every state member of this community is interested in protecting it. At the moment of the creation of obligation every state acquires the legal interest, and is not bound to present it additionally (except in the case of violations of norms).

If the obligations *erga omnes* are deemed to protect a collective interest, it is not clear why obligations of this kind could not arise on regional or subregional level. It seems that such a conclusion has been confirmed by the practice of regional human rights organs. So e.g. the European Commission stated that *a Contracting Party, when it refers an alleged breach of the Convention to the Commission under Article 24, is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe*.⁵⁵

The Inter-American Court declared in its opinion of 1989 in an even more expressive manner that *The evolution of the here relevant „inter-American law“ mirrors on the regional level, the developments in contemporary international law, and especially in human rights law, which distinguished that law from classical international law to a significant extent. That is the case, for example, with the duty to respect essential human rights, which is today considered to be an erga omnes obligation*.⁵⁶

The thesis on the regional obligation *erga omnes* seems to be supported *de lege ferenda* by the Draft Articles on State Responsibility. On the one hand, the draft comments that the universal observance of obligations of fundamental importance for the protection of human beings constitutes the fundamental interest of international community (so *implicite* Article 19 al. 3(c) of the Draft Articles on state responsibility),⁵⁷ and on the other hand, while considering the definition of an injured state, it indicates that in the case of the violation of a multilateral

⁵⁵ *Austria v. Italy* case (1961), 3 YBECIR 140 (1961).

⁵⁶ *Interpretation of the American Declaration*, IACHR A/1989, 45 – 46.

⁵⁷ Cf. YBILC 1976, vol. II (Part Two) 95 *et seq.*

treaty, or customary norm guaranteeing human rights or fundamental freedoms, the notion of *the injured state* means every state bound by the treaty or custom except the violating state (so Article 5 al. 2(c) (iii) of Draft Articles on state responsibility Part Two).⁵⁸

Therefore, it seems that one can accept the thesis of the existence of regional obligations *erga omnes*. Taking into account the weakness of customary law in the field of human rights, these obligations would be above all conventional.⁵⁹ The difference between them, and the typical obligations stemming from multilateral treaties will consist in the fact that every state party will have a legal interest in protecting human rights without the necessity to prove it, and in undertaking any action against the violating state it will act on behalf of and in favour of all the other state parties. The remaining states parties can join the claim by the acting party but they cannot present any claim dealing with the same issue themselves.

There is also a dispute among authors whether the obligations *erga omnes* derive from all the norms protecting human rights, or exclusively from some of them. In the latter case one usually associates these obligations with the norms of *jus cogens* protecting the so-called *hard core of human rights*.⁶⁰ Taking into account the earlier remarks one must emphasize that the obligations *erga omnes* derive also from the international norms other than *jus cogens* (which means that the norms of *jus cogens* also generate obligation *erga omnes*). Therefore, one can remark that obligations *erga omnes* come into being principally on the basis of multilateral treaties (general and regional), they stem from all substantive

⁵⁸ Cf. YBILC (1985), vol. II (Part Two), 25 – 27.

⁵⁹ Th. Meron, *op. cit.*, at 194 – 195 writes: *Following the judgment in Barcelona Traction, and perhaps under its influence, there has been a growing acceptance in contemporary international law of the principle that, in addition to the increasing number of human rights agreements granting each state party locus standi against the other states parties regardless of the nationality of victims (conventional erga omnes), all states have a legitimate interest in, and the right to protest against, significant violations of customary human rights regardless of the nationality of the victims (customary erga omnes). Eo ipso the obligations erga omnes do not infringe the principle ius facit inter partes.*

⁶⁰ Cf. e.g. P. Weir: *Towards Relative Normativity in International Law?* 77 AJIL 430 (1983). Incidentally it is worth to remark that the idea of identifying the norms of *jus cogens* with the hard core of human rights does not seem correct. The comparing of the treaty clauses forbidding derogation is based upon the false conviction that one can compare the regional and universal treaties. These treaties have been drafted in the different periods of the development of humanitarian idea. Moreover, not every treaty contains such a clause (*vide* the African Charter). The idea of the hard core would without any justification subject the imperative force of the universal norms to their confirmation on the regional level, and would lead towards the inexplicable division of the peremptory norms into those constituting *jus cogens* and those which are not *jus cogens* (are they therefore *jus dispositivum*?). If the concept of *jus cogens* is based upon the universal norms (Article 59 of the 1969 Vienna Convention), such a condition with respect to human rights is fulfilled exclusively by the norms formulated in Article 4 al. 2 of the Covenant on Political Rights. Regional norms are *jus cogens imperfectum* and their imperative force is effective within one region only, under the condition of the conformity with the Covenant. In the international legal order as a whole they occupy the position between *jus cogens* and *jus dispositivum*.

human rights norms contained in such treaties, and they can be implemented in the framework of the procedures legally provided by these treaties.

Obligations *erga omnes* are of substantive character. The existence of procedural norms is indispensable in order to implement them. *Ex hypothesi* it seems that these obligations are connected with *actio popularis*. However, the ICJ in the judgment in the South-West Africa case of 18 July 1966 rejected *actio popularis* as not existing under international law at present.⁶¹ One can suppose, however, that in connection with the formation of the peremptory norms of human rights it will be accepted, subject to the condition that it will not be extended to any other claims. At the present stage of development of the international law of human rights *actio popularis* is restricted to conventional obligations.⁶² Finally, the specific character of human rights obligations means that they acquire the *erga omnes* character.

3.6. Obligations *erga omnes* as protecting collective values are in a way obligations of solidarity. This idea has been confirmed by the Institut du Droit International in its resolution *La protection des droits de l'homme et le principe de non-intervention dans les affaires intérieures des Etats* of 1989. The resolution reads in Article 1 that from the obligations *erga omnes* derives *un devoir de solidarité entre tous les Etats en vue d'assurer le plus rapidement possible une protection universelle et efficace des droits de l'homme*.⁶³

This reasoning seems to correspond directly with the international law in force. In the preambles to the Covenants (al. 4) we find the confirmation of the obligation to support the general and effective respect of human rights and freedoms, based upon Articles 1, 55 and 56 of the UN Charter. Article 2 al. 1 of the Covenant on Economic, Social and Cultural Rights obligates the states parties to secure gradually the full enjoyment of rights *through international assistance and co-operation*. Article 4 of the Covenant on Civil and Political Rights subjects the right of the states to derogate from certain guarantees of human rights to the conditions of conformity with international law and of control by the UN and other states parties. The preamble to the European Convention states that human rights belong to the *common heritage* of the states parties, and the ideals of justice and peace in the world are realized i.a. through the *common understanding and observance of Human Rights*; the Convention is supposed to express the *collective enforcement* of these rights (al. 4 – 5). The European Social Charter should be realized *by all appropriate means, both national and international in character* (Part I, *in capite*). Also Article 26 of the American Convention and Article 1 of the Protocol thereto, and in particular al. 4 of the preamble to the African Charter, refer to the obligation of international co-operation.

⁶¹ ICJ Rep. 1966, at 47. Cf. H. Thirlway: *The Law and Procedure of the International Court of Justice 1960 – 1989*, Part One, 60 *BYBIL* 97 (1989).

⁶² See: *Barcelona Traction*, ICJ Rep. 1970, 47.

⁶³ The text reproduced in 25 *FdJ* 136 *et seq.* (1989).

It seems that one can establish certain standards of international solidarity in this context. The cooperation and support, as well as the cooperation with a competent international organizations constitute the minimum standard. A higher standard is created by the collective control structure (the organs created by the treaties), and the highest one by the possibility of undertaking a collective enforcement action, in particular in the form of sanctions of international organizations (suspension of membership, exclusion from membership, use of armed force) in the case of particularly grave breaches of human rights. The minimum standard is founded upon both conventional and customary basis, while the higher standards are of optional character and must be expressly provided by treaties. So interstate obligations in the field of human rights require solidarity in action and reaction.⁶⁴

3.7. The subjective obligations in the field of human rights are governed by the rule *ius facit inter partes* (Article 34 of the 1969 Vienna Convention). Its binding force in the domain of individual rights is weakened to a considerable degree. The European Court decided that *the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman, or degrading treatment, or punishment in the requesting country* (not party to the Convention – C.M.).⁶⁵ It seems that this argumentation can be *de lege lata* extended to the other peremptory rights, and *de lege ferenda* upon all remaining rights of individuals. The obligations considered above gain priority over the traditional international legal obligations in the sphere of enforcement.

3.8. The specific character of human rights obligations is reflected also in the responsibility for their violations. In traditional international law the state is responsible for the violations of obligations imputable to it.⁶⁶ Such a general approach to the fundamental rule of state responsibility gives rise to disputes as to the grounds of responsibility (fault or risk) and its premises (the violation of international obligation and imputability are generally accepted, but the inclusion of damage is disputable; the ILC is of the opinion that damage constitutes an *inherent element of the violation*).⁶⁷

In the field of human rights the principles of responsibility are not clear, though it seems that with respect to objective obligations it is based on risk (the state is responsible for the simple fact of violation).⁶⁸ On the contrary, the indi-

⁶⁴ A.a., Article 2 al. 3 *in fine* of the resolution.

⁶⁵ The *Soering* case (1989), *ECHR Publ. A/161*, 35 – 36.

⁶⁶ Cf. Draft Articles 1 – 4 on State Responsibility, Part One, *YBILC* 1973, vol. II, 173 ff.

⁶⁷ Quoted by Th. Meron, *op. cit.*, 207 – 208.

⁶⁸ Cf. the Report of the European Commission in the case *Foti et al.* (1980), *Digest* 4 (1985), 415; the decision of the European Court in the case *Young, James and Webster* (1981), *ECHR Publ. A/44*(1981), 20; the judgments of the Inter-American Court of 29 July 1988 in the case *Velasquez Rodriguez v. Honduras* (1988), *IACHR*, Series C (Decisions and Judgments), No. 4, at 151 and 154 (1988).

vidual would be unable to prove its rights. It is certain that the existence of damage does not constitute a premise of responsibility. The scope of responsibility is extended to cases in which no damages occur, which is especially visible with respect to the so-called potential violations (the *de facto* possibility of the application of a bill, or execution of particular decision concerning an individual).⁶⁹ This institution results from the extension of the scope of the responsibility of states upon the real risk of violation of rights. A serious breach on a widespread scale of the obligations in the field of human rights is deemed to be an international crime (Article 19 of the ILC Draft on State Responsibility, Part One).

Under traditional international law, the state is responsible for its own acts, i.e. the acts and omissions of the state organs and private persons acting in such a quality, also *ultra vires*, in the framework of the due diligence.⁷⁰ This scheme is fully confirmed in the field of human rights; it is even aggravated by emphasizing that it is irrelevant which state agency violates the right and under what circumstances – the acts must simply reflect the execution of the sovereign power.⁷¹ The responsibility of the state in the case of the infringement of objective obligations is sharpened also by the impossibility of the reference to the consent of the bearer of the right infringed as the circumstance precluding wrongfulness. Any limitation of rights in the case of the state of necessity, or extreme distress must conform to the respective provisions of the human rights treaties.⁷²

The important change in the regime of responsibility consists of the fact that in the case of the claim connected with the violation of the objective obligation, the burden of proof passes to the state perpetrating the violence contrary to the rule *ei incumbit probatio qui dicit, non qui negat*. Such a solution is connected with the in principle unequal position of the parties, and occurs on the one hand in the existence of legal norms adopting the presumption *pro victima*,⁷³ and on the other hand, in the obligation to cooperate in good faith with the competent control bodies in explaining all complaints of the claimant and providing it with all necessary information concerning the case.⁷⁴

⁶⁹ So the decision of the European Court in the cases *Groppera Radio AG* (1990), *ECHR Publ. A/173* (1990), 20; *Klass et al. v. the FRG* (1978), *ECHR Publ. A/28* (1978), 18; *Soering* (1989), *ECHR Publ. A/161* (1989), 35.

⁷⁰ Articles 5 – 11 of the ILC Draft on State Responsibility, *YBILC* 1974, vol. II, Part One, 277 ff; see also: the *Hostages* case, *ICJ Rep.* 1980, 29 – 31.

⁷¹ *Zimmermann and Steiner* case (1983), *ECHR Publ.* 66 (1983), 13; *Comm.* 52/1979, *D. Saledzs de Lopéz v. Uruguay. Sélection de décisions I*, at 94.

⁷² Cf. Article 29 of the ILC Draft on State Responsibility, Part One, *YBILC* 1979, vol. II (Part Two), 109 *et seq.*

⁷³ Cf. the regulations of the European Convention using the expressions accepting the exceptions and limitations to the guarantees of respecting the rights – e.g. Articles 2 al. 2, 4 al. 3, 5 al. 1, and in particular al. 2 of Articles 8 – 11 of the Convention.

⁷⁴ Article 5 al. 1 of the Additional Protocol to the Covenant on Political Rights, art. 28 al. 1(a) of the European Convention, Article 48 al. 1(a) of the American Convention.

The dual character of state responsibility for the violations of human rights is another effect of the specific character of the obligations in this field. The responsibility for the violations of the objective obligations is of a compensatory-corrective character while the responsibility for the infringements of the subjective obligations – to the contrary – of corrective-compensatory character. It means that in the case of violation of the rights of the individual the state is obliged to redress damages by the payment of compensation and to eliminate the source of the violation,⁷⁵ while in the case of the violation of the subjective obligation the state is obliged to pay compensation to the individual exclusively, if the victim of the violation can be personally identified and the claiming state acts in favour of such person.⁷⁶ Furthermore, what is particularly important, the state is responsible for the implementation of its obligations first of all towards its own nationals, and not only towards the aliens as provided under traditional international law.

Finally one must remark that contrary to the suggestions by certain authors⁷⁷ procedural systems of the vindication of claims under international law constitute self-contained regimes neither in the sense of the legal basis of control nor from the point of view of the rights provided for the individuals and states, though the conventional systems of protection are *implicite* or *explicite* preferred by the parties.⁷⁸ The protection of rights in the case of objective obligations is of subsidiary character and certain extra-conventional methods of the settlement of disputes can be used (e.g. the disputes arising from the Covenant on Economic, Social and Cultural Rights can be resolved within the UN system, the disputes from the European Convention in the framework of the Council of Europe, etc.).

4. Concluding remarks.

The state obligations in the field of human rights are denoted by their important particularity in comparison with traditional international legal obligations. The specific character is marked by the exclusion of human rights from the domestic competence of states within the scope defined by the treaties, by

⁷⁵ Cf. Article 50 of the European Convention and Article 68 al. 2 of the American Convention. The compensatory-corrective obligations derive also from the Covenant on Civil and Political Rights – so the practice of the Human Rights Committee e.g. Comm. 162/1983 *O. Berterreche Acosta v. Uruguay* (1988), 44 *Rapport du Comité des Droits de l'Homme* (1989), 197; Comm. 203/1986 *R.T. Munioz Hermoza v. Peru* (1988), *ibidem*, 218, etc.

⁷⁶ *Ireland v. UK* (1978), 1 *European Human Rights Reports* 106 (1979).

⁷⁷ E.g. K. Zemanek: The Unilateral Enforcement of International Obligations, 47 *ZaöRV* 41 (1987). As to the notion of the self-contained regimes, cf. the *Hostages* case, *ICJ Rep.* 1980, 40. See: in particular Article 40 of the Covenant on Civil and Political Rights.

⁷⁸ See: Article 62 of the European Convention and the *Nicaragua* case, *ICJ Rep.* 1986, 134, where the ICJ declared that *However, where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves.* The protection of human rights under customary law should be implemented by using the methods appropriate for respecting human rights. So *the protection of human rights, strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras.* *Ibidem*, 134 – 135.

the self-executing character of the norms, the special methods of interpretation, the non-reciprocal character of interstate obligations and their *erga omnes* effect, in the character of solidarity, in the weakening of the effects of the *inter partes* rule, and finally in the enlarging and strengthening of state responsibility.

In this new way realizing the ideas of humanism and solidarity the international law of human rights endeavours to contribute to form the world order. It must be acknowledged that it plays the avant-garde role in this process, even if this instrument is not always sufficiently effective.

Universal Protection of Minorities

(Selected Problems)

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Since the 16th century States have been trying to solve the problem of minorities by concluding treaties and conventions or later, within the framework of international organizations, by establishing special legal bodies and a specific international mechanism for protecting and promoting the rights of minorities as well as avoiding internal and external conflicts.

This paper intends to present some world – wide attempts at solving minority problems within the last seventy five years.

I

The concept of "minority" is one of the most complicated issues in international law. The term "minority" is, without being defined, used in major documents. Moreover, international law refers to various kinds of minorities, for example: "ethnic", "racial", "religious", "linguistic". It means that only persons who are members of a given minority because of their race, nationality, ethnicity, religion, mother tongue are protected by international law. Such rules do not refer for example to sexual minorities.

Sometimes indigenous populations are bracketed with minorities, but generally, they are regarded as a separate issue by international law. Indigenous populations may constitute minorities in certain circumstances but due to their history and separate cultural patterns, social institutions, different economic situation and own legal system they should be excluded from the minority definition.¹

Two ILO Conventions deal with rights of indigenous people – the Convention on Indigenous and Tribal Populations No.107 of 1957 and the Convention No. 169 Concerning Indigenous and Tribal Peoples adopted in 1989.²

The term "peoples" used in the ILO Convention No. 169 was earlier used in the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 and, what is most important, in the UN Charter (Articles 1(2), 55) and in two identical first Articles of two International Covenants on Human

¹ UN Doc. C/CN.4/Sub.2/186/7; Add.1(vol.2) par.379; M.Cobo Report.

² ILO Convention No.107, 328 U.N.T.S 247; ILO Convention No. 169, 28 I.L.M. 1384 (1989); M.N. S h a w: The Definition of Minorities in International Law, in: *The Protection of Minorities and Human Rights*, 13 – 16 (1992).

Rights of 1966. The above – mentioned Articles declare: "All peoples have the right to self – state determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Neither the UN Charter nor the Covenants explain the term "peoples" and for that reason it is controversial whether minorities can be the peoples and if they have the right to self-determination. It seems that the term "peoples" refers only to inhabitants of the non-self-governing territories³ which Chapter IX of the UN Charter refers to. According to the study elaborated by A.Critescu, the term "peoples" points out to people possessing clear identity and own identity, stresses their strong connection with a territory (in the case of minorities, their ethnicity is more emphasized than territorial aspects) and such "people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in Article 27 of the ICCPR."⁴

The meaning of "peoples" in the wider, sociological sense is unacceptable due to practical reasons. It is impossible to authorize under international law all groups to create their own State.

It can be concluded that the term "peoples" does not refer to minorities, so minorities are not entitled to the right to self-determination under international rules. On the other hand, it cannot be ruled out that minorities can be entitled to the internal right to self-determination which is described as full participation in political, economic, social and cultural life of a given country in accordance with its constitutional structure. Generally, however, these matters are beyond the interest of international law.

Despite having separated the terms "indigenous people", "peoples" and "minorities", the construction of the definition of a minority is hardly possible anyway because of complexity of the issue.

First attempts at defining minorities were made by the Permanent Court of International Justice in *the Greco – Bulgarian Communities case* referring to the multiemigration of the Greco – Bulgarian communities. According to the Court: "«community» is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other."⁵

Working up of the definition was continued by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities after the Second World War. The most significant suggestions to the minority definition were surrendered

³ Not every non-self-governing territory was taken into consideration, for example Hong-Kong.

⁴ A. Critescu: „The Right to Self-determination: Historical and Current Developments on the basis of United Nations Instruments” (1981), UN.Doc.E/CN4/Sub.2/404/Rev. 1 at par. 279.

⁵ *PCIJ* 1930, Ser.B, No. 17, at 19.

by the Secretary General in his memorandum in 1950 and the Sub-Commission in its early years, in 1953. The memorandum dealt first of all with origins of minorities and less with the definition.⁶ The Sub-Commission proposed: "...the term minority includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of population; such minorities should properly include a number of persons sufficient by themselves to preserve such traditions or characteristics; and such minorities should be loyal to the State of which they are nationals."⁷

More than twenty five years latter, in 1979 the special rapporteur of the Sub-Commission – Professor F. Capotorti published his report: "Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities" in which he pointed out that the universally accepted definition of minority is a very difficult task because there are too many aspects to be considered. Despite of that difficulty Professor F. Capotorti defined a minority as: "a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."⁸

The definition of the minority included in the draft of the UN Convention on Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities of 1979⁹ is based on the definition submitted by F. Capotorti.

A different point of view is presented in the other study submitted to the Sub-Commission by Jules Deschenes in 1985. He described the minority as "a group of citizens of a State constituting a numerical minority and in the non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having the sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aims to achieve equality with the majority in a fact and in law."¹⁰ This proposition of the definition is closer to the advisory opinion given in 1935 by the Permanent Court of International Justice in *the Minority Schools in Albania case*¹¹ in which the Court stressed the need to ensure for the minorities equality not only in law but in fact, as well. Moreover, it seems that the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities¹² adopted on 18 December 1992

⁶ F. Capotorti: "Study of the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities"; UN.Doc. E/CN.4/Sub.2/384. Add. I The Concept of Minority, at 7.

⁷ UN.Doc.E/CN.4/64/Annex I, Res. II.

⁸ F. Capotorti: "Study on ...", Add. I, The Concept of Minority, at 10.

⁹ UN.Doc.E/CN.4/1983/66.

¹⁰ UN.Doc.E/CN.4/Sub.2/1985/31.

¹¹ PCIJ 1935, Ser. A/B, No. 64, at 17.

¹² Text of the Declaration 47/135 of 1992 in: "Human Rights. A Compilation of International Instruments (First Part)", 140 (1993).

confirms this rule which it expresses in its Article 2 (2). The Article claims: "Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life".

The issues such as citizenship of persons belonging to the minorities, non-dominance of such groups and their numbers are the main subject of the opinions of States submitted to the draft of the Convention. There is no agreement among them as to what makes the constructing of the universal binding definition of the minority impossible.

It can be concluded that in spite of complexity and diversity, the problem of the lack of the minority definition has absorbed the attention of States and international organisations for more than sixty years. It seems to be obvious because without defined conception of a "minority", it is impossible to point out who is entitle to enjoy the rights and duties of persons belonging to such a group. However, sometimes the attempts to work out the minority definition caused negligence of the work on the rights of persons belonging to minorities. Asbjorn Eide who in 1991 submitted to Sub-Commission the study "Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities" in which he wrote: "If I were to start my task with a working definition I would not be able to carry out the study."¹³

II

The development of the international protection of minorities can be divided into three periods:

1. During the first period (before 1919), which is called the "early period", states incorporated into treaties protective clauses concerning mainly religious minorities. Since the 16th century several treaties containing such clauses were concluded.¹⁴ Both kinds of treaties (signed by Christian and non-Christian States) granted with various groups mainly freedom of faith and sometimes other civil rights.

¹³ UN.Doc./CN.4/Sub.2/1991/43.

¹⁴ There were among them: the Augsburg Peace Treaty (1555); the Treaty of Westphalia (1648) granting religious rights to the Protestants in Germany; the Treaty of Oliva (1660) in favor of the Roman Catholics in Livonia; the French-Spanish Treaty of Nijmegen (1678); the Treaty of Ryswick (1697) which protected the Catholics in territories which had been ceded by France to Holland; the Treaty of Paris (1763) concluded between France, Spain and Great Britain protecting the Roman Catholics in Canada; the Polish-Russian conventions of 1767 and 1775 in favor of dissidents in Poland; the Treaty of Vienna (1815) which provided for religious minorities certain civil rights; the Treaty of Berlin (1878) concerning the rights of Turks, Greeks and Romanians under Bulgarian rule; the International Convention of Constantinople (1881) protecting Muslims under the Greek law. These treaties were mentioned in: L. G e l b e r g: *Prawo międzynarodowe i historia dyplomatyczna*, 51 (1954); A. M i c h a l s k a: *Prawa człowieka w systemie norm międzynarodowych*, 11 (1982); N. L e r n e r: *Group Rights and Discrimination in International Law*, 9 (1991); J. S y m o n i d e s: „Collective Rights of Minorities in Europe” in: *The Changing Political Structure of Europe*, 107 (1990); J. W i n i a r s k i: *Wybór źródeł do nauki prawa międzynarodowego*, 7 – 8 (1938).

The 19th century clearly differs from the first three hundred years of the "early period". In the 19th century, besides religious groups, the term "national" and "ethnic" minorities appears in some international acts. This is a period of new nations being born and the fight for national independence. States attempted to avoid ethnic tensions either by adoption of domestic regulations ensuring equality of all nations and ethnic groups (like Austria and Hungary in their constitutions of 1867 and 1868), or by concluding multilateral conventions during great conferences, for example in Vienna (1815), Berlin (1878) or Constantinople (1881). However, no efficient system and no protective mechanisms were established and the protection of minorities, as previously, was only partial. In that period diplomatic intervention (humanitarian intervention) was used by big powers seemingly in favor of some minorities, but in fact, it was only a pretext for expansion.

2. The second period is connected with the system established by the Treaty of Versailles after the First World War. It is called "the minority treaties system". The Allied Powers did not incorporate any generally binding obligations into the League Covenant mainly for political reasons. Except for the United States¹⁵ the main Powers did not make any attempts to include any provisions for minorities to universal international documents. They were not interested in binding themselves by international obligations but on the other hand they acknowledged that such protection was necessary in the enlarged and newly – created states. Ethnic tensions in these countries could threaten not only with internal order of a given state but with all system. Moreover, including the regulation on protection of minorities into the general binding act could justify the undesirable interventionist policy. In such situation it was decided that the minority issue would be solved by the particular minority treaties. This treaty system under the League of Nations included three types of instruments: a) treaties with particular States concerning protection of minorities (the new or enlarged States like Poland, Czechoslovakia, Yugoslavia, Rumania and Greece concluded such separate treaties with the Allied Powers. Alongside there were some local treaties concerning minorities: the German – Polish treaty on Upper Silesia and local conventions relating to Danzig and Memel; conventions concluded between Greece and Bulgaria as well as Greece and Turkey regarding exchanges of their minorities); b) provisions on minorities included in general peace treaties (it regarded defeated States – Austria, Hungary, Bulgaria, and Turkey); c) declarations made by the newly-created States (Albania, Estonia, Lithuania, Latvia and Iraq were forced to make such declarations as a condition of their admission to the League of Nations; Finland had to make such a declaration but only regarding the Aaland Islands).

In May 1919 Germany made only a unilateral declaration on non-discrimination of minorities,¹⁶ so generally this State was not bound by any minority

¹⁵ W. M c K e a n: *Equality and Discrimination under international Law*, 14 – 15 (1983).

¹⁶ See: K. J e z i o r a ŋ s k i: *National Minorities in Europe*, 12 (1933).

obligations on its territory. There was only one exception regarding Upper Silesia by virtue of Polish – German Treaty of 15 May 1922 but that treaty was concluded only for the period of fifteen years. According to the Treaty between Poland and Allied Powers, Poland had the minority obligations on its all territory but Germany only on the territory of Upper Silesia. That fact and the expansive, abusive minority politics of Germany was the reason for renunciation of minority obligations by Poland in 1934.

The treaties provided for minorities, *inter alia*: the right to life and liberty, the right to freely exercise their religion, the right to use their own language, the equality of minority schools, the right of establishing their own charitable, religious and social institutions. The League Council had the possibility of supervision over these obligations thanks to the Guarantee Clause which was the main provision of each treaty. The text of Article 12 of the Polish Treaty¹⁷ was a model for the majority of treaties. Under this procedure certain States could bring allegations of violations of the treaty provisions to the Council of the League which could, in turn, refer such allegations to the Permanent Court of International Justice. Individuals, under certain conditions, had the right to present their petitions to the Council of the League.

The advantage of the League of Nations system was the fact that the Permanent Court of International Justice took part in the minority procedure before the Council of the League. Members of the Council could ask the Court's opinion on facts or law. Some matters which were brought before the Court related to the *sui generis* Upper Silesia system. Three cases regarding the German minority on Poland were submitted to the Court. *The Administration of Prince von Pless* (1933)¹⁸ and the *Polish Agrarian Reform and German Minorities* (1933)¹⁹ were finally withdrawn but in the *Minorities Schools in Upper Silesia case* (1928)²⁰ the Court gave the judgment. Five questions were submitted for advisory opinions, but of which three once again related to the German Minority in Poland: *the Settlers of German Origin in the Territory Ceded by Germany to Poland* (1923),²¹ *the Acquisition of Polish Nationality* (1933)²² and *the Access to German Minority Schools in Polish Upper Silesia* (1931).²³ Still another matter related to the Polish minority in the Free City of Danzig – *the Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig* (1932)²⁴ and *the Minority Schools in Albania case* (1935).²⁵

The minorities treaties system collapsed. The two decades between the world wars were marked by political and social conflicts and the recrudescence of

¹⁷ L.of N.Doc. C.L.110. 1927, i. 43.

¹⁸ PCIJ, Ser. A/B, Nos. 52, 54, 59 (1933).

¹⁹ PCIJ, Ser. A/B, Nos. 58, 60 (1933).

²⁰ PCIJ, Ser. A, No. 15 (1928).

²¹ PCIJ, Ser. B, No. 6 (1923).

²² PCIJ, Ser. B, No. 7 (1923).

²³ PCIJ, Ser. A/B, No. 40 (1931).

²⁴ PCIJ, Ser. A/B, No. 44 (1932).

²⁵ PCIJ, Ser. A/B, No. 64 (1935).

racist ideology. This system was not able to ensure all minority rights and keep peace. But there were not only political and social reasons for such a failure. The treaty system had some technical defects, mainly concerning complicated and slow procedures. The minority system was closely connected with the overall inter-war structure of the League and after its disintegration the system collapsed with it. However, there were some advantages in this system. For the first time, the idea of the responsibility of States for all human beings within their territories was acknowledged. The system established procedural precedents concerning human rights issues (the petitions procedure) and in this period the concept of international organizational guarantees was created.

III

After the Second World War almost all treaties, which had been concluded under auspices of the League of Nations, lost their force. In 1950 the Secretary General presented the report on the minority protection which referred, among others, to the legal validity of the minority treaties. He stated: "Reviewing the situation as a whole, therefore, one is led to conclude that between 1939 and 1947 circumstances as a whole changed to such an extent that, generally speaking, the system should be considered as having ceased to exist."²⁶

In this period concluding minority treaties was unpopular (because of German exploitation and abuse of the League system) and all minorities were suspected of being a potential "fifth column". To some extent the minority problem was to be solved by the compulsory expulsion. According to agreements concluded between 1944 and 1949 millions of people had to leave their homes. Apart from Serbs, Croats, Czechs, Slovaks, Magyars, there were Germans (fifteen million) and three million Poles.²⁷ The transfer was to prevent from establishing new minority groups in the European states where the new borders were setting. The compulsory transfer had started before the Potsdam Conference but the Article XIII of Potsdam Protocol justified them. There were only two requirements regarding expulsion – such transfer had to be effected in orderly and humane manner.

It seemed, that partially because of the expulsion the minority problem lost its significance. Even more so as the victorious powers decided that in the United Nations system the protection of minorities would be generally exercised by protecting and promoting individual human rights and freedoms.

Equality and non-discrimination have been established in many binding and non-binding international acts. The UN Charter in Articles 1 and 55 and the Universal Declaration of Human Rights²⁸ in Article 2 have guaranteed the uni-

²⁶ Study on the Legal Validity of the Undertakings Concerning Minorities, UN Doc.E/CN.4/367.

²⁷ P. Thornberry: *International Law and the Rights of Minorities*, 114 (1992).

²⁸ GA Res. 217 (III), UN Doc. A/810, at 71 (1948).

versal applicability of these two principles. In consequence, persons belonging to minorities can enjoy recognition as persons in the view of law, equality in courts and equal legal protection of the law, the right to fair trial with language interpretation or translation. These rights are ensured by the Universal Declaration (Articles 6,7) and the Covenant on Civil and Political Rights²⁹ (Articles 14, 16, 26). Declared in the Covenant: freedom of thought, conscience and religion (Article 18), freedom of opinion (Article 19) and freedom of association (Article 22) are also the rules of special significance for minorities. Many other generally binding acts of international law also deal indirectly with minorities.

Firstly, the Convention on Prevention and Punishment of the Crime of Genocide of 1948³⁰ which extends the protection to minorities but the protection protects groups only from physical destruction and not from so-called "cultural genocide". The Convention on the Elimination of Racial Discrimination of 1965³¹ provides for "certain racial or ethnic groups" the "...equal enjoyment or exercise of human rights and freedoms..." in Article 1, paragraph 4 and in Article 2, paragraph 2. It protects their social, cultural and economic rights. Similar to those above but being a non-binding document is the UN Declaration against Intolerance and Discrimination Based on Religion or Belief of 1981.³²

Secondly, there are other important instruments protecting the rights of women and children and simultaneously the rights of persons belonging to minorities like the UN Convention on the Elimination of All Forms of Discrimination against Women of 1979³³ or the UN Convention on the Rights of Child of 1989.³⁴

Thirdly, there are legal acts drawn up by the specialized agencies of the UNO. In 1958 the International Labour Organization adopted the Convention on Discrimination in Employment and Occupation.³⁵ Worth mentioning are also the UNESCO Convention against Discrimination in Education of 1960,³⁶ which refers to the right of members of minorities to setting up their own schools with their own language as a language of instruction, and the UNESCO Declaration on Race and Racial Prejudice of 1978.³⁷

Any special rights of minorities regarding preservation of their identity and tradition were not mentioned in the United Nations Charter nor even in the Universal Declaration of Human Rights in spite of the fact that such regulations seem to be necessary in order to prevent minorities from assimilation. However,

²⁹ GA Res. 2200 A. 999 UNTS 171.

³⁰ GA Res. 260 (III), 78 UNTS 277.

³¹ GA Res. 2106 (XX), 660 UNTS 195.

³² UN Doc. A/36/51 (1981).

³³ UN Doc. A/Res/34/180.

³⁴ 28 I.L.M. 1457 (1989).

³⁵ 362 U.N.T.S. 31 (1958).

³⁶ E/CN.4/Sub.2/210, annex, UNESCO Doc. 11C/15.

³⁷ Text in N. L e r n e r: „The UN Convention on the Elimination of All Forms of Racial Discrimination”, Appendix 3.

in 1946 there was created the Commission on Human Rights, and later in 1947 the Sub-Commission on Prevention of Discrimination and Protection of Minorities which played the dominant role in the preparation of Article 27 of the Covenant on Civil and Political Rights. Article 27 declares:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities should not be denied the right, in the community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". Except Article 27 of the Covenant there is no universal regulation strictly concerning the issue of the protection of minorities and from the formal point of view it is the only one binding treaty law on a world – wide scale. Article 27 is criticized for its "scantiness" which raises more problems than it solves.³⁸

Firstly, it is not clear what the passage "...in community with the other members of their group..." means. There are different views as to the interpretation of Article 27. Some commentators indicate that Article 27 contains "elements of group protection".³⁹ Others affirm only the individual protection given in that article.⁴⁰ Some authors regard it as a reference to the way of using rights mentioned above.⁴¹ It seems that Article 27 has its own double character and its apparently contradictory elements are exposed according to a situation or tendencies but in fact they are two sides of executing of a given right. For example Article 27 refers to rights which can be executed individually, like the right to practise own religion but on the other hand to rights executed in a community, like the right to practise this religion with other coreligionists or the right to establishing own associations.

Secondly, Article 27 refers to "ethnic, religious or linguistic minorities" and it leaves out the term "national" minorities. On the other hand, it does not offer any suggestions concerning the definition of the minority nor the criteria that should be applied to classify a group as a minority.

Thirdly, there is still another problem concerning the character of Article 27. Is its character positive or negative?. In a negative understanding no one should be denied the right to enjoy his culture, to profess and practise his own religion or to use his own language and a State should ensure him merely non-discrimination which means "equality in law". But such non-discrimination is as well possible without Article 27. So, it seems that this article was elaborated in the special purpose. The non-discriminating treatment of minorities does not ensure them "equality in fact" which requires the positive interpretation of that article. The "equality in fact" was stressed in the quoted above advisory opinion

³⁸ Ch. Tomuschat: „Protection of Minorities under Art. 27 of the International Covenant on Civil and Political Rights“, in: *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte*, Festschrift für H. Mosler, 951 (1983).

³⁹ T. Modée: *The International Protection of National Minorities in Europe*, 108 (1969).

⁴⁰ Ch. Tomuschat: „Protection...“, at 954.

⁴¹ Y.N. Kly: *International Law and Black Minority in the US*, 36 (1969).

of the Permanent Court of International Justice of 6 April 1935 on Minority Schools in Albania. In the light of the advisory opinion given by the PCIJ and other articles of the Covenant, Article 27 should be interpreted in the positive manner. In 1992 the UN Commission on Human Rights stressed the positive and broad interpretation of Article 27 in the unanimously adopted Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.⁴²

The Article 1 Declaration states: "1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity. 2. States shall adopt appropriate legislative and other measures to achieve those ends...".⁴³ The consecutive Articles confirm an active role of a State towards persons belonging to minorities, especially Article 4. According to Article 2 persons belonging to minorities have the right to enjoy their culture, practise their religion, use own language in private and in public, take part in life of the society, participate effectively in decisions referring to them on the local and national levels. They have the right to set up and maintain their own associations and they have the right to have free and peaceful relations with members of other minorities and with persons of the same origin but living in other States.

Undoubtedly the Declaration is the act of great moral significance but it is only a non-binding document, so its effectiveness is rather small. It should be confirmed by the practice of States which may prove their will to ensure "the equality in fact" for minorities by their international activity and their internal legislation. The Meetings of the Conference on the Human Dimension of the CSCE are such an expression of the dynamic activity of States but the legal validity of the documents elaborated during these Meetings is not clear. They cannot be acknowledged as binding acts, they can only be suggestions. In such a situation, the internal activity of States seems to be the most measurable.

Since 1989 the very warm discussion on the minority law has been continuing in the Polish Parliament. The main issue is a way of ensuring of the minority rights – by only one general minority act or in different manner. Such minority act should ensure all rights for all minorities living in Poland but because of the complexity and diversity of the minority issue, there is always the possibility that the rights of persons belonging to one or even some minorities would be not taken into consideration. Moreover, such act can cause undesirable and artificial

⁴² M. Nowak: „The Evolution of Minority Rights in International Law”, in: „Documents of the Second Amsterdam International Law Conference „Peoples and Minorities in International Law”, 8–10 (1992); R.B. Bilde: „Can Minorities Treaties Work?”, in: Y. Dinstein, M. Tabor: „The Protection of Minorities and Human Rights”, 71, 11 (1992); N. Lerner: „Group Rights ...”, at 12; L. Ehrlich: *Prawo międzynarodowe*, 618 (1958).

⁴³ Text of the Declaration 47/135 of 1992 in: „Human Rights. A Compilation of International Instruments (First Part)”, 140 (1993).

differences in the Polish society. It seems, that the particular minority problems should be solved by departmental regulations (for example regulations regarding setting schools), by executing international obligations and, first of all, by applying international standards.

Poland is a Party of the UN Charter, both Covenants and the Optional Protocol to the Covenant on Civil and Political Rights, the Convention on Prevention and Punishment of the Crime of Genocide, the Convention on the Elimination of Racial Discrimination, the UN Convention on the Rights of Child of 1989, the ILO Convention on Discrimination in Employment and Occupation and the UNESCO Convention against Discrimination in Education. Apart from universal obligations, Poland is bound by regional instruments like the European Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, Poland has been taking part in the CSCE activity ceaselessly since 1975.

Poland is also bound by bilateral treaties on friendship and mutual co-operation which among others contain regulations regarding minorities. In 1991 Poland concluded such a treaty with Germany. That treaty contains comparatively profound regulation regarding minorities and has become the pattern for the next agreements. Relations with other neighbors were regulated by Poland initially in declarations and later in treaties which refer to the rights of national minorities. Poland signed and ratified treaties with Ukraine, Russia, Belorussia (all in 1992) and with Czech and Slovak Federative Republic (1991). But now, after the splitting of the southern neighbor of Poland there is the need to conclude new, separate treaties with Czech Republic and Slovak Republic. After long negotiations the treaty with Lithuania has just been signed (27 of April) 1994. Moreover, such treaties containing among others minority provisions were concluded by Poland with Hungary (1991), Estonia (1992) and Latvia (1992).

The Parties of the above mentioned treaties obliged themselves to apply international standards and they assumed an active attitude towards the minority protection. According to the treaties the States do not limit their minority policy only to non-discrimination but they "undertake essential activity in order to realize of the rights of the national minorities.." (Article 15(2) of the treaty with Latvia and 11 of the treaty with Ukraine), or "Parties will make efforts to ensure for persons..." (Article 16(2) of the treaty with Belorussia) or they will "mutually enable and facilitate the activity aiming at the assistance for members of (minority) groups..." (Article 21(2) of the treaty with Germany).

It seems that the Polish policy on minorities is compatible with international standards. Moreover, taking into consideration the literal interpretation of the bilateral treaties, it is based on the active attitude of the State to the minority issue.

IV

The methods of supervision of States attitude to the living within their borders minorities can be divided into three groups: political control, consideration of State reports and judicial or quasi judicial procedures.

The political control is based on the work of Special Rapporteurs or Working Groups created by Commission on Human Rights. The independent Rapporteurs examine how human rights in a given country are protected, then their reports are reviewed by the Commission. The Rapporteurs examined the protection of some rights with reference to the minorities but no appropriate mandate dealing solely with the rights of minorities was set up. The procedure established by ECOSOC resolution 1503⁴⁴ enables inter alia, the participation of NGO-s and persons representing minorities in public.

In opposition to the procedure mentioned above, the next method is based on the human rights standards established in the UN Conventions. By virtue of some of them the independent experts that constitute Committees, they are entitled to scrutinizing State reports on respective treaties as well as then can consider State, individual or group complaints. The Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women are such monitoring bodies.

The main aim of jurisprudence is solving particular conflicts but to some extent it can contribute to setting standards in the field of human rights protection and minority rights at the same time. The output of the existing juridical or quasi-juridical bodies is rather modest in the field of minority matters when compared with the opinions and judgments of the Permanent Court of International Justice, but the activity of the Committee of Human Rights established by the Optional Protocol to the Covenant on Civil and Political Rights is worth of special attention, more so as Poland has become a party to the Protocol since February 1992.⁴⁵

According to the Protocol, the procedures before the Committee are not very complicated. Individuals whose rights included in the Covenant are being violated by the State may submit complaints to the Committee. The Committee of 18 independent members is entitled to check the admissibility of complaints. The claims cannot be anonymous, nor can be an abuse of the right of submission. They cannot be incompatible with the provisions of the Covenant as well. Apart from these requirements an applicant has to show that he has exhausted every domestic remedy and that the same matter is not simultaneously being considered by any other international body. It is only individuals that have the right to submit communications relating to their individual and executed in the community rights. Groups and organizations are deprived of the right to lodge a complaint.

⁴⁴ ESC Res. 1503 (XLVIII) (1970).

⁴⁵ Entered into force 07.02.1992 and has become effective since 1st of May.

(It seems to be an argument for the individual character of the protection of minorities). If the communication has been accessed as admissible, the State has six months to take a stand towards the complaint. The procedures are generally written in form and are confidential but it does not excluded hearings and personal appearances of applicants before the Committee. The conclusions given by the Committee are published in the annual report to the UN General Assembly.

First time the Committee considered the case of a person belonging to a minority in 1981 – *Lovelace v. Canada*. A Maliseet Indian, who first married and than divorced a non – Indian Canadian, complained that by getting married she lost, according to the Indian Act, the right to return to the reservation and to live "in community with the other members" which was incompatible with Article 27 of the Covenant. The Committee stated: "Persons who were born and brought up in the reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as «belonging» to this minority and to claim the benefits of Article 27 of the Covenant".⁴⁶ Moreover the Committee in its Views suggested that Canada should amend the Indian Act. In 1990 the Committee found another violation of Article 27 in the case *Lubicon Lake Band (Ominayak v. Canada)*. This case related to traditional rights of Canadian Indians to hunting and fishing. The Committee recognized that Article 27 should include "the right of persons, in community with others, to engage to economic and social activities which are part of the culture of the community to which they belong."⁴⁷

The cases mentioned above and others like *the Mikmaq v. Canada*⁴⁸ and *Ivan Kitok v. Sweden*⁴⁹ related to similar situations which were not classical minority cases because they referred rather to indigenous people.

*The Dominique Guesdon v. France case*⁵⁰ regarded the French – speaking Breton and his right to interpretation during the a criminal proceeding against him. In that case the basis for complaint was Article 14 and 26 but the Committee found no violation of Guesdon's rights.

Persons belonging to minorities also have the right to invoke other provision included in the Convention on the Elimination of All Forms of Racial Discrimination. The Committee on the Elimination of Racial Discrimination has not dealt with the minority complaints as such but several times considered the matters of migrant workers, for example *Yilmaz-Dogan v. Nether-lands*⁵¹ and

⁴⁶ Communication No. 24/19772, HRLJ 158 (1981), M. N o w a k, *The Evolution ...*, at 3.

⁴⁷ Communication No. 167/1984 M. N o w a k: „The Evolution...”, at 4.

⁴⁸ Communication No.205/1986, 5 HRLJ 194 (1984).

⁴⁹ Communication No. 197/1985; G. A l f r e d s s o n, A. Z a y a s: „Minority Rights: Protection by United Nations”, 14 IIRLJ 6 (1993).

⁵⁰ Communication No.219/1986 op.cit, at 7.

⁵¹ Communication No.1/1984 op.cit, at 8.

Demba Talibe Diop v. France.⁵² However the issue of the migrant workers is not strictly connected with the minority issue. Usually (but not always) they are not interested in preserving their identity and they aim at assimilation with the rest of a society. Additionally, they usually are not citizens of the country in which they are living. Not being bound by the citizenship with the State where they live, their loyalty to this State seems to be problematic. It should be stressed that the loyalty is the first and main duty of members of minorities. Because for these reasons, despite the definition of a minority presented by J. Deschenes, the migrant workers could not be acknowledged as a minority.

V

Undoubtedly the role of the UN system in protecting the rights of minorities is significant but it does not prevent the world from tensions and wars because every minority problem is unique and every minority group has its particular history, requirements and every minority is in a different situation. Professor Capotorti stated in his Report that "...the very different situations of minorities in the various countries makes States skeptical of a juridical approach to the problem at the world level..."⁵³. The similar opinion was presented in the preliminary report submitted to the Sub-Commission by Mrs. Palley who expressed her doubts about uniform solutions of the minority problems. She advocated a thematic study on national experience which could enable the supportive and advisory role of the UN.⁵⁴

It seems, that there is the need to survey particular experiences of States. However, on the other hand there are not any obstacles to accept a challenge in order to create a universally binding document referring to minorities only. The Declaration on the Rights of Persons Belonging to Minorities is the significant turning point in the UN policy towards minorities issues. Perhaps the convention will be the next step in the field of minority protection. Such a treaty should establish a working body helping in the implementation of provisions included in the convention. Existence of such a convention may enable States to submit minority matters before the International Court of Justice. Moreover, the future convention could be a pattern for the regional regulations and bilateral treaties.

⁵² Communication No.2/1989 op. cit, 12 HRLJ 300 (1991).

⁵³ F. Capotorti: „Study...”, Preface, at 5.

⁵⁴ UN Doc.E/CN.4/Sub.2/1989/43.

The Right to Freedom of Scientific Investigation under Space Law

JACEK MACHOWSKI

Introduction

The Universe forms the greatest natural laboratory and a boundless experimental range available to mankind, offering a unique medium and sphere for scientific investigation. Outer space is both an object and place of scientific research, while its nature and physical features are such, that its exploration, investigation and use are predominantly of international character. No wonder, then, that a considerable part of space law provisions were dedicated to international scientific cooperation in outer space. Their drafting was accompanied by heated debates on the scope of freedom of scientific investigation vested in individuals and states in their space activities. The outcome of these debates culminated in stipulations on *the right to freedom of scientific investigation*, incorporated into various legal instruments forming the body of space law.

The unusual character of space activities consists in the fact that they are taking place in a milieu of two opposite legal regimes: in "air space" under the rule of state sovereignty and in "outer space" under a common international regime, characterized by freedom of action, including the freedom of scientific investigation. And it is at the undefined borderline between these two spaces, where most of the doubts and conflicts on the scope of that freedom are emerging. The resulting inclusion of numerous derogations from and limitations on the right to freedom of scientific investigation into space law, was aimed at the protection of universal interests and safeguarding of superior values, as well as the fundamental rights of man, peoples, nations and states. The laws were formulated because of the importance of outer space to the progress of science and, vice versa, the significance of science to the exploration and utilization of outer space for the benefit of mankind.

According to relevant legal provisions, outer space is considered free for exploration, investigation and use by all mankind, but what that means under international law has yet to be clearly defined. The principles of absolute freedom of outer space which were readily accepted in early United Nations resolutions were carefully reconsidered in subsequent international agreements. Interest has slowly moved away from the original proclamation of an absolute freedom and unlimited liberty of exploration, investigation and research with regard to outer space, towards a cautious analysis of political, military, economic and social

effects of possible misuses and abuses of the stipulated right to freedom of investigation and the legal implications that it would involve. The results of that analysis led to the adoption of the mentioned restrictions and limitations on the right. But even now, in the transition period from exploration to exploitation of outer space, the importance of scientific investigation is not declining. Perhaps only the weight is moving slowly from pure towards applied sciences. Another characteristic feature of these regulations is their growing minuteness of detail and the increasing number of limitations imposed on the right.

I. The origin, scope and substance of the right to freedom of scientific investigation under space law

At present, the right to freedom of scientific investigation appears in the law in two forms: either as one of the human rights¹ vested in individuals, particularly research workers, astronauts and others, or as a right of states.² Although the available comprehensive catalogues of rights and duties of states do not specify their right to freedom of investigation, it is stipulated in numerous multilateral conventions and bilateral agreements, thus binding the parties of these instruments in law, and in case of the so called objective regimes, the obligations one binding *erga omnes*. In the first instance, the right of states to freedom of investigation was granted in respect of the so called "international" or "common" spaces, which were placed beyond the sovereignty and jurisdiction of particular states. So far, the following areas and spaces have been subjected to such legal regimes: in the law of the sea³ – the high seas and the so called "Area", comprising the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction; in space law – the outer space including celestial bodies therein, and finally Antarctica – under the 1959 Antarctic Treaty.⁴

Like in other branches of international law, the fundamental principles of space law, including the idea of freedom of outer space, were initially conceived and propounded in legal doctrine by publicists. By allowing freedom of investigation, exploration and use, as opposed to establishing new zones of so-

¹ Art. 15(3) of the 1966 International Covenant on Economic, Social and Cultural Rights. J. Machowski: „Freedom of research as human right (in Polish)”, in: *Życie Szkoły Wyższej*, No 19, p. 23 – 39 (1989).

² J. Machowski: „The principle of freedom of research in the light of international law (in Polish)”, in: *Studia Filozoficzne*, 1979, No 7(164), p. 151 – 165; J. Machowski: *Freedom of Research: a legal and sociological approach*, University of Jos (Nigeria), Postgraduate Open Lecture Series, Vol. I, No 8, 3 – 38 (1984).

³ B. Kwiatkowska-Czechowska: „Scientific research in the light of the Third Conference on the Law of the Sea (in Polish)”, in: *Sprawy Międzynarodowe*, 1979, No 6, p. 133 – 146; J. Symonides: *Third Conference on the Law of the Sea and the investigation of the World Ocean (in Polish)*, (1981); A. Soons: *Marine Scientific research and the law of the sea*, (1982).

⁴ J. Machowski: „The right to freedom of research under the Antarctic Treaty System”, in: *Polish Polar Research*, 1990, No 3 – 4, p. 419 – 434; Ch.C. Joyner: *Antarctica and the Law of the Sea*, (1992).

vereignty, it has been suggested that outer space could serve the common interest of all mankind.⁵

The practical importance of these theoretical considerations was dramatically emphasized during the International Geophysical Year 1957/58, when the tacit acceptance by states of overflying satellites launched on this occasion was interpreted as a general consent to free overflight for scientific purposes.⁶ Although, the right to freedom of scientific investigation in outer space was nowhere formally laid down in law, it was generally understood that the early experiments with rockets and artificial satellites would benefit from that freedom. But the acquiescence of governments with respect of these overflights for scientific purposes did not yet mean a general recognition *de iure* of a general freedom of use principle for space.⁷

Nevertheless, this lack of any initial objection has firmly established the direction of future development of space law, based on the principle of freedom of exploration, investigation and use of outer space, formulated in subsequent UN General Assembly resolutions and declarations,⁸ which preceded the conventional stipulations.

After an extensive debate in the Committee on the Peaceful Uses of Outer Space (COPUOS – established in December 1958), the UN General Assembly formulated the principle that "outer space and celestial bodies are free for exploration and use by all States in conformity with international law and are not subject to national appropriation".⁹

That principle was further elaborated in subsequent resolutions, and in the 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.¹⁰ It has reached such a degree of maturity that it can safely be regarded as a precursor of the right to freedom of scientific investigation stipulated in the subsequent international agreements on space law.

In the meantime, however, the practical value of this principle remained open to many doubts, especially in the light of spectacular achievements in space technology and conquest of outer space. These achievements, and reciprocal suspicions and fears on possible military uses of outer space, prompted the space

⁵ O. S c h a c h t e r: „Who Owns the Universe“, in: *Space Law, A Symposium, Special Committee on Space and Astronautics*, US Senate, 85th Congress, 2nd Session, 1959, p. 8 – 17; C.W. J e n k s: *Space Law*, 170 (1965).

⁶ A.G. H a l e y: „Recent Developments in Space Law and Metalaw“, in: *Harvard Law Record*, 1957, No. 24, p. 1; *Space and Government*, 67 (1963).

⁷ The UN General Assembly ad hoc Committee on the Peaceful Uses of Outer Space expressed in 1959 the view that "in principle, outer space is on condition of equality, freely available for exploration and use by all, in accordance with existing or future international law or agreements", in UN Doc. A/4141/1959. This seems to have been the first express formulation of the principle of freedom of exploration in outer space.

⁸ UNGA Res. 1348(XIII) of 13 XII 1958; Res. 1472(XIV) of 12 XII 1959; Res. 1721(XVI) of 20 XII 1963.

⁹ UNGA Res. 1721(XVI) of 20 XII 1961, para. 2.

¹⁰ UNGA Res. 1962(XVIII) of 13 XII 1963, paras. 2, 4 and 6.

powers to take steps towards transformation of the declaratory principles into legally binding international rules governing the activities of states in outer space.

The formal guarantees of the right to freedom of scientific investigation, as part of free access to and free and equal exploration and use of outer space, are contained in the 1967 Space Treaty¹¹ and in the 1979 Moon Agreement.¹² Both stipulations are widely recognized as fundamental to the entire body of space law.

An analysis of the relevant international instruments stipulating the right to freedom of scientific investigation in outer space suggests a number of significant questions, such as: Who is the subject of this freedom? What is its spatial coverage? What is its scope and meaning? What does investigation, exploration and use of space involve? And last, but not least, what limitations are placed upon this freedom and who is obliged to observe these limitations?

The phraseology used throughout space law instruments includes three terms, referred to freedom, the interrelationship of which requires explanation. They are: "investigation", "exploration" and "use". Unfortunately, the drafting history of the relevant space law provisions provides little guidance to their meaning.¹³ Thus, we must rely on the interpretations offered by various authors.¹⁴

The above distinction is of particular importance for the establishment of the scope of limitations on the right to freedom of scientific investigation in outer space. For example, it is generally agreed, that the right to free use is subject to greater limitations than the right to free exploration.¹⁵ Similarly, more limited are the applied, then pure scientific activities.¹⁶ It should be noted, how-

¹¹ Art. I(3) "There shall be freedom of scientific investigation in outer space, including the moon and other celestial bodies, and States shall facilitate and encourage international co-operation in such investigation". Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies (called further the 1967 Space Treaty), adopted in the UNGA Res. 2222(XXI) on 19 XII 1966, opened for signature on 27 I 1967, entered into force on 1 X 1967, 610 *U.N.T.S.* 206; 18: 3 *U.S.T.* 2410; *T.I.A.S.* 6347.

¹² Art. VI(1) "There shall be freedom of scientific investigation on the moon by all States Parties without discrimination of any kind, on the basis of equality and in accordance with international law". Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (called further the 1979 Moon Agreement), adopted in UNGA Res. 34/68 on 5 XII 1979, opened for signature 18 XII 1979, entered into force on 11 VII 1984.

¹³ UN Docs. A/C.1/PV 1210 – 1214(1961) and A/C.1/SR 1210 – 1214(1961), also Stevenson, *International Cooperation in the Peaceful Uses of Outer Space*, in: *US Department of State Bulletin*, 1962, No. 4, p. 180.

¹⁴ G. M a r c o f f: *Traité de droit international public de l'espace*, 330–332 (1973); S. G o r o v e: *Studies in Space Law: Its Challenges and Prospects*, 49–63 (1977); N.M. M a t t e: *Space Activities and Emerging International Law*, 249–274 (1984). According to Marcoff, freedom of outer space covers the rights to: free access, free exploration and free use, while the right to free exploration applies to research activities, including scientific investigation.

¹⁵ N.M. M a t t e: *op. cit.* (note 14), p. 270–271.

¹⁶ Art. I of the 1967 Space Treaty proclaims the unconditional freedom of scientific investigation, without the limitations imposed on the freedom of exploration and use, namely those of non-discrimination, equality and accordance with international law. Thus, according to

ever, that as a result of generally restrictive trends, some of the limitations were successively extended to the right to freedom of scientific investigation.

The undefined terms "exploration" and "scientific investigation" used in space law overlap at least partially in some cases, especially in research for military and peaceful purposes, which may be of non-scientific or multi-purpose character.¹⁷ Thus, it is arguable that in the light of the cohesive construction of Art. I of the 1967 Space Treaty, different standards apply to scientific investigation than to exploration and use of outer space.¹⁸ Some authors go even further in this reasoning, pointing out that the limitations of "contamination clause", imposed by Art. IX of the 1967 Space Treaty on "studies of outer space", apply to all scientific activities in space, thus to scientific investigation alike.¹⁹

Even accepting the proposition on the preferential status of scientific investigation to other space activities, one can hardly accept that the limitations imposed by space law on "exploration and use" do not concern the narrower notion of scientific investigation. There are in space law a number of such limitations on freedom of exploration and use which are of particular importance for scientific investigation, such as: the non-discrimination and equality clauses, the common benefit and interest clause, the non-appropriation clause, the international law clause, the proscription of nuclear weapons clause, the responsibility and liability clause and the consultation, observation and information clauses.

To conclude our considerations on terminology and notions in space law, it is necessary to establish whether "investigation" and "exploration" mean the same thing, and whether "exploration" means the same thing as the word "use"? If these terms were to mean the same thing, their joint use in the given contexts, sometimes in the same articles, would be redundant. If exploration and use mean two different things, it might be possible to engage in exploration without use or in use without exploration. Similarly, if exploration and investigation mean two different things, it might be possible to engage in exploration without investigating or vice versa. But that way of reasoning is of little help in explaining fully the meaning and interrelationship of these three terms.

As earlier indicated, scientific investigation involves both exploration and use of outer space. Exploration and investigation are inseparably linked together,

some writers, scientific investigation enjoyed a preferential status to other activities under space law. G. M a r c o f f: *op. cit.* (note 14), p. 330 – 332; N.M. M a t t e: *op. cit.* (note 14), p. 271 and Staff Report on the Treaty of 1967, Committee on Aeronautical and Space Sciences, US Senate, 90th Congress, 1st Sess., 23 (1967).

¹⁷ N.M. M a t t e: *op. cit.* (note 14), p. 271.

¹⁸ N.M. M a t t e: *op. cit.* (note 14), p. 272; G. M a r c o f f: *op. cit.* (note 14), p. 332; S. G o r o v e: *op. cit.* (note 14), p. 51 – 52. On this subject, the Comention ... provides as with interesting comparative information stating in Art. 1, that "... mineral resource activities means, prospecting, exploration or development, but does not include scientific research activities" and containing definitions of the notions of "prospecting" and "development". Doc. AMR/SCM/88/ 78 of 2 VI 1988.

¹⁹ S. B h a t t: „Studies in Aerospace Law: From Competition to Cooperation", 86 (1974).

sometimes even meaning the same.²⁰ The phraseology of Art. I of the 1967 Space Treaty suggests that the terms "exploration and use" are broader than the term "scientific investigation" and involve the latter.²¹

In examining the spatial coverage of the freedom of scientific investigation in outer space one must keep in mind that the sphere in which the principle is operating, is boundless and contiguous to air space with an undetermined boundary.

The rules of space law, providing for the right to freedom of scientific investigation, refer jointly or separately to "outer space", "the moon" and "celestial bodies". Thus, the spatial coverage of this right must be analysed within the context of terminology used in various space law instruments. Earlier documents referred with some inconsistency and non-uniformity only to "outer space" and "outer space and celestial bodies".²² Later, "the moon" was added and specified – in particular in the 1979 Moon Agreement – as one of the celestial bodies of special character and particular importance.

The crucial questions on which most debates on the spatial coverage of space law rules concentrated, were: whether the term outer space included celestial bodies, and whether the term celestial bodies included the moon?

In commenting on the spatial coverage set forth in Art. I of the 1967 Space Treaty, namely "outer space, including the moon and other celestial bodies", the American Ambassador Arthur Goldberg observed that "obviously whatever the definition of outer space, the moon and other celestial bodies are in outer space".²³

During the negotiations in the Legal Sub-Committee of COPUOS which took place in summer of 1966, the problem has arisen of whether to combine the clauses relating to freedom of outer space with the freedom of the moon and other celestial bodies, or to separate them?²⁴ As a result of that discussion, the

²⁰ According to Oxford Advanced Learner's Dictionary of Current English (ed. A.S. Hornby), (1982 Fourth Impression), "to explore" means "travel into or through (a country, etc.) for the purpose of learning about it ... examine thoroughly in order to test, learn about" (p. 300) while "to investigate" means "to examine, inquire into; make a careful study of"; – "investigation – careful and thorough inquiry" (p. 449).

²¹ "It was noteworthy that the freedom principle, commended to states by the General Assembly, was no longer confined nor expressly linked to the freedom of scientific investigation. Although the term exploration phrased in much wider terms since 'use of outer space' clearly would include other scientific missions, such as application satellites. Inclusion of the term 'use' also served to broaden the freedom to conduct any type of activity in space not prohibited by international law". N.M. M a t t e o p. cit. (note 14), p. 261. See also: UN Docs. A/AC.105/C.2/1960; A/AC.105/C.2/SR.7/1962 at 5 and A/AC.105/C.2/SR.8/1962.

²² See: for instance par. 2 of the Soviet draft Declarations in UN Docs. A/AC.105/L.2 of 10 IX 1962, A/5181, Annex 3 of 27 IX 1982 and A/AC.105/C.2/L.6 of 16 IV 1963, also par. 1 of the British draft Declaration in UN Doc. A/C.1/879 of 4 XII 1962 and in the United States draft in UN Doc. A/C.1/881 of 8 XII 1962.

²³ Treaty on Outer Space, Hearings before the Comm. on Foreign Relations, Senate Executive D, 90th Cong. 1st Sess. 55 (1967).

²⁴ UN Doc. A/AC.105/C.2/SR.64/1966, p. 10.

basic regime of freedom of investigation, exploration and use established for outer space, was in the 1967 Space Treaty extended explicitly on the moon and other celestial bodies.

The negotiating history of the 1967 Space Treaty indicates that the intention of its authors was to include the moon into the term of celestial bodies and the latter into the notion of outer space. Their specification in particular Treaty provisions was aimed at the indication to specific rights and duties of states in different parts of outer space.²⁵

In art. VI(1) the 1979 Moon Agreement stipulates freedom of scientific research "on the moon". But Art. I provides that "the provisions of this Agreement relating to the moon shall also apply to other celestial bodies within the solar system, other than the earth, except in so far as specific legal norms enter into force with respect to any of these celestial bodies". Further "for the purposes of this Agreement reference to the moon shall include orbits around and other trajectories to or around it". It should be noted that by 1982 the orbital areas had gained general acceptance as the spatial equivalent of outer space.²⁶ The debates on the legal status of the geostationary orbit have brought some confusions into the topic of the scope of freedom in its uses and exploration.²⁷ It was, however, generally agreed that objects in orbit are in outer space.²⁸

In Art. I(3) of the 1979 Moon Agreement it was stated that "this agreement does not apply to extraterrestrial materials which reach the surface of earth by natural means". Thus, for example, the legal status of a meteor collected as a sample and removed from the moon or other celestial body for scientific purposes, will in accordance with Art. VI(2) of the 1979 Moon Agreement fall under the rule of space law. But, a meteorite collected for the same purposes from the surface of the earth, will not.²⁹

According to Art. VIII(1) of the 1979 Moon Agreement, states "may pursue their activities in the exploration and use of the moon anywhere on or below its surface" and according to par. 2(b), they can "place their personnel, space vehicles, equipment, facilities, stations on or below the surface of the moon".

²⁵ The 1967 Space Treaty contains 25 references to "the moon and other celestial bodies" and 7 separate references to "celestial bodies" only.

²⁶ B. D u d a k o v: „International Legal Problems of the Use of Geostationary Orbit", in: *Proceedings of the 15th Colloquium on the Law of Outer Space*, 1973, p. 71; J.J. G e h r i g: „Geostationary Orbit-Technology and Law", in: *Proceedings of the 19th Col. on the Law of Outer Space*, 1977, p. 273; P.P.C. H e a n a p p e l: „Article II of the Outer Space Treaty and the Status of the Geostationary Orbit", in: *Proceedings of the 21th Col. on the Law of Outer Space*, 1979, p. 28 – 29 and M. W i l l i a m s: „The Geostationary Orbit: A Limited Natural Resource from Outer Space", in: *International Relations*, 1979, No 6, p. 670.

²⁷ Art. 33(2) of the 1973 International Telecommunication Convention stated that "radio frequencies and the geostationary satellite orbit are limited natural resources", *T.I.A.S.* 8572, also M. W i l l i a m s: op. cit. (note 26).

²⁸ Treaty on Outer Space, Hearings before the Comm. on Foreign Relations, Senate Executive D, 90th Cong. 1st Sess. 11 at 17 and 29.

²⁹ J. M a c h o w s k i: „The Legal Status of Meteors and Meteorites", in: 39 *YBAAA* 101 – 108 (1989).

The absence of a defined boundary of outer space raises further problems of spatial coverage of the right to freedom of scientific investigation under space law. Thus, the next question is, whether space activities may enjoy the freedom of scientific investigation provided by space law also in air space and on the earth's surface?

According to some writers, freedom of scientific investigation "in" outer space which is guaranteed by space law, might in certain circumstances be applicable to scientific investigation of the earth or even on the earth, despite the fact that the earth cannot be regarded as a celestial body or part of outer space in the meaning of space law.³⁰ This reasoning may hardly find support in the clear-cut wording of the 1967 Space Treaty which speaks about scientific investigation "in" outer space rather than investigation "of" outer space, as well as of the 1979 Moon Agreement which speaks about scientific investigation "on" the moon and celestial bodies "other than the earth".

However, one cannot ignore the practice of states in this respect and the general trends in earth-oriented scientific activities from outer space and space-oriented scientific activities from the earth. In as much as space law is speaking of scientific investigation "in" and not "of" or "for" outer space, it seems reasonable to conclude that research activities on earth and in air space, even those continued later in outer space, are not strictly within the meaning of the discussed space law provisions. That reasoning might be blurred slightly by the fact that Articles II and III of the 1967 Space Treaty mention some activities in the exploration and use "of" outer space. It is obvious that such activities might include some preparatory research work on earth and in air space prior to investigation in outer space. But, the right to freedom of such space-oriented scientific investigations would better be regulated by general provisions on the right to freedom of research,³¹ than the specific rules of space law.

Mutatis mutandis, in favour of such reasoning speak the provisions of Art. VIII of the 1967 Space Treaty which provides for international liability of the state that launches or procures the launching of an object into outer space for damage to another party to the Treaty by such object on the earth, in air space, or in outer space including the moon and other celestial bodies. On the same assumptions was drafted the 1972 Liability Convention.³² From these provisions it could be argued that once a space-oriented scientific investigation was launched – no matter where – it might be considered an activity in the

³⁰ G o r o v e: op. cit. (note 14), p. 182 – 183 and S. G o r o v e: „Freedom of Exploration and Use in the Outer Space Treaty: A Textual Analysis and Interpretation”, in: *Denver Journal of International Law and Policy*, No 1, 93 – 107 (1971).

³¹ J. M a c h o w s k i: op. cit., (note 2).

³² Convention on International Liability for Damage Caused by Space Objects (called further the 1972 Liability Convention) adopted in the UNGA Res. 2777(XXVI) on 29 XI 1971; 24: 3 U.S.T. 2389/1973; T.I.A.S. 7762; opened for signature 29 III 1972, entered into force on 9 X 1973.

exploration and use of outer space in the meaning of space law. Even if astronomical observation from the earth's surface might be relevant for scientific investigation in outer space, it is doubtful that such activities were either intended or envisaged by the authors of space law instruments. In fact, the 1967 Space Treaty provides in Art. X that the signatories must consider on the basis of equality any requests by other parties to be afforded an opportunity to observe the flight of their space objects. The nature of such an opportunity for observation and the conditions under which it could be afforded must be determined by agreement between the states concerned.

The language of the relevant provisions of space law refers to "States", "all States" and "all States Parties", leaving little doubt as to the intention of their authors in respect of the subjects of the right to freedom of scientific investigation in outer space.

The next question arising is whether this reference to states precludes the enjoyment of this circumscribed freedom by entities other than states, such as juridical and natural persons, and in particular, by intergovernmental and non-governmental organizations, national governmental agencies and non-governmental entities, and finally individuals, especially scientific and research workers and astronauts.

Had it been the intention of the drafters to preclude entities other than states, they could have replaced the above referred phrases by the wording "only by States". Even then the effect of such stipulation would remain uncertain unless international governmental organizations were also made parties of the relevant space treaties and agreements.

Numerous references to juridical and natural persons in the relevant provisions of space law instruments point to the intention of their authors to grant entities other than states certain freedoms in outer space, including the freedom of scientific investigation, under conditions set down by these provisions.³³ But the stipulation that states "bear international responsibility for national activities in outer space", underscores the idea of continued jurisdiction and control of states over national organizations, non-governmental entities and individuals. Although states, in the performance of their personal jurisdiction, bear international responsibility for the activities of their nationals in outer space, it should be noted that apart from the right to freedom of scientific investigation accorded to those states, individuals, and in particular research workers, carrying

³³ Art. VI and XIII of the 1967 Space Treaty provide that compliance with the Treaty is to be borne both by international organizations and by States Parties to the Treaty participating in such organizations. The 1979 Moon Agreement goes even further by providing that "references in this Agreement to States shall be deemed to apply to any international intergovernmental organization which conducts space activities if the organization declares its acceptance of the rights and obligations provided in this Agreement and if a majority of the States members of the organization" are parties to the Moon Agreement and Space Treaty. Art. IV(2), XI and XVI of the 1979 Moon Agreement.

out investigation in outer space enjoy personal rights to freedom of scientific research, accorded to them by relevant international instruments on human rights.³⁴

After the formulation of the right to freedom of scientific investigation in outer space, the authors of the relevant international instruments have set to define its scope and contents and to provide adequate means and measures for its effective implementation. By the time space law came into being, the right to freedom of scientific investigation had already been widely recognized, especially in respect of the so called "common areas and spaces"³⁵ Its projection into outer space and adaptation to its physical features and political status became one of the concerns of the drafters of relevant space law provisions. Many of these, and in particular the right to freedom of scientific investigation, were modelled on similar clauses in the 1959 Antarctic Treaty and related instruments.³⁶

Art. I(3) of the 1967 Space Treaty proclaiming the freedom of scientific investigation in outer space committed states "to facilitate and encourage international cooperation in such investigation". With this aim in mind, as in Antarctica, the use of military personnel, equipment and facility for peaceful scientific research in outers, the space was permitted.³⁷

In order to further promote international cooperation in the exploration and scientific investigation of outer space, the relevant space law provisions have committed states to undertake among other following actions:

a. to consider on a basis of equality any requests by other states to be afforded an opportunity to observe the flight of space objects launched by these states, while the nature of such an opportunity for observation and the conditions under which it could be afforded shall be determined by agreement between the states concerned;³⁸

b. to inform the UN Secretary General as well as the public and international scientific community, to the greatest extent feasible and practicable, of the nature, conduct, locations and results of activities in outer space, while on receiving the said information, the Secretary General should be prepared to disseminate it immediately and effectively.³⁹ In particular, information on the time, purposes, locations, orbital parameters and duration shall be given in respect of each mission to the moon as soon as possible after launching, while information on

³⁴ Note 1.

³⁵ Notes 3 and 4.

³⁶ Note 4. M a t t e: op. cit. (note 14), p. 176; J e s s u p and T a u b e n f e l d: „Outer Space, Antarctica and the United Nations”, in: *International Organizations*, 1959, No 13, p. 363; Draft to an International Covenant for Outer Space, the Treaty of Antarctica as a Prototype, in: *Proceedings of the 3rd Coll. on the Law of Outer Space*, 1960, p. 120; S t a u b: The Antarctic Treaty as Precedent to the Outer Space Treaty, in: *17th Colloq. on the Law of Outer Space*, 282 (1974).

³⁷ Art. IV of the 1967 Space Treaty and Art. III(4) of the 1979 Moon Agreement.

³⁸ Art. X of the 1967 Space Treaty.

³⁹ Art. XI of the 1967 Space Treaty.

the results of each mission, including scientific results, shall be furnished upon completion of the mission;⁴⁰

c. to open to representatives of other states on a basis of reciprocity all stations, installations, equipment and space vehicles on the moon and other celestial bodies;⁴¹

d. in carrying out scientific investigations states shall have the right to collect and remove from the moon samples of its mineral and other substances;⁴²

e. to agree on the desirability of exchanging scientific and other personnel on expeditions to or installations on the moon to the greatest extent feasible and practicable;⁴³

f. to recognize the freedom of movement, according to which personnel, space vehicles, equipment, facilities, stations and installations may move or be moved freely over or below the surface of the moon.⁴⁴

Of no less importance for the effective enjoyment of the right to freedom of scientific investigation in outer space is the set of provisions of space law stipulating rules for the rescue of astronauts⁴⁵ and liability for damage.⁴⁶ At first sight far from scientific cooperation, these provisions give scientific investigation in outer space a feeling of safety and security, thus contributing to its freedom.

II. The pre-conditions and limitations on the right to freedom of scientific investigation in outer space

The freedom principle propounded in space law is limited expressly for well founded reasons and its limitations are indicated in relevant legal provisions. The rationale behind the limitations on the right to freedom of scientific investigation was to safeguard science against manipulation by external forces, often adverse to its fundamental principles and objectives, and to draw a borderline between a legitimate limitation and justified restriction on the one hand and unfounded manipulation and abusive exercise on the other.

While Art. I(3) of the 1967 Space Treaty proclaimed the unconditioned freedom of scientific investigation,⁴⁷ Art. VI(1) of 1979 Moon Agreement

⁴⁰ Art. V(1) and IX(1) of the 1979 Moon Agreement.

⁴¹ Art. XII of the 1967 Space Treaty.

⁴² Art. VI(2) of the 1979 Moon Agreement.

⁴³ Art. VI(3) of the 1979 Moon Agreement.

⁴⁴ Art. VIII(2) of the 1979 Moon Agreement.

⁴⁵ Art. V of the 1967 Space Treaty, Art. X and XII(3) of the 1979 Moon Agreement, also Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (called further the 1968 Rescue Agreement), adopted in UNGA Res. 2345(XXII) on 19 XII 1967, 672 U.N.T.S. 120, opened for signature on 22 IV 1968, entered into force on 3 XII 1968.

⁴⁶ Art. VII of the 1967 Space Treaty, Art. XIV(2) of 1979 Moon Agreement also 1972 Liability Convention (note 32).

⁴⁷ Notes 11 and 16.

imposed on it three conditions, namely: a. non-discrimination, b. equality, and c. accordance with international law. But, apart from these, there are a number of pre-conditions, duties and limitations on freedom of exploration and use of outer space, part of which, as earlier stated, is scientific investigation.⁴⁸

Consequently, the exploration and use of outer space, including scientific investigation, shall be carried out:

1. in accordance with international law, without discrimination of any kind and on a basis of equality;⁴⁹

2. in the interest of maintaining international peace and security, and with promotion of international cooperation and mutual understanding;⁵⁰

3. for the benefit, well being and in the interest of all countries, irrespective of their degree of economic or scientific development, with due regard to the corresponding interests of other states and shall be the province of all mankind.⁵¹

The above preventive measures were aimed among other things at the establishment of balance between scientific and technological progress and the intellectual, spiritual, cultural and moral advancement of humanity. Thus, the right to freedom of scientific investigation in outer space is also subjected to general restrictions upon or derogations from any of the fundamental human rights recognized in international law.⁵²

Peace and security are other values enjoying special protection of international law. Consequently, space law provisions provide things, among other for such measures as the prohibition of placing in orbit around the earth of objects carrying nuclear weapons or weapons of mass destruction, installation of such weapons on celestial bodies, or stationing them in outer space in any other manner, the establishment of military bases, installations and fortifications and the conduct of military manoeuvres on celestial bodies. Of particular importance for the exercise of the right to freedom of scientific investigation is the prohibition of the testing of any type of weapons on the moon and other celestial bodies.⁵³

⁴⁸ Notes 12 and 16.

⁴⁹ Art. I(2) of the 1967 Space Treaty and Art. II of the 1979 Moon Agreement which substantiates that requirement by referring it to the UN Charter and the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, contained in UNGA Res. 2625(XXV) of 24 X 1970, according to which States have the duty "to cooperate with one another in accordance with the Charter (...) as well as in the field of science and technology for the promotion of international culture and educational progress".

⁵⁰ Art. III and IV of the 1967 Space Treaty and Art. II and III of the 1979 Moon Agreement.

⁵¹ Art. I of 1967 Space Treaty and Art. II and IV of the 1979 Moon Agreement.

⁵² Art. 4 and 15(3) of the 1966 International Covenant on Economic, Social and Cultural Rights (note 1); Human Rights and Scientific and Technological Developments, UN Department of Public Information, New York 1982, p. 91, also Declaration on the Use of Scientific and Technological Progress for Peace and Mankind, UNGA Res. 3384(XXX) of 10 XI 1975, which in par. 8 states that "All States shall take effective measures, including legislative measures, to prevent and preclude the utilization of scientific and technological achievements to the detriment of human rights and fundamental freedoms and the dignity of the human person".

⁵³ Art. IV(2) of 1967 Space Treaty.

That prohibition follows the general trend in international law towards limitation of the right to freedom of research aimed at the exploration of new kinds and systems of weapons of mass destruction. These limitations contained in various international instruments usually appear in two forms: as a general ban on research or as a ban on experiments and tests.

No wonder, then, that the first concerns on keeping outer space peaceful were displayed during the disarmament negotiations, because there was disclosed the possibility of transformation of outer space into the high ground for tests of new weapons and a military experimental range.⁵⁴ The absence of a clear and definite prohibition of non-peaceful uses of outer space in the 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space,⁵⁵ enabled the space powers to continue research on so called "non-aggressive military space systems", especially for communications, navigational, geodetic, meteorological and reconnaissance purposes.⁵⁶

Concern for the detrimental effects of scientific investigation in outer space for military purposes appears in numerous international instruments drafted outside the system of space law. The application of modification techniques in outer space, and also from outer space on the natural environment of the earth in military use has been precluded by the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. The Convention which came into force on 5 X 1978, is particularly aimed at preventing the threat of so called "geophysical war", including the draft changes on damaging the ozone layer of the atmosphere with the help of chemical compounds disposed from satellites. Both quantitative and qualitative limitations on the military uses of outer space are also contained in bilateral Soviet-American agreements.⁵⁷

⁵⁴ See: the Treaty on the Scope of Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, signed in Moscow on 5 VIII 1963, containing the ban on any nuclear tests and prohibition to assist such tests. In 1958 the Soviet Union proposed the establishment an international cooperation in research of cosmic space, and to serve as a clearing house and coordinator of national research. This idea was opposed by the United States on the grounds that not enough was known about how space would affect the international political system. UN Doc. A/C.1/SR.989/1958 and A/AC.105/L.2/1962, also R. T r e c c o c c e: *The Principle of the Peaceful Uses of Outer Space: An Example of the Role of International Politics in the Formulation and Interpretation of Space Law*, Centre for Research of Air and Space Law, McGill University, Montreal 1981, No 21, p. 54 – 64.

⁵⁵ UNGA Res. 1962(XVIII) of 13 XII 1963.

⁵⁶ *Outer Space: Battlefield of the Future* (ed. B. Jasani), (1978); The Continuing Conflicts in the Interpretation of the Legal Rules Governing Military Space Activities, in: *The International Law Association, Report of the 63rd Conference*, 282 – 353 (1988).

⁵⁷ See: the 1972 Treaty on the Limitation of Anti-Ballistic Missile System and its Protocol of 3 VII 1974, in which the parties pledged in Art. V to ban the development, testing and deployment of anti-ballistic missile system or space-based components. For details see: V.S. V e r e s h c h e t i n: „Limiting and Banning Military Use of Outer Space: Issues of International Law“, in: *Essays in International Law in Honour of Judge Manfred Lachs*, 671 – 684 (1984).

Apart from the above listed bans and limitations, international instruments contain provisions which can be described as indirect limitations or preconditions on the right to freedom of scientific investigation in outer space or space directed activities. Particularly, they contain demands on holding consultations in case an act or experiment planned by a nation in outer space may cause potentially harmful interference with peaceful exploration and activities of other states.⁵⁸

However, for the purpose of the present paper, our interest is limited strictly to the question of the scope of limitations on the right to freedom of scientific investigation in outer space for military purposes. The main problem here lies not only in the difficulty of drawing precisely a borderline between research strictly for peaceful or military purposes, but also in the absence of an unambiguous definition of the term "exclusively for peaceful purposes".⁵⁹ Another difficulty is the only partially demilitarized status of outer space,⁶⁰ a result of the political position of space powers which considered it more advantageous to avoid too many legal restraints on the freedom of experimentation and investigation in outer space.

Further pre-conditions on the enjoyment of the right to freedom of scientific exploration and investigation of outer space refer to the concepts of "benefit", "well being" and "interest". Space law neither contains a clue as to the meaning of these terms,⁶¹ nor indicates how is going to determine whether or not a particular scientific activity is in a given case for the benefit, well being or interest of "all countries", "other states" or "all mankind", or how this will be done leaving the question rather to its own interpretation of each case and to the supposed amicable disposition of the parties concerned.⁶² The procedure for visitations and inspections, and in the case of non-fulfillment of treaty obligations or interference with the rights of other states, for a system of consultations, and in case of dispute for means of peaceful settlement, provided by space law instruments,⁶³ seem here to be of little practical assistance.

Significant in that context is the non-appropriation clause,⁶⁴ according to which scientific and research activities on the moon or on other celestial bodies do not create any legal title to claim any kind of acquisition or national appropriation thereon.

⁵⁸ Art. IX of 1967 Space Treaty.

⁵⁹ M a y e r: "The term 'peaceful' in the Light of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space", in: *Zf Luft und Weltraumrecht 110 (1968)*; Z h u k o v: "On the Question of Interpretation of the Term 'peaceful uses of outer space' contained in the Space Treaty", in: *Proceedings of the 11th Colloq. on the L. of Outer Sp.*, 36 (1968).

⁶⁰ Art. IV of 1967 Space Treaty and Art. III and IV(2) of 1979 Moon Agreement.

⁶¹ G o r o v e: op. cit. (note 14), p. 56 – 58. "Benefit normally refers to some advantage or indulgence, as opposed to detriment or deprivation. While the word 'benefit' has similar connotations, it has been defined as a pattern of demands and its supporting expectations", H. L a s s w e l l and A. K a p l a n: *Power and Society*, 23 (1950).

⁶² Art. XII and XIII of the 1967 Space Treaty.

⁶³ Art. XV of the 1979 Moon Agreement.

⁶⁴ Art. XI(2) of the 1979 Moon Agreement.

The earlier referred conditions of non-discrimination and equality were amplified by the requirement that exploration and use of outer space shall be carried out for the benefit and in the interest of "all countries irrespective of their degree of economic and scientific development". That provision safeguards the legitimate interests of less developed and non-space countries. The latter, however, depend on the good-will of the space powers, especially with regard to the share with the international scientific community of information, including research results of space missions, as well as availability of collected samples of mineral and other substances collected on the moon and other celestial bodies, as well as the exchange of scientific personnel on expeditions, as provided by the relevant space law stipulations.⁶⁵

Alongside the right to free collection and availability of samples for scientific purposes,⁶⁶ of particular importance is the freedom to establish and own scientific stations in outer space, on the moon and other celestial bodies. These were subjected to a number of conditions, such as the right of visitations by other states on a basis of reciprocity, the condition of such localization as not to impede the access to the moon for others or to block access to certain places for others by placing stations in their way; and the duty to notify the UN Secretary General on the location and purposes of that station and any change in it. All these restrictions must be read together with the provisions of Art. XV of the 1979 Moon Agreement, which put a constraint upon the freedom of establishment through a form of cooperation.⁶⁷

Apart from the limitations discussed so far, real difficulties in the application of the right to freedom of scientific investigation are arising in confrontation with the necessity to compromise that right with the requirements of the conservation and protection of the space environment from detrimental effects resulting from its exploration and use. Outer space forms not only an immense scientific laboratory, but represents also a sphere based on a very fragile physical and chemical balance, the shaking and disruption of which might have detrimental consequences for our whole planet and the life on it.

Thus, the history of drafting the relevant space law provisions was marked by attempts to reconcile the freedom of exploration and investigation of outer space with the need to prevent adverse effects of scientific activities there.⁶⁸ The controversial character of environmental protection is reflected in the de-

⁶⁵ Art. V, VIII, IX, X, XI and XII of the 1967 Space Treaty and Art. V, VI, VII, IX, XIII and XV of 1979 Moon Agreement.

⁶⁶ Art. VI(2) of the 1979 Moon Agreement.

⁶⁷ Art. VIII and XII of the 1967 Space Treaty and VIII, IX and XV of the 1979 Moon Agreement. See also: UN Doc. A/AC.105/C.2/XI/W.P.17 of 13 IV 1972.

⁶⁸ In 1958 the International Council of Scientific Unions (ICSU) formed an Ad Hoc Committee on Contamination by Extraterrestrial Exploration (CETEX). S. G o r o v e: „Limitations on the Principle of Freedom of Exploration and Use: Benefit and Interest", in: *Proceedings of 13th Coll. on the L. of Out. Sp.*, 74 (1971); J. A. J o h n s o n: *Pollution and Contamination in:- Space, in Law and Politics in Space*, 39 (1964).

ficiencies of the extensive Art. IX of 1967 Space Treaty,⁶⁹ which is limited only to parties to the treaty and is lacking of clarity in the sentence concerning "pursue of studies" and contains the only obligation to avoid "harmful" contamination, suggesting the permissibility of other contamination which is not harmful. Also, nothing was said about possible contamination of the earth from outer space. There is no definition of such terms as "contamination" and "potentially harmful interference", on of as other terms used in that article, thus leaning room for doubts, which were revealed already in the process of its drafting.⁷⁰

Legitimate fears concern the use in space exploration of nuclear energy and radioactive materials, which are particularly important in all modern scientific research. To find a compromise between these interests and involved risks, the relevant space law provisions have imposed certain limitations on the application of nuclear energy and radioactive materials, both for military and peaceful purposes, prohibiting among others tests and uses of nuclear weapons in outer space and radioactive contamination.⁷¹

In examining the issue of safety in space activities, legal experts have noted the relevance of provisions contained in Articles I, VI, IX and XI of the 1967 Space Treaty, Art. 5 of the 1968 Rescue Agreement, Art. XXI of the 1972 Liability Convention, Art. IV and VI of the Registration Convention⁷² and Art. VII of the then draft Moon Agreement.⁷³ As a result of those comparative studies, the wording of Art. VII(2) of the 1979 Moon Agreement was agreed, requiring states to notify the UN Secretary General "in advance of all placements by them of radioactive materials on the moon and of the purpose of such placements". In addition to the COPUOS sponsored space law agreements, there are other international instruments that relate to the use of nuclear energy in space, in particular the 1963 Treaty on the Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water.

Since 1978 COPUOS has intensively examined the operational and legal aspects of the application of nuclear power and radioactive materials in the exploration of outer space. As a result of these studies, attention has gradually

⁶⁹ The article provides among other that states "shall pursue studies of outer space, including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the earth resulting from the introduction of extraterrestrial matter, and, where necessary, shall adopt appropriate measures for this purpose".

⁷⁰ Art. IX of the 1967 Space Treaty came about as a compromise between Soviet and American proposals. See: Art. 10 of the US draft and Art. VIII of the Soviet draft in the Report of the V session of the Legal Subcommittee COPUOS in 1966, Annex I, UN Doc. A/AC.105/35 at 6 - 9 and 12 - 16 and A/AC.105/C.2/SR.68/1966 at 5 - 6.

⁷¹ UN Doc. A/8391/1971, A/C.1/L.568/1971, A/AC.105/101/1972 and A/AC.105/115/1973.

⁷² Convention on Registration of Objects Launched into Outer Space (called further 1976 Registration Convention) adopted in UNGA Res. 3235(XXIX) on 12 XI 1974, 28: 1 *U.S.T.* 695(1976 -7); *T.I.A.S.* 8480, opened for signature on 14 I 1975, entered into force on 15 IX 1976.

⁷³ UN Doc. A/AC.105/288, Annex 3 at 2.

been directed away from the issue of a possible moratorium to the acknowledgment that nuclear energy might be the preferred type of fuel, source of power and the indispensable material in space research. But, because of inherent risks and attendant anxieties, attention has been drawn to the formulation of restrictive legal norms governing those uses, leading to limitations on the right to freedom of scientific investigation.

Irrespective of the importance of environmental protection, the supreme value first and foremost protected by law is the human being, and in particular his life and health. This goal puts a barrier to the freedom of indiscriminate experimentation and risks for pseudo-scientific investigation.⁷⁴ Accordingly, space law stipulates the safeguarding of human life and health, committing states, among other things to inform immediately other states and the United Nations "of any phenomena they discover in outer space, including the moon and other celestial bodies, which could constitute a danger to the life or health of astronauts".⁷⁵

Availing themselves once more of the extensive experience of the 1959 Antarctic Treaty system,⁷⁶ the authors of the 1979 Moon Agreement provided in its Art. VII(3) for the designation on the moon of areas of special scientific interest as international preserves for which special protective arrangements are to be agreed in consultation with the competent UN bodies. The exercise of the right to freedom of scientific investigation in such areas will obviously be subjected to limitations provided by the agreed protective arrangements.

In assessing the scope of the right to freedom of scientific investigation and the limitations on it, it is necessary to take into consideration also the moral and ethical aspects of inter-human and international relations. Not only legal principles and rules, but also the human interest in self-preservation, as well as the norms of ethics and morality prompt the need for self-imposed limitations, including the necessity of developing effective legal measures to prevent the detrimental side effects of scientific research. In this context, the traditional principle that everything not prohibited by law is permitted, runs counter to certain general principles of international law and the norms of international morality. This is of particular importance in regard to outer space.⁷⁷

⁷⁴ See: Art. 7 of the 1966 International Covenant on Civil and Political Rights providing that no one "shall be subjected without his free consent to medical or scientific experimentation".

⁷⁵ Art. V of the 1967 Space Treaty, Art. X of the 1979 Moon Agreement and the 1968 Rescue Agreement.

⁷⁶ B.A. B o c z e k: „Specially Protected Areas as an Instrument for the Conservation of the Antarctic Nature", in: *Antarctic Challenge* (ed. R. Wolfrum), 65 – 101 (1986). Notes 4 and 36.

⁷⁷ Manfred L a c h s: *International Academy of Astronautics*, Doc. IAA/(Scieg. Ctee) II. 2 – 3 (1970).

III. Freedom of scientific investigation in commercial and cultural uses of outer space

While the first decade of space flights was largely devoted to exploration and scientific investigation, the following years of space activities have been increasingly dedicated to practical applications and commercial uses, such as telecommunications, remote sensing and weather observation satellites.⁷⁸ That transition has by no means decreased the importance of scientific activities in space, since each practical application must be preceded by careful studies and research, thus amplifying the role of the right to freedom of scientific investigation. Such interests and trends are leading to further substantiation and minuteness of detail, as well as the spreading of its rules to more legal instruments.⁷⁹ Those rules, which stipulate the freedom of scientific investigation, restrict its scope not only in the area of space exploration, but also project it into the sphere of uses and exploitation of outer space, and subject it to further restrictions and limitations.

With respect to the controversial problem of commercial exploitation of the natural and mineral resources of the moon and other celestial bodies, the main issue in question was whether or not a moratorium should be placed on that exploitation until an international regime could be established to regulate these activities. Until its establishment it was agreed that for the purpose of scientific investigation, states will have the right to use the mineral and other resources of the moon and other celestial bodies for non-commercial purposes.⁸⁰

The directions of present space investigation are both space-oriented and earth-oriented. The former tend towards moon, planets and the further frontiers of the universe, while the latter turn from the deck of ever more sophisticated space stations down, towards our globe below. The substantial differences between these two directions of space exploration add new dimensions to the right to freedom of investigation.

Direct television broadcasting, remote sensing of the earth by satellites, and surveillance satellites bring new discoveries in the uses of outer space, which in turn require adequate international regulations, and call for new approaches to the right to freedom of scientific investigation as applied in commercial and cultural utilization of outer space.

⁷⁸ N.M. Matte: *From Scientific Exploration to Commercial Utilization in Aerospace Law* (1977); *A Survey of Space Application – for the Benefit of All Mankind*, NASA Office of Space Science and Applications (1967); *The Application of Space Technology to Development*, UN Department of Economic and Social Affairs (1973).

⁷⁹ Art. VI(2) and XI of 1979 Moon Agreement provide us with good examples of these trends, referring among other to "the exploitation of natural resources of the moon" and putting the rights of scientific investigators essentially in a *res communis* situation, barring states and their nationals from establishing sovereign or proprietary rights over the explored territory, including the surfaces and subsurfaces of the moon. C.Q. Christol: *The Modern International Law of Outer Space*, 274 (1982).

⁸⁰ UN Doc. A/AC.105/171/1976.

Two kinds of activities pose new problems to freedom of outer space: remote sensing of the earth by satellites as a form of commercial exploitation and direct broadcasting by satellites as a form of cultural use of outer space. Although these activities are of utilitarian character, they both encompass problems of freedom of scientific investigation in outer space. Both these activities give rise to a conflict between the two legal principles of freedom of outer space and exclusive national sovereignty of each state over its territory.⁸¹ Consequently, both these activities raise the common legal problem of "prior consent",⁸² which limitates considerably the right to freedom of scientific investigation, especially at its initial and experimental stages.

1. Remote sensing of the earth by satellites and the freedom of scientific investigation

Although earth observation from outer space, both for military and peaceful purposes, was practised prior to the conclusion of the 1967 Space Treaty, this treaty contains no references to such activities. Nonetheless, it was generally agreed that earth-resource remote sensing is in accordance with international law and should be governed by the principles of the 1967 Space Treaty, including the principle of freedom of scientific investigation.⁸³

Not all states were ready to accept this conclusion without reservations. Thus, two pre-conditions, affecting indirectly the freedom of scientific investigation in respect of remote sensing activities, have been advanced, namely: a. the need for respect of the right of all nations to permanent sovereignty over their natural wealth and resources, the exercise of this right in the interest of national development and the well being of citizens, proclaimed in relevant UN General Assembly resolutions⁸⁴ and b. the requirement of prior consent of the state to the sensing of its territory.

On these assumptions, during the seventies all remote sensing programmes were carried out on an experimental basis, while in the eighties they entered operational stage. Technical improvements raised serious objections of political and legal nature on the part of states affected by these activities, calling among other things for further limitations of the freedom of investigation of the earth's surface from outer space. On the other hand, the multiple benefits have intensified

⁸¹ C. D a l f e n: „The International Legal Process: Direct Broadcasting and Remote Sensing by Satellite Compared", in: 10 *CanYBIL* 186 – 211 (1972).

⁸² Pamela L. M e r e d i t h and George S. R o b i n s o n: *Space law: A Case Study for the Practitioner, Implementing a Telecommunications Satellite Business Concept* (1992).

⁸³ UN Doc. A/AC.105/320, Annex IV(1983).

⁸⁴ UNGA Res. 1803(XVII) of 14 XII 1962, 2158(XXI) of 25 XI 1966, 2386(XXIII) of 19 XI 1968, 2962(XXV) of 11 XII 1970, 3016(XXVII) of 13 XII 1972, 3102(S-VII) of 1 V 1974 and also the Declaration on the Establishment of a New International Order at 4(a). Also UN Doc. A/AC.105/C.2/SR.220/1974, A/AC.105/171, Annex IV(1976).

efforts to solve potential conflicts by means of international agreements and joint ventures in the field of remote sensing of the earth by satellites.⁸⁵

Remote sensing often raises legal conflicts between the freedom of exploration and use of outer space on the one hand, and national sovereignty over natural resources on the other. Legally, both principles are part of customary international law embodied in numerous UN resolutions and international treaties, binding the parties. In most instances, these conflicts result in legal limitations on the right to freedom of scientific investigations in outer space.

One of the main motives behind the formulation of this right was the obtaining of scientific information by means of research, which in the performance of remote sensing, either at experimental stage or in the collection of scientific data, is subject to certain pre-conditions and limitations imposed by space law.⁸⁶

Special attention to the legal implications of remote sensing oriented at areas which, like outer space, are beyond the national sovereignty and jurisdiction, namely the high seas and Antarctica is required. Since all three are subjected to very similar regime of freedom of scientific investigation, the limitations on the accrued rights are relatively lesser, than in respect of areas under states sovereignty and jurisdiction.

2. Direct broadcasting activities by satellites and freedom of scientific investigation

There has been so far a considerable amount of tolerance as regards foreign interference from outer space.⁸⁷ Thus, it might be expected that similar attitude will in future accompany the likely launching of solar powered satellites and the construction of solar power stations on the moon requiring remittance of the produced energy to earth. For the time being, however, the direct broadcast satellites (D.B.S.) provoked political and legal controversies, calling for adequate regulations and limitations.

The interrelationship between the scientific uses of outer space and the application of D.S.B. transmissions is two-fold, operating in the area of scientific

⁸⁵ In the 1972 Agreement between the US and the USSR on Cooperation in the Exploration and Use of Outer Space for Peaceful Purposes it was stated that: "The survey of a wide variety of earth features and conditions from space primarily on spectral basis may be scientifically useful and economically advantageous". Attachment II, par. 1.

⁸⁶ "Separating the space segment – data collection by satellites – and the ground segment – receiving, processing and dissemination of remotely sensed data – one can say that the space segment of remote sensing is carried out in accordance with the freedom of exploration and use principle of the Outer Space Treaty (Article I), as long as States act in accordance with international law (Article III), respect the interests of other States (Article IX) and inform the UN Secretary General as well as the public and the international scientific community, to the greatest extent feasible and practicable of their remote sensing activities (Article XI)". N.M. Matte: *Aerospace Law* 128 (1977).

⁸⁷ As an example of such an attitude of states may serve the intelligence remote sensing system from outer space. But states have not acquiesced to foreign radio and TV interference from space.

research aimed at the development and improvement of space communications and space broadcasting on an experimental, non-commercial basis and in the dissemination of scientific and educational information by means of D.B.S., both implying freedom of scientific research.

In the latter case, the main conflict arises between the requirement of prior consent and the right to free flow of information, including scientific information. It is widely agreed that a state has a right – some even say a duty – to judge what kind of information reaches its population from outer space.⁸⁸ But D.B.S. brings to the fore not only the principle of state sovereignty, but also the principle of freedom of information, closely related to the freedom of scientific investigation, both stipulated in the Covenants of Human Rights.⁸⁹ States in their space activities – whether scientific, cultural or commercial – when enjoying the stipulated freedoms must exercise them in conformity with applicable international law. D.B.S. poses a legal conflict comparable to that caused by remote sensing of the earth by satellites, namely, a conflict between freedom of investigation, exploration and use of outer space and the principle of national sovereignty. Many governments fear that D.B.S. might result in the reception of politically or socially unwanted foreign radio and television programmes which might contravene the principle of non-interference in the domestic affairs of states. This fear is needless with respect to point-to-point communications satellites, transmitting among other things scientific data, which can easily be controlled by each state concerned.⁹⁰

The crucial legal problem involved is the question of prior consent: whether State A needs prior permission from State B to broadcast a radio and TV programme to that State? The answer is not easy, taking into consideration that the benefits of direct broadcasts stem not only from entertainment and education, but also from the spread of scientific information in the spirit of freedom of research and investigation. But, on the other hand, the possible abuses of those opportunities, feared by governments, emerge from the temptations provided by dynamic development of new transmission techniques. They often occur under

⁸⁸ D a l f e n, G o t t l i e b and K a t z: „The Transborder Transfer of Information by Communications and Computer Systems: Issues and Approaches to Guiding Principles”, in: 68 *AJIL* 227 (1974).

⁸⁹ Art. 19 of the 1966 International Covenant on Civil and Political Rights and Art. 15(3) of the 1966 International Covenant of Economic, Social and Cultural Rights (note 1). According to the French lawyer Jean Rivero both freedoms belong to the same broader notion of intellectual and moral liberties and liberties of thought. Jean R i v e r o: *Les Libertés Publique*, Vol. 1, *Les droits de l'homme*, 23 – 26 (1973).

⁹⁰ For example the joint Canadian-American CTS (Communications Technology Satellite), owned by Canada, launched by N.A.S.A. on 17 I 1976. Its programme involved i.e. scientific experiments with community satellite broadcasting of medical information and TV programmes to remote areas of Canada, especially those inhabited by Eskimos. US Dept. of State Bulletin, Vol. LXX, No 1877, 22 IV 1979, p. 446. Some developing countries, like Brazil, Iran and Indonesia are carrying out intensive studies on the utilization of D.B.S. for dissemination of educational and scientific contents.

cover of pseudo-scientific contents and ideas of undesired political propaganda, unfair commercial advertising and socially or religiously unacceptable programmes from one country to another, from one society to another. Sometimes, they are hide behind the shield of freedom of scientific investigation. In D.B.S. a proper balance between the benefits and possible costs is desired. The educational and scientific benefits of D.B.S. are particularly important for the developing countries.⁹¹ A special role is played in this respect by the controversial Declaration of guiding principles on the use of satellite broadcasting for free flow of information, the spread of education and greater cultural exchange, adopted by the UNESCO General Conference on 15 XI 1972 and the prior UN General Assembly resolution 2733(XV) of 16 XII 1970 inviting UNESCO to promote the use of satellite broadcasting for advancement of education and training, science and culture. Generally in line with the principles of freedom of information and scientific investigation, the Declaration definitely tends toward the adoption of a prior consent rule [Art. VI(2), VII(2) and IX], imposing significant limitations on these liberties.⁹² Even furthergoing limitations were proposed in other drafts and legal instruments on D.B.S.⁹³

The protracted negotiations stretched into the eighties in an effort to narrow the gap between the different positions taken on a number of questions, including the controversial prior consent rule.⁹⁴ Finally, in 1987, the UN General Assembly adopted the Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting,⁹⁵ propounding in paras 13 – 15 the rule of prior consent.

Since the right to freedom of scientific investigation in outer space is affected by the above referred instruments only indirectly, we shall not enter into further discussion. Nonetheless, the interaction between these standards should not be ignored, because it raises a number of fundamental legal issues of far reaching consequence in the practical enjoyment of the freedom of investigation, explo-

⁹¹ India and its SITE (Satellite Instructional Television Experiment) project serves here as the classic example. UN. Doc. A/AC.105/72 of 11 XII 1969, A/AC.105/114 of 28 III 1973, A/AC.105/120 of 29 XI 1973, A/AC.105/128 of 5 IV 1974 and A/10020(1975), p. 17.

⁹² For the text of the UNESCO Declaration see: *M a t t e*: op. cit. (note 86); *From Scientific Exploration to Commercial Utilization*, Toronto 1977, p. 299. The Declaration was adopted with a vote of 55 in favour, 7 against (Australia, Canada, Costa Rica, Denmark, the Federal Republic of Germany, the UK and the US) and 22 abstentions. Of the 128 then UNESCO member states 110 were present and only 84 voted; thus the result does not seem to represent even a real majority of the Organization members.

⁹³ See: the Soviet Draft Convention on Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting (Art. V); the Argentine Draft International Convention on Direct Broadcasting by Satellite (Art. X) and the 1975 Principles governing the use by States of artificial earth satellites for direct television broadcasting. For texts see: *M a t t e*: op. cit. (note 86), Annexes VB, C and D respectively, p. 303 – 316.

⁹⁴ UN Doc. A/8771(1972), A/AC.105/WG.3/V/CRP.2(1974).

⁹⁵ UNGA Res. 37/92 of 4 II 1983. This resolution received majority support mainly of the then socialist bloc states and most of the Third World countries, opposed by the Western space powers.

ration and use of outer space. The crucial question in the application of the prior consent rule is whether the principle of national sovereignty prevails over the right to freedom of scientific investigation in outer space. *Mutatis mutandis* the same concerns apply to the freedom of dissemination of scientific information, which is an important part of that right and is extensively treated in international instruments and D.B.S.

Closely linked with the question of "prior consent" is the secondary problem of "spill over", which occurs when D.B.S. transmissions of one or more specific countries can be received – intentionally or unintentionally – in other countries. The received signals of such "spill over" may be destroyed by the technique of "jamming". Without entering into further details, it may be concluded that all these techniques may indirectly impair the right to freedom of investigation in outer space.

Conclusion

The conduct of space activities is governed by a number of recurring legal principles, among which the freedom of investigation, exploration and use is present in virtually every instrument of space law. Scientific research is, like many other space activities, subjected to the fundamental freedom principle, limited by a number of pre-conditions, derogations and restrictions on the right to freedom of scientific investigation stipulated by space law.

Antecedent to the principle of freedom of exploration and use of outer space was the freedom of the air doctrine, formulated at the emergence of air law. This concept, which developed in early aeronautical law, has the greatest similarity with the principle of the freedom of outer space under space law. Today, if one compares it with the factors leading to the decline of the freedom of the air doctrine, there is a well founded anxiety that the present status of the freedom of exploration and use, including scientific investigation of outer space, may also be gradually limited. This may be especially true when economic, military or other advantages induce states to lay claim on certain parts of outer space, like the geostationary orbit, the moon and other celestial bodies etc. Similar trends are also noted in the law of the sea and air law.

Opponents of these trends are looking with anxiety at the growing number and expanding scope of rules providing for control, limitations and ban on research, experiments and tests with harmful effects, which are conducted both for peaceful and military purposes, considering them as an assault on the right to freedom of scientific investigation in outer space. It should be noted, however, that most of these limitations serve to safeguard and protect superior values, such as peace, human life and health, environment etc., and thus are devoted to the interest and welfare of mankind as a whole and ultimately are strengthening the right to freedom of scientific investigation itself by preventing its abuse for aims incompatible with the objectives of law and science.

The Legal Framework of a Polish–American Economic Cooperation

LIVIUS ILASZ

1. Introductory note

The rapid liberalization of trade and foreign investment starting in 1988 has ensured Polish economic recovery in its transition to a free market economy. Especially, Polish liberalization of trade regimes by granting foreign trade the rights to enterprises has abolished the state monopoly in foreign trade.¹ The currently available estimates for Poland indicates that enterprises, although most of them are state-owned, control about four-fifth of all export and import transactions in the country.²

The significant increase in the enterprise autonomy which influence both the size and composition of exports and imports in Poland is an evidence that domestic producers are experiencing competition from foreign imports.³ The state's absolute control over foreign trade, so characteristic for communist rule era, has given way to the use of traditional instruments of trade policy such as the use of tariffs, quotas and licenses to meet goals of national economic policy. Those goals include the acquisition of high-technology imports, the prevention of excessive depletion of foreign exchange reserves, and the prevention of excessive exportation of goods in short supply.⁴ In addition, Poland emphasizes a total commitment to GATT principles and goals.⁵ Poland is a member of the General Agreement of Tariffs and Trade (GATT) and applies a Generalized System of Preferences which sets lower tariffs on imports from developing countries. Tariffs and the custom classification are based on the Harmonized System of Coding and Harmonized Description of Commodities developed by the International Customs Cooperation Council as applied in most countries.⁶

Since the beginning of the Polish economic reforms in 1988, the government has assigned a key role to foreign capital in the transition to a free market economy process. Therefore, Poland, through appropriate legislation and interna-

¹ *World Bank Official*, interview with USITC staff, (June 5, 1991); *USITC Publication 2452*.

² OECD (Organization for Economic Cooperation and Development) officials, interview with USITC staff June 8, 1991; *USITC Publication 2452*.

³ *Id.*

⁴ *Id.*

⁵ Interview with representative of Polish embassy in Washington, D.C., July, 1991 *USITC Publication 2452*.

⁶ *European Update 1991* WL 11687 (D.R.T.), p. 134.

tional treaties, has expanded the possibilities of foreign owner-ship beyond joint ventures to one of complete ownership of industrial assets.⁷ Despite such a significant liberalization of foreign investment, Western Businesses remain cautious in making use of new opportunities.⁸ A factor, they are properly aware of, and which always has to be considered when making an investment in another country is the degree of guarantee for the funds being invested no matter what form the investment takes. For example, U.S. has an investment treaty signed with Poland (*infra*) which provides governmental guarantees and protection, for the investment and profits, and protection against expropriation without adequate compensation. The treaty also provides for the free transfer of dividends in a freely convertible currency and provides for arbitration and conciliation in disputes between a foreign investor and the Polish government. Also, in December 1991, Poland, signed an association agreement with the European Communities. These agreements ensures that all investments in Poland are governmentally guaranteed against expropriation without fair and adequate compensation.⁹

All past and recent foreign direct investment in Poland virtually has been in joint ventures. Joint venture activity is dominated by German and Austrian firms. The major economic factors such as location, culture, and historical ties play a major role in this relationship. Although U.S. ventures are fewer in number than those involving German and Austrian firms, total U.S. capital outlays are proportionally larger.¹⁰

2. Laws and regulations of the Republic of Poland affecting the economic relations with U.S. investors

Although there were affecting legal acts of an indirect nature affecting economic activities in Poland, these acts had a substantial impact on economic relations with U.S. As early as in 1976, the Communist government in Poland, being in desperate need of foreign capital and technical assistance, introduced the first reasonably comprehensive legislation concerning joint venture/foreign investment legislation in Eastern Europe. The new law on Foreign Representations Regulation directed the procedural conditions and organizational framework for foreign legal entities and individuals intending to establish their representative offices within the territory of the Polish People's Republic.¹¹ Practically speaking, this law permitted and even encouraged creation of "Polonia Firms",

⁷ Interviews with the vice president of U.S. investment firm active in CEE (June 6, 1991), CEE analysts at the OECD (June 17 – 18, 1991), and staff at European – based international bank active in CEE (June 19, 1991); *USITC Publication* 2452.

⁸ *Id.*

⁹ *European Update* 1991 WL 11687 (D.R.T.) Sec 6, 3, 3, 2, p. 140.

¹⁰ „Export Competitiveness of Major Manufacturing and Services Sectors”. Investigation N° 332 – 308 *USITC Publication* 2452, p. 11, 12.

¹¹ Regulation of the Council of Ministers of Feb. 6, 1976 on Conditions, Procedures and Authorities competent to Grant Rights to Establish Representations by Foreign legal and National

usually small businesses owned by foreigners (preferably of Polish extraction) to be set up and operate in Poland. The law provided for the establishment of trading offices by foreign companies to serve as their Polish branch. These branches would represent their trading interests, offer technology information services and supervise sales activities.

Accordingly, the Paragraph 1 of the Foreign Representations Regulation states that "A foreign legal or natural person, hereinafter called 'a foreign enterprise', may establish a representation in the territory of the Polish People's Republic to perform economic activity exclusively upon being granted a permit provided for by the regulation".¹² The possible area of economic activity under this act is described in subparagraph 1 of paragraph 1 –

"A representation of a foreign enterprise may be established for the performance of economic activity in the area of foreign trade, transport, tourist and cultural services"¹³.

A second law that formed the legal basis for conducting economic activity in Poland was the Small Manufacturing Business Act of July 6, 1982.¹⁴ The initial provision of the Act directed to increase the production of goods and services for the Polish domestic market as well as increasing exports with the participation of foreign natural and legal persons. Articles 1 and 2 of the Act state that "Legal persons having their seats abroad, citizens of foreign states, Polish citizens permanently residing abroad as well as the partnership and companies seated in Poland and formed by those persons having their exclusive interest therein, hereinafter referred to as 'foreign economic subjects' may conduct economic activity as specified in this Act, hereinafter referred to as 'economic activity' within the territory of the Polish People's Republic."¹⁵ Art. 2 states that "Foreign economic subjects may conduct economic activity on their own behalf and account as well as in partnerships and companies with Polish economic subjects".¹⁶

Persons with the Territory of the Polish People's Republic in Order to Carry on Economic Activity (*Dziennik Ustaw* (Official Journal) 1976, N°. 11, item 63 with later amendments: *Dziennik Ustaw* 1989, N°. 26, item 133).

¹² Id. See: also Paragraph 13 which states the legal requirements to obtain the permit. A permit for performing economic activity in foreign trade shall be issued by the Minister of Foreign Trade (now acting Minister of Foreign Economic Relations – see: *Dziennik Ustaw* 1987 N°. 33, item 17 amended by *Dziennik Ustaw* 1989, N°. 75, item 445 – article 123), and in other areas specified in paragraph 1 subparagraph 1 – by a relevant minister in agreement with the Ministry of Foreign Trade and the Ministry of Finance.

¹³ Id.

¹⁴ Act of July 6d, 1982 on the Rules of Carrying on Economic Activity in Small Manufacturing Business by Foreign Legal and Natural Persons within the Territory of the Polish People's Republic (*Dziennik Ustaw* 1989, N°. 27, item 148 with later amendments in *Dziennik Ustaw* 1989, N°. 74, item 442; *Dziennik Ustaw* 1991, N°. 60, item 253).

¹⁵ Id. See: Chapter 1 of General Provisions Art. 1 § 1 and § 2.

¹⁶ Id. Based on provision of Art. 2 foreign entities, apart from conducting operations in Poland on their own behalf, could establish a partnership with Polish entities. The Polish entities which were entitled to enter into partnerships with foreign partners in this way were small state

The law of 1982, when using the term "economic activity concerning small businesses", did not define the concept of the small business but only stated in art. 2 of the General Provision that it creates a basis for: the production of goods and services, traffic of goods and exportation of own products and services as well as importation of inputs necessary for production of goods and services. Therefore the companies established under the 1982 law only enjoy the right to import to the extent required in order to conduct their own activities.

The law of July 6, 1982 on the Rules of carrying on Economic Activity is now being of the closed character, because according to its regulations, only those who have acquired or who have submitted an application before January 1, 1989 for a permit to conduct economic activity, may do so. The submission of applications for these permits is no longer valid starting with January 1, 1989. Therefore, all companies who currently wish to establish economic activities in Poland must follow either the 1976 law on foreign Representation Regulation (*supra*), the 1991 Foreign Investment Law (*infra*) or the 1983 Law on Banking (*infra*).

The third legal act passed in 1988 which shaped the legal framework for conducting economic activity in Poland was called the Economic Activity with Participation of Foreign Parties Act.¹⁷ It was the first act in the post-war Polish legislative history that introduced to the system of Polish economic relations a clear bundle of rules that guaranteed an equal treatment of all economic units as well as the freedom to engage in economic activity. This law has been replaced by a new Foreign Investment Law.¹⁸

The Polish Foreign Investment law, passed on June 14, 1991 sets out the current principles by which business may be done in Poland. The right to conduct economic activity, according to the Foreign Investment Law, is universal and permitted to everyone who fulfills the basis conditions determined by law¹⁹ (discussed *infra*).

Similarly, the Banking Law of January 31, 1989 provides for the establishment of banks in Poland by foreign parties in the form of joint-stock companies and for the opening of Polish agencies and branches by foreign banks.²⁰ This acts sets forth the principles of activity as well as the formation and organizational structure of banks (discussed *infra*).

Finally, the most important law that directly effects U.S.–Polish economic relations was the treaty between the United States of America and the Republic of Poland concerning Business and Economic Relations with Protocol and Four

enterprises cooperatives genera, partnerships, and limited liability and joint-stock companies. See: also *European Update* 1991 WL. 11687 (D.R.T.), p. 25.

¹⁷ Act of 23 December 1988 on Economic Activity – *Dziennik Ustaw* 1988, N°. 41, item 324.

¹⁸ Act of 14 June 1991 on Companies with Foreign Shareholdings – *Dziennik Ustaw* 1991, N°. 60, item 253.

¹⁹ *Id.*

²⁰ Act of January 31, 1989 – The Banking Law – *Dziennik Ustaw* 1989, N°. 4, item 21; later amendments *Dziennik Ustaw* 1989, N°. 54, item 320, *Dziennik Ustaw* 1989, N°. 59, item 350); *Dziennik Ustaw* 1989, N°. 74, item 439.

Related Exchanges of letters, signed March 21, 1990 at Washington (discussed *infra*).²¹

3. Laws and regulations of the United States having an impact on economic relations with Poland²²

Since 1988 when Poland stated its intention to make a decisive transition from a central planning to a free market economy, an important aspect to this transaction has been the influx of Western investment with a simultaneous increase in trade with the West. The U.S. government has been aware of the commercial opportunities presented to its citizen by new developments in Poland and other Eastern European Countries. The laws and regulations of the U.S. affecting the economic relations with Poland are designed to reduce the risk of trade and American investment involvement in Poland. Besides the comprehensive bilateral Agreement on Investment and Business Relations with Poland signed March 21, 1990 at Washington (discussed *infra*),²³ there are several legal acts having significant impact on the present economic relationship between the United States and Poland.

The MFN (Most Favored Nation) Tariff Treatment was denied to communist countries according to the Trade Agreements Extension Act of 1951.²⁴ Section 401 of the Trade Act of 1974 reaffirmed the policy of denying MFN tariff treatment to imports from these countries with the exception of Poland, whose MFN trade status had been restored in 1960. However, section 402 of the Trade Act of 1974²⁵ authorized the President to extend MFN status to those countries that meet the freedom of emigration requirement provided in this section, called Jackson-Vanik amendment. According to section 402s of the Trade Act of 1974, the main purpose of the MFN tariff treatment policy implemented by U.S. Congress was to "assure the continued dedication of the United States to fundamental human rights". Actions of nonmarket economy countries which denied their citizens the right of opportunity to emigrate or imposed more than a nominal tax of other charges on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice were violating policy objective of MFN tariff system.²⁶ Therefore, the amendment upheld earlier provision that communist

²¹ U.S. Department of Commerce Room H - 6043 Washington, DC 20230; Commercial Law and Practice Course Handbook Series: „Joint Ventures and Privatization in Eastern Europe - Trade Law and Agreements involving Eastern Europe" by Catherine A. Novelli, April 15 - 16, 1991; 575 PLI/Comm 9.

²² For extended description of Laws and Regulations of the United States affecting trade with Eastern Europe and the Independent States of the Former Soviet Union written by Arthur Aronoff see: corporate law and Practice Course Handbook Series. *The Commerce Department speaks 1992*; Developments in Import Administration: Export and Investment Abroad - 789 PLI/Corp. 477.

²³ *Id.*

²⁴ *Id.*

²⁵ See: 19 U.S.C., §2432.

²⁶ *Id.*

or communist dominated countries were still ineligible for MFN tariff treatment²⁷ although Poland was not affected by this Act. The Jackson-Vanik Amendment prescribes eligibility for MFN treatment, government credits and investment guarantees, as well as prohibits the President from concluding commercial agreements under the Trade Act of 1974²⁸ with these countries, unless the President finds a country in compliance with objectives of MFN or waives that sections requirement. Poland, not being exempt by the Jackson-Vanik amendment, has been receiving various U.S. government credits and investment guarantees.²⁹

The Overseas Private Investment Corporation (OPIC) established by Congress in 1969, has been designed to help American companies remain competitive in the international market place.³⁰ The OPIC is a self sustaining, U.S. government agency whose purpose is to promote economic growth of less developed "friendly countries" by encouraging U.S. private investment in those nations. OPIC assists U.S. investors through direct loans or loan guaranties typically ranging from 2 million to 25 million dollars which usually do not exceed 50% of the total project cost. Moreover, OPIC can insure U.S. investment projects overseas against the risk of political violence (such as war, revolution, civil strife) in regard to assets and business income, expropriation and inconvertibility of local currency.³¹

The Eastern Europe Growth Fund (EEGF) is a new program of the Overseas Private Investment Corporation (OPIC) designed to activate new investments in Central and Eastern Europe.³² The EEGF is designed to raise capital to finance productive business enterprises in Eastern Europe thereby generating vital new economic activity, private-sector growth and employment opportunities. Because the EEGF is being created with financial guaranties from OPIC, the investment projects and insurance obligations are backed by the full faith and credit of the United States of America, as well as by OPIC's own substantial financial reserves.

Poland has been determined to be eligible for Generalized System of Preferences (GSP).³³ The GSP is designed to offered duty free or reduced duty

²⁷ 19 U.S.C. ss2192, 2193, 2432, 2439.

²⁸ 19 U.S.C. s2435.

²⁹ A products of non-market economy, that Poland was at this time, may be eligible to receive non-discriminatory treatment (most-favored-nation indicating that such a country is not violating the eligibility to that treatment. Such a report with respect to such country, like Poland, shall include information as to the nature and implementation of emigration laws and policies and restrictions or discrimination applied to or against person wishing to emigrate, 19 U.S.C.A. s2432 – subchapter IV – Trade Act of 1974.

³⁰ 22 U.S.C. ss2191, 2191a, 2199.

³¹ *Id.*

³² Commercial law and Practice Course Handbook Series, „Joint Ventures and Privatization in Eastern Europe Trade Law and Agreements involving Eastern Europe” by Catherine A. Novelli – 575 PLI/Comm 9. p. 242.

³³ The President designed Poland as a beneficiary country for purposes of the GSP on January 9, 1990 by Proclamation N°. 6087 – 55 Fed. Rep. 709.

treatment to over 4000 products from 135 countries.³⁴ GSP serves to induce other nations to fulfill their legal obligations to United States under international trade agreements and if necessary to impose trade sanctions against countries that engage in certain "unfair" international trade practices.³⁵

In determining whether to designate Poland as a beneficiary country, the President had to consider few aspect of economic and political relations. The economic factors taken under Presidential consideration was the extent to which Poland will provide market access for U.S. goods and services, the degree of the eliminating of trade – distorting investment policies and the effectiveness to enforce intellectual property rights. In order to fulfil its political mandate and to be eligible for Generalized System of Preferences (GSP), Poland had to be beneficiary of non-discriminatory treatment (MFN), and to be contracting party to the GATT and a member of the IMF. Further-more, Poland had to be free from any "domination on control" by international communism. Moreover, according to congressional intent, the President may not grant GSP to a country that does not afford to its labor force the "internationally recognized workers rights which include the rights of association and organizing, a prohibition on the use of forced labor, the establishment of a minimum employment age and the existence of acceptable working hours and conditions".³⁶

The Trade and Development Program (TDP), conducted by an independent U.S. Government Agency of the International Development Cooperation Agency IDCA promotes economic development in developing countries, inter alia in Poland, by funding feasibility investment studies, consultants, training programs and other project planning services.³⁷ In Poland TDP assists state and private enterprises by encouraging potential major development project which offer large export potential. It is done by funding U.S. private sector involvement in project planning and helping U.S. firms for follow-up contracts when these projects are implemented.

TDP activities cover a wide spectrum of economic activities through Polish government based on international economic cooperation. The current activities in Poland provided through TDP include important infrastructural and environmental projects.³⁸ For example the Ministry of Communication received a finan-

³⁴ 19 U.S.C. s2462.

³⁵ Alan O. S y k e s: „Constructive Unilateral Threats in International Commercial Relations: The Limit case for Sec.” 301, p. 59. International Law Institute with Georgetown University Law Center – 23 LPIB 263.

³⁶ Corporate Law and Practice Course Handbook Series: the Commerce Department speaks 1992: „Development in Import Administration Export and Investment Abroad”. Eastern Europe and Former Soviet Union – prepared by Arthur A r o n o f f; October 1992 789 PLI (Corp. 477).

³⁷ Commercial Law and Practice Course Handbook Series: „Joint Venture and Privatization in Eastern Europe – Trade Law and Agreements involving Eastern Europe” by Catherine A. N o v e l l i – 575 PLI/Comm 9.

³⁸ Corporate Law and Practice Course Handbook Series – The Commerce Department speaks 1992: „Development in Import Administration; Export and Investment Abroad”, Programs of the United States Government and Multinational Organizations Supporting Trade and Investment in

cial grant for a study on the modernization of the national network and for the development of local industry in the telecommunication sector. In addition, TDP offered a financial aid for technical assistance in the evaluation of proposals for the Cellular Telephone Project. Moreover, there is an extensive study being conducted of the possibility modernizing the national air traffic control system. Additionally, TDP has statutory authority to facilitate access to natural resources of interest to the United States beside these mentioned above studies and financial support to major public sectors. A priority, according to TDP objectives, is to have those public sectors for which there is high probability to allocate substantial resources for foreign goods and services to succeed.³⁹ According to operational framework all official request for TDP assistance may be made by the appropriate head of the government agency or ministry either directly to TDP in Washington or the U.S. Embassy in Warsaw. While no formal application form is required, a description of the anticipated project and required a study accompanying the official letter of request is needed. The requirement of the description of the anticipated project arises from the need to verify whether the given request qualifies for TDP assistance. There are a couple significant factors which determine the appropriateness of TDP assistance. Firstly, the project must represent a development priority for the sponsoring country and the project financing has been identified and is likely if the study suggests project feasibility. Secondly, there must be the potential for U.S. exportation of goods and services during project implementation.

In response to rapid economic transition and political reforms Poland's, and following Solidarity Leader (now Polish President) Lech Wałęsa's historic address to a joint session of Congress, the U.S. Congress authorized and President Bush signed into law a significant financial assistance program called "The Support for Eastern Europe Democracy Act of 1989 ("SEED")".⁴⁰ The Act provides general guidance such as directing the U.S. Government to seek a generous and early rescheduling for debts owned by the Government of Poland as well as specific funding provisions. In addition, the "SEED" Act provides the specific funding provisions which are designed to provide the structural adjustment of Poland's economy to that of the world market. Thus, for example the U.S. Government through its Department of Treasury made a contribution to the international fund to stabilize the Polish currency. The funds are to be kept in a reserve and drawn on as necessary to stabilize the Poland's local currency. Furthermore, the United States Government took a leadership role in supporting loans made

Eastern Europe and the Former Soviet Union by R.B. Schwartzman – 789 PLI/Corp. 497 (1992).

³⁹ Catherine A. Novelli, note 37, *ibidem*.

⁴⁰ *Id.* at 351. See also: Corporate Law and Public Course Handbook Series: The Commerce Department speaks 1992: „Development in Import Administration: Export and Investment Abroad”. Programs of the United States Government and Multinational Organization supporting Trade and Investment in Eastern Europe and the Former Soviet Union – by R.B. Schwartzman, note 38, *ibidem*.

by the International Monetary Funds (IMF) and the World Bank Organizations. Moreover, within the "SEED" Act, U.S. Department of Agriculture provides agricultural assistance to Poland with an emphasis on food production. This program is designed to work by selling surplus of U.S. agricultural products, with the potential proceeds to be used to improve the Poland's domestic agricultural infrastructure.⁴¹

Additionally, the "SEED" Act appropriates money to expand the Trade and Development Program which provides, *inter alia*, federal guarantees for loans to Polish companies to import U.S. products. The guarantees which are made through U.S. Agency for International Development to the Export-Import Bank, in turn are available to U.S. exporters. Furthermore, the "SEED" Act provides specific funding provisions in the area of educational, cultural and scientific activities. Under these provisions, the President is directed to encourage the establishment of sister institutions between American and Polish school and universities in the fields such as medicine and health care, business management and environmental protection. These educational exchange programs are directed to emphasize skills in business and economics which are essential for the development of a free market economy.⁴²

The successful development of a free market economy is conditioned on the development of the Private Sector. Therefore, under the "SEED" Act, the U.S. Department of Labor is directed to provide technical assistance programs that serve to enforce labor market reforms. These programs may include training, job search and employment services, unemployment insurance and occupational safety and health protection. Finally, to provide comprehensive support for development of the private sector of the Polish economy, the U.S. government created the Polish-American Enterprise Fund (PAEF).⁴³

In order to implement the policies and practices conducive to promote and development of Polish private sector economy the PAEF is designed to provide different kinds of assistance. hence, the Enterprise Fund provides loans, grants, equity investments, feasibility studies, technical assistance and other forms of economic assistance to help a variety of small and medium sized businesses. The Polish-American Enterprise Fund strives to combine two kinds of objectives it pursues. The PAEF is actively fulfilling its congressional mandate by seeking investment opportunities in Poland by simultaneously showing a positive return on capital from the projects it sponsors.⁴⁴

⁴¹ *Id.* at 355.

⁴² *Id.* at 353.

⁴³ *Id.* at 216.

⁴⁴ *Id.*

4. U.S.–Polish Business and Economic Treaty of 1990

4.1. Introduction

U.S.–Polish Business and Economic Treaty of 1990 was signed on 21 March 1990, at Washington by Polish Prime Minister Tadeusz Mazowiecki and U.S. President George Bush. The treaty, as defined by the Office of the Press Secretary, became "an important and vital step in enhancing the attractiveness of the investment and business environment in Poland".⁴⁵

The U.S.–Polish Treaty of 1990 became the first U.S. post-war economic agreement with a newly democratic Eastern European Country, which has been intended to encourage and facilitate U.S. investment by providing internationally recognized protections and standards. These protections and standards, covers the key legal framework in regard to a treatment of investment, business rights and dispute settlement.

President Bush, in recommending and submitting the treaty on June 19, 1990 to the U.S. Senate for ratification confirmed his support to strengthen economic relations with Poland which will facilitate and encourage the political and economic reforms taking place in Eastern Europe. Moreover, he expressed his conviction that the treaty will serve to stimulate the growth of Poland's private sector and market institutions as well as to protect U.S. investment and business activity in Poland. Furthermore, he stated that the tenet of this policy, which is reflected in the treaty, is that U.S. direct investment abroad and foreign investment in the U.S. should receive fair, equitable and non-discriminatory treatment. It was also the best understanding of President Bush, submitting the document for Senate ratification, that the parties also agreed to international law standards for expropriation and compensation; free financial transfers; and procedures, including international arbitration for the settlement of disputes.⁴⁶

4.2. Treatment of investment

According to the U.S.–Polish Business and Economic Treaty, U.S. investors in Poland will be treated equally as Polish nationals or investors from other countries, whichever is more favorable. This basic assumption is reflected in Article II, § 6 relates the treatment of investment to be in compliance with norms of international law. It provides that "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law; neither party shall in any way impair by arbitrary and discriminatory measures the ma-

⁴⁵ Eastern Europe Business Information Center – U.S. Department of Commerce Room H-6043 Washington, DC 20230 – 375 PLI/Comm 9, p. 118.

⁴⁶ Message from the President of the United States transmitting the Treaty between the United States of America and the Republic of Poland concerning Business and Economic relations. (referred to the Committee on Foreign Relations) to the U.S. Senate for ratification – commercial law and Practice Course Handbook Series – 575 PLI/Comm 9.

nagement, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investment. Each party shall observe any obligation it may have entered into with regard to investments".⁴⁷

In order to understand the operational extent of the investment part of the U.S.-Polish Business and Economic Treaty it is necessary to relate the Treaty provision with Polish domestic law on Companies with Foreign Shareholdings of June 14, 1991, known also as Foreign Investment Law.⁴⁸ The Companies with Foreign Shareholdings Act set forth the conditions for admitting foreign subject to share income gained from carrying on enterprises within the territory of the Republic of Poland.⁴⁹ The Act sets out the conditions under which capital may be invested in Poland by foreign entities. The foreign legal and natural persons may invest only in the form of economic entities which take the form of limited liability of joint-stock companies with the level of foreign participation ranging from 0% to 100%.⁵⁰ The capital of foreign entities may be contributed in monetary or non-monetary form. Accordingly, the law states that the foreign subject contribution to the company's capital may be brought in Polish currency obtained as a result of a sale, in a foreign exchange bank, of convertible currency at the buying rate of foreign currency announced by the National Bank of Poland.⁵¹ Alternatively, the capital may be brought in non-cash assets, provided that the contribution has been transferred from abroad or acquired in exchange for Polish currency at the rate of exchange at official NBP (National Polish Bank) rates in an authorized bank.⁵²

The essential part of the U.S.-Polish Business and Economic Treaty is one dealing with compensation for expropriation. Here, U.S. and Poland agreed to internationally recognized standards for expropriation which confer protection from unlawful interference with property interests. The Treaty provides that "investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization except for a public purpose, in a nondiscriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law".⁵³

Furthermore, the treaty regulates the extent and conditions concerning compensation. The compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action

⁴⁷ U.S.-Polish Business and Economic Treaty of 1990: Art. 2 § 6. Doc. 101-18; Executive report 101-34 U.S. Senate Doc. Room.

⁴⁸ Companies with Foreign Shareholdings Act *Dziennik Ustaw* 1991, N°. 60, item 253. The Companies with Foreign Shareholdings Act revokes and replaces the 1988 Joint Ventures Law – *Dziennik Ustaw* 1988, N°. 61, item 324.

⁴⁹ Id. at Chapter I Art. 1 § 1 – The Act creates the possibilities for foreign subjects both to form companies and to acquire shares in existing companies.

⁵⁰ Id. at Chapter I art 1 § 2.

⁵¹ Id. at Chapter II art 10 § 1.

⁵² Id. at Chapter II, art 10, § 2.

⁵³ U.S.-Polish Business and Economic Treaty of 1990 Chapter VII § 1 – Doc. 101-18; Executive report 101-34 U.S. Senate Doc. Room.

was taken or became publicly known. The compensation for investors in case of expropriation will be paid without delay including interest at a commercially reasonable rate from the date of expropriation. The treaty further states that such compensation shall be fully realizable, freely transferable and calculated on the basis of the prevailing market rate of exchange for commercial transaction on the date of propriation.⁵⁴ Moreover, a national or company of either Party that asserts that all or part of its investment has been expropriated will have a right to prompt review by the appropriate judicial or administrative authorities of the other party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefor, conforms to the provisions of this treaty and to principles of international law.⁵⁵

The similar provision providing protection for ownership and eventual expropriation has been included in the Poland's domestic law. The act of 29 December 1989, on the Amendment to the Constitution of the Polish People's Republic (discussed *supra*) stated that "the Republic of Poland shall protect ownership and the right of inheritance and shall guarantee full protection of personal property. Expropriation shall be possible in public interest only and for just indemnity".⁵⁶ Similarly, the Act of 14 June 1991 on Companies with Foreign Shareholdings "assures the payment of indemnity to foreign subject, on reciprocal basis, to the amount of the part of the company's assets falling thereto, in order to redress the loss suffered in consequence of acts of expropriation or as a result of application of other measures causing effect equal to expropriation".⁵⁷

Another important matter related to investment provision, included in the U.S.-Polish Business and Economic Treaty of 1990, was the transfer of funds. The government of the Republic of Poland has agreed to permit the immediate and complete repatriation of expert earnings and capital from Poland to the U.S. The Treaty explicitly provides that all investors will be permitted to do all transfers related to an investment of commercial activity in the free manner and without delay into and out of its prospective territory. Such transfers include returns, compensation pursuant to expropriation, payments arising out of an investment dispute or commercial dispute. Furthermore, according to the Treaty, such transfer will include payments made under a contract, including amortization of principal and accrued interest payments made pursuant to loan agreement, proceeds from the sale or liquidation of all or any part of an investment and any additional contributions to capital for the maintenance or development of an investment.⁵⁸ The treaty assumes that such transfers shall be made in a freely

⁵⁴ *Id.*

⁵⁵ *Id.* at Chapter VII § 2.

⁵⁶ *Dziennik Ustaw* 1989, N°. 75, item 444; Art. 7.

⁵⁷ Companies with Foreign Shareholdings Act – *Dziennik Ustaw* 1991, N°. 60, item 253; Chapter III art 22.

⁵⁸ U.S.-Polish Business and Economic Treaty of 1990 at art V, § 1, Doc. 101-18; Executive report 101-34 U.S. Senate Doc. Room.

usable currency at the prevailing market rate of exchange for commercial transactions on the date of transfer with respect to spot transactions in the currency to be transferred.⁵⁹

The similar provisions in regard to transfer of funds are made in the Polish 1991 Foreign Investment Law.⁶⁰ The Act provides that a foreign subject, having paid all the due taxes shall be entitled to purchase foreign currency in a foreign exchange bank and to transfer it abroad, without any separate exchange permit. The transfers mentioned in the Act include amounts obtained as indemnity for expropriation. It's important to note that in the Annex to the U.S.-Polish Business and Economic Treaty, Poland imposed some restriction on repatriation of U.S. investment profits to assume an undisturbed transition to a free market economy. However, Poland agreed to progressively eliminate restrictions on repatriation of U.S. investor profits with no restriction for profits beyond 1995. The transfer of profits derived from an investment has been made according to the following schedule.⁶¹

- as of 1st January 1992: 20% of the remaining profits gained in 1990 – 1991 and not previously transferred;
- as of 1st January 1993: 35% of the remaining profits gained in 1990 – 1992 and not previously transferred;
- as of 1st January 1994: 50% of the remaining profits gained in 1990 – 1993 and not previously transferred;
- as of 1st January 1995: 80% of the remaining profits gained in 1990 – 1994 and not previously transferred;
- and finally as of 1st January 1996: 100% of the remaining profits gained in 1990 – 1995 and not previously transferred and 100% of profits gained thereafter.⁶²

In addition to, the Act of 14 June 1991 on Companies with Foreign Shareholdings the introduction of Polish Banking law has extended the investment possibilities for U.S. financial market in Poland. The Banking Law of 31 January 1989 defines the principles of bank creation, organization and areas of business activity.⁶³ According to the law, the basic bank activities in Poland involve the provision of interest yielding deposit and loan facilities and are based on the principles of monetary and credit policy established by the Parliament.⁶⁴ The Polish Banking Law provides for the creation of commercial banks and allows

⁵⁹ Id. at art V § 2.

⁶⁰ Companies with Foreign Shareholdings Act – *Dziennik Ustaw* 1991, N°. 60, item 253.

⁶¹ The schedule is an integral part of the U.S.-Polish Business and Economic Treaty included in the Annex to the Act.

⁶² Id.

⁶³ Banking Law Act of 31 January 1989 – *Dziennik Ustaw* 1989, N°. 4, item 21 2 with later amendments: *Dziennik Ustaw* 1989, N°. 54, item 320, *Dziennik Ustaw* 1989, N°. 59, item 350 and *Dziennik Ustaw* 1989, N°. 74, item 439.

⁶⁴ Id. at Chapter 1, Art. 4.

for the full participation of foreigners in the banking system.⁶⁵ A bank may be founded by a legal or natural person provided that there will be at least three companies or enterprises in the case of legal person and not less than 10 individuals in the case of natural person.⁶⁶ However, it is important to note, that in the case of involvement by foreign investors, there is a requirement of evidence of the availability of a minimum 6 million dollars U.S. in Poland.⁶⁷ All banking activities, including those of the branches and agencies of foreign banks, are governed by the legal stipulations set out in the banking Law and letter amendment (see footnote 63) and are supervised by the national Bank of Poland (NBP – Narodowy Bank Polski).

The U.S.–Polish Business and Economic Treaty calls on the Parties to apply their tax policies fairly and equitably. Article VI of the treaty states that "each Party should strive to accord fairness and equity on the treatment of investment of, and commercial activity conducted by, nationals and companies of the other party".⁶⁸ Because the U.S. addresses tax matters specifically in tax treaties, the present treaty generally excludes such provisions. However, the treaty will apply to matters of taxation to the extent they relate to expropriation, transfers or investments agreements.⁶⁹

Furthermore, in the case of investment agreements the tax provision of this treaty will apply to the extent that they are not subject to the dispute settlement provision of a convention for the avoidance of double taxation between the two parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.⁷⁰

In summary, the U.S. nationals and companies seeking to invest in Poland are subject to Polish law governing the entry of foreign investment (discussed *supra*), which allows denial only if the proposed investment presents a threat to state national security, economic or environmental well-being. In a side letter, supplementing the Treaty, signed by Mr. Dariusz Ledworowski, Under Secretary of State, Ministry of Foreign Economic Relations, the Polish government, in implementing its various investment procedures, shall treat nationals and companies of the U.S. at least as favorably as the nationals and companies of any third country.⁷¹

⁶⁵ *Id.* at Chapter 5, Art. 77. The article states that „A bank in the form of a joint-stock company may be also established by foreign person or with foreign capital interest”.

⁶⁶ *Id.* at Chapter 5, Art. 57.

⁶⁷ *European Update* 1991 WL 11687 (D.R.T.), p. 118.

⁶⁸ The U.S.–Polish Business and Economic Treaty of 1990 Treaty Doc. 101-18; Executive Report 101-34 U.S. Senate Doc. Room.

⁶⁹ *Id.* Art. VI § 2 (2) (b) (c).

⁷⁰ *Id.*

⁷¹ U.S. Department of Commerce Room H-6043 Washington D.C. 20230; commercial law and Practice Course Handbook Series: „Joint Ventures and Privatization in Eastern Europe” – 575 PLI/Comm 9, p. 190.

4.3. Business organizations and their rights

The general principles on the conduct of private economic activity can be found in the Constitution of the Polish Republic⁷² (discussed supra) Art. 6 of the Act states that "The Republic of Poland shall guarantee freedom of economic activity irrespective of the type of ownership; restriction of that freedom may be imposed by statutory law only."⁷³ In other words, Poland by its constitutional Amendment guarantees the freedom to conduct economic activity to all person, irrespective of their public or private status. An restriction on this freedom can be imposed only by the Parliament issuing specific regulations to the contrary. The Polish investment law of June 1991 (discussed supra)⁷⁴ treats the right to conduct economic activity as universal one which is only subject to fulfillment of the basic conditions determined by the legislative. Furthermore, in relation to foreigners there are some limited regulation regarding areas of economic activity which, are limited by a duty to obtain an appropriate permit.

Establishing a business in Poland, if not a state-owned enterprise or a cooperative, should be done according to the rules defined by the Polish commercial code.⁷⁵ The Polish Commercial Code, combined together with a relevant provisions on the business rights, which were addressed in the U.S.-Polish Treaty of 1990, provide the legal guidance as to how to advance the U.S. investor's interest in the newly established free market economy.⁷⁶ It should, be pointed out that if a prospective business will be following the principle of a free market economy, the Commercial Code is the most important legislative act which provides a comprehensive guideline for business activity in Poland. On the other hand, the articles of the U.S.-Polish Treaty of 1990, within the relevant provisions on the business rights, concentrates explicitly on nondiscriminatory treatment to nationals and economic enterprises of each party to the treaty in respect to activities associated to.⁷⁷

- the granting of franchises or rights under licenses;
- the issue of registrations, licenses, permits and other approvals necessary for the conduct of commercial activity, which shall in any event be issued expeditiously;

⁷² Act of 29 December 1989 on the Amendments to the Constitution of the Polish People's Republic - *Dziennik Ustaw* 1989, N°. 75, item 444, Art. 6.

⁷³ Id.

⁷⁴ Act of 14 June 1991 on Companies with Foreign Shareholdings - *Dziennik Ustaw* 1991, N°. 60, item 253.

⁷⁵ The Commercial Code, which is based on German Company law was issued on 27 June 1934. *Dziennik Ustaw* and was recently supplement by Act of 31 August 1991 on the Amendment to the Regulation by the President of the Republic of Poland: The Commercial Code.

⁷⁶ U.S.-Polish Business and Economic Treaty; Doc. 101-18; Executive Report 101-34; U.S. Senate Doc. Room.

⁷⁷ The following items were enumerated in the Art. II of the U.S.-Polish Business and Economic Treaty of 1990 - Treaty Doc. 101-18 Executive Report 101-34 - U.S. Senate Doc. Room.

- the access to financial institutions and credit markets;
- the access to their funds held in financial institutions;
- the importation and installation of equipment necessary for the normal conduct of business affairs, including, but not limited to office equipment and automobiles, and the export of any equipment and automobiles so imported;⁷⁸
- the dissemination of commercial information;
- the conduct of market studies;
- the appointment of commercial representatives, including agents, consultants and distributors and their participation in trade fairs and promotion events;
- the marketing of goods and services, including through internal distribution and marketing systems and by direct contract with individuals and companies;
- the access to public utilities, public services of all types at nondiscriminatory prices, if the prices are set or control by the government.⁷⁹

Furthermore, according the Treaty, Poland has agreed to adopt major new intellectual property standards which are among the most sophisticated in the world in areas of product protection⁸⁰, protection of integrated circuit layout designs (computer software),⁸¹ and protection of proprietary information, whether such information is of a technical or commercial nature.⁸² Moreover, in the a side letter supplementing the treaty, the Polish government stated that it will adhere to the Paris Act and the Berne Convention for the Protection of Literary and Artistic work.⁸³ Furthermore, another side letter relates to the U.S.–Poland Agreement on the Development and Facilitation of Tourism, signed on 20 September 1989, which reassures that tourism enterprises that are still under state control will provide service to U.S. nationals and companies on a fair and equitable basis.⁸⁴

Foreign legal and natural persons may conduct their business in Poland in the form of a limited liability⁸⁵ or a joint-stock⁸⁶ company in accordance with

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id. at Annex 1.

⁸¹ Id. at Annex 1.

⁸² Id. at Annex 3.

⁸³ Such an intention was expressed by are of few letter accompanying the treaty signed by Mr. Dariusz Ledworowski, under Secretary of State, Ministry of Foreign Economic Relations, Warsaw Poland directed to Mrs. Carla A. Hills acting as U.S. Trade Representative, at Executive Office of the President, Washington, D.C. 21 March 1990 – Doc. 101-18 U.S. Senate Doc. Room.

⁸⁴ Id.

⁸⁵ Polish Commercial Code Art. 161 states: „Foreign Limited Companies can be admitted to run their activity on the territory of the Republic of Poland upon permission granted by the Minister of Industry and Trade”.

⁸⁶ Id. at Art. 310 § 3 states that Foreign joint-stock companies may be allowed to run their activities on the territory of the Republic of Poland exlusively upon a permission of the Minister of Industry and Trade and the Minister of Treasury.

the Polish Commercial Code. Therefore, all joint-ventures established in Poland must take one of these forms in order to be Polish legal entity. However, the shares may be held exclusively by foreign shareholders (i.e. companies with 100% foreign capital). It should be noted that according to the Polish Commercial Code, a limited liability company may be established by a sole shareholder.⁸⁷ On the other hand in order to establish a joint-stock company, at least three founders of the company are required.⁸⁸

Under the June 1991 Act on Companies with Foreign Shareholdings⁸⁹ shareholders may invest in companies or in joint ventures with Polish enterprises without the prior approval of the Polish government except in the following fields:⁹⁰

- management of seaports and airports
- intermediating and dealing in real estate
- defence industry not requiring any concession
- wholesale trade in imported consumption goods
- provision of legal aid.

If a company's planned field of activity is within Art. 4 of the Foreign Investment law (mentioned above) and thus subject to licensing requirements, its permit will be only issued after consent which has been obtained from a responsible governmental body having legal power to grant the license. The general rules needed to be complied with to obtain a permit are described in the Commercial Code.

Once a limited liability or joint stock company is created upon compliance with all licensing and permit requirements, its legal establishment must be accomplished by a notarial deed.⁹¹ Furthermore, the application has to be entered into the commercial register.⁹² The register is held by the economic department of the District Court in the area where the company is to be located. Only upon registration does the new economic entity acquire legal existence and may commence its operations.

The U.S.-Polish treaty paid particular attention to overcome bureaucratic obstacles and transparency problems that may continue during the transitional period in Poland and thus impairing the full implementation of the Treaty. Therefore, in a side letter to the Treaty,⁹³ Poland designated within

⁸⁷ Id. at Art. 158 § 1.

⁸⁸ Id. at Art. 308.

⁸⁹ Companies with Foreign Shareholdings Act (*Dziennik Ustaw* 1991, N°. 60, item 253).

⁹⁰ Id. at Chapter 2; Art. 4.

⁹¹ Polish Commercial Code – Art. 162 § 1 for limited liability company and Art. 308 for joint-stock company.

⁹² Id. at Art. 160 § 4 for limited liability company and Art. 311 § 5 for joint-stock company.

⁹³ The side letter to the treaty signed by Mr. Dariusz Ledworowski, under Secretary of State, Ministry of Foreign Economic Relations Warsaw, Poland directed to Mrs. Carla A. Hills acting as U.S. Trade Representative at Executive office of the President Washington, D.C. 21 March 1990 Doc. 101-18 U.S. Senate Doc. Room; see: also Art. VIII of U.S.-Polish Business and Economic Treaty regarding Exchange of Information and Transparency.

its Agency for Foreign Investment a Deputy President who shall assist U.S. nationals and companies in deriving full benefits from the Treaty. According to the intent of the letter, the Deputy President would work toward coordination and problem solving for U.S. investors facing regulatory difficulties, as well as functioning as a reliable source for information pertinent to foreign investors.

5. Dispute settlement

U.S. and Poland agreed to abide by internationally recognized standards for arbitration that serve to provide an investor with the right to go to international arbitration after six months for any type of dispute. Article IX of the Treaty⁹⁴ which deals with the settlement of disputes between a Party and an investor of the other Party relates to dispute involving:

- the interpretation or application of any investment agreement between a Party and national or company of the other party;
- the interpretation or application of any investment authorization granted by a Party's foreign investment authority to such national or company; or
- an alleged breach of any right conferred or elected by this treaty with respect to any investment.

International arbitral rules generally allow parties to an agreement containing an arbitration clause to choose the substantive law that will govern disputes.⁹⁵ Although the parties may choose the law of a particular jurisdiction, not necessarily involving one of the parties, they often specify that "general principles of law" will apply. The statute of the International Court of Justice provides generally accepted guidance as to the content of general principles of law in the international context. According to this guidance, in deciding international conflicts the court will refer to international conventions, international custom, the general principles of law recognized by civilized nations or judicial decisions.⁹⁶ Arbitration as a way to settle commercial disputes between a party and an investor of the other party has been a popular and successful alternative to national courts for decades.⁹⁷ Although Art IX (2) of U.S.–Poland Business and Economic Treaty of 1990 encourage the parties to initially seek to resolve the dispute by consultation, negotiations and even resort to local courts, the general purpose of the arbitration allows parties to avoid having disputes judged in the national courts of the opposing party.

Arbitration in the international context of the U.S.–Polish Treaty involves a major difficulty which is the choice of substantive law to be applied in the

⁹⁴ U.S.–Polish Business and Economic Treaty of 1980 Doc. 101-18; Executive Report 101-39; U.S. Senate Doc. Room.

⁹⁵ „General Principles of Law in International Commercial Arbitration”, Harvard Law Review Association, June 1988, 101 *Harv. L. Rev.* 1816.

⁹⁶ See: Statute of the International Court of Justice, Art. 38 (hereinafter I.C.J. Statute), reprinted in *Current International Treaties* 137 (T. Millar ed. 1984).

⁹⁷ See: De Vries: „International Commercial Arbitration: A Contractual Substitute for National Courts”, 57 *Tul. L. Rev.* 42, 43 – 44 (1982).

given dispute.⁹⁸ Accordingly, Article IX regarding settlement of Disputes Between a Party and an Investor of the other Party directs that the investment agreement shall remain binding and shall be enforceable in accordance with the terms of the investment agreement, relevant provision of domestic laws and applicable international agreement regarding enforcement of arbitral awards. The substantive law of the arbitration may be specified by the parties in their original agreement.⁹⁹ Therefore, the parties to an agreement including an arbitration provision have virtually complete autonomy in selecting the substantive law which will eventually govern the dispute. In this case, almost any choice of substantive law by the parties is enforceable, so long as the arbitral award itself is enforceable.¹⁰⁰

In the event the dispute cannot be resolved through consultation and negotiation, the Article IX the U.S.-Polish Treaty states that "the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures".¹⁰¹ The dispute-settlement procedures are introduced in Article IX (3) of the Treaty. According to them, at any time after six months from the date on which the dispute arose, the national or company concerned may choose to consent in writing the submission of the dispute for settlement by conciliation or binding arbitration.¹⁰² The dispute in such a case will be submitted "to the International Centre for the Settlement of Investment Disputes ("Centre") or to the Additional Facility of the Centre or pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") or pursuant to the arbitration rules of any arbitral institution mutually agreed between the parties to the dispute".¹⁰³ The commencement of the conciliation or binding arbitration proceedings will be conditioned upon two premises. Firstly, the dispute has not been submitted by the national or company for resolution in accordance with any applicable previously agreed dispute settlement procedures. Secondly, the national or company concerned has not brought the dispute before a court of justice or administrative tribunal of competent jurisdiction of the Party that is a party to the dispute.¹⁰⁴

⁹⁸ „General Principles of Law in International Commercial Arbitration”, Harvard Law Review Association June 1988, p. 10 note – In general, arbitral tribunals recognize a distinction between the law of arbitration procedure, or *Lex arbitral* and the substantive or proper law governing disputes. 101 *Harv. L. Rev.* 1816.

⁹⁹ *Id.*, see also: *Branson, Wallace*: „Choosing the Substantive Law to Apply in International Commercial Arbitration”, 27 *VA. J. Int'l L.* 39, 46 (1986).

¹⁰⁰ *Id.*, see also: *Elf Aquitaine Iran (France) v. National Iranian Oil Co. (Iran)* 11 *Y.B. COM. ARB.* 97, 101 (1986). An arbitral award is not enforceable unless the arbitrator had competence to decide the issue presented. The general arbitral principle of *Kompetenz-Kompetenz* dictates that the arbitral tribunal always has competence to decide the issue of its own competence. *Supra* note.

¹⁰¹ U.S.-Poland Business and Economic Treaty of 1990, Doc. 101-18; Executive Report 101-34; U.S. Senate Doc. Room

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

6. Conclusion

The U.S.–Polish Business and Economic Treaty supported by relevant provisions of Polish domestic laws encourage, facilitate and protect U.S. investment and business activity in Poland, which acts as an important stimulus to Polish economic reform that supports the transition to a free market economy. Potential U.S. investors who otherwise might perceive uncertainties in the newly re-open international investment market in Poland will find considerable assurance in the protection provided by this Treaty. Poland's willingness to provide U.S. investors with meaningful assurances and guarantees, which constitutes a major departure from its earlier critical attitude towards foreign investment market, will become a key factor in strengthening the U.S.–Poland bilateral investment relationship.

Increasing Air Passenger Compensation Within or Around the Warsaw System

MAREK ŻYLICZ

1. Warsaw Convention – the most widely accepted treaty on private international law

The Convention for the unification of certain rules relating to international transportation by air, done at Warsaw on 12 October 1929,¹ is about to celebrate its 65th anniversary. That convention, serving as the basic document of the systems known as the Warsaw System, has been ratified, adhered to or otherwise accepted by 124 states (their number will probably increase when the position of all new states emerging from the former USSR and Yugoslavia is clarified). Anyhow, it is the most widely accepted international treaty on private (civil) law.

2. Basic objectives and compromise solutions

2.1. Objectives

The basic purpose of the Warsaw Convention – as defined in its preamble – is regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier. Before the Warsaw Convention, there were no uniform rules of law governing the contract of carriage by air, the rights and obligations of the parties and the air carrier's liability. National laws differed as did the rules of conflict of laws and jurisdiction enacted in different countries. The unification of the relevant principles and rules with respect to international air transport was necessary to remove uncertainty and confusion.

As to the substance, the uniform regime had to reconcile the interests of the air transport industry and the interests of its customers – passengers and owners of air cargo. The problem was thus related to the general (public service) objectives of national air transport policies rather than to specific objectives of protecting national interests in international air transport trade.

¹ For text see: „II Conférence Internationale de Droit Privé Aérien”, Warsaw 1930.

2.2. Protection of air carrier customers

The following main elements contained in the Warsaw Convention aimed at protection of air carrier customers:

1. Liability of the carrier based on a legal presumption of its fault. This principle, shifting the burden of proof to the carrier (for possible exculpation), was evidently more favourable to the victim than the most common at that time principle of liability based on the fault proven, or than the American theory of *res ipsa loquitur*.

2. Unlimited air carrier's liability in cases of proof of its wilful misconduct (*dol* or *faute équivalente au dol*, according to the original French text of the convention) or failure to deliver the traffic documents as required, or raising the limits by special contract.

3. Nullity of contractual provisions tending to relieve the carrier of liability or to lower the liability limits established by the convention.

4. Granting the plaintiff a choice among four jurisdictions in the contracting states, based on the carrier's domicile, its principal place of business, its place of business through which the contract of carriage was made or the place of destination.

2.3. Limitation of liability to protect infant air transport industry²

As a *quid pro quo*, the Warsaw Convention established – in favour of the carrier – monetary limitations of its liability. The limits amounted to: 125.000 Poincaré French gold francs for death or injury of passengers, 250 francs per kilogram of registered baggage or cargo and 5.000 francs for objects of which the passenger takes charge himself. Their equivalents in the United States Dollars (1990) are: 12.000, 24 and 480 respectively; and in the Special Drawing Rights of the International Monetary Fund: 8.300, 17 and 332.

Various arguments were advanced to justify these limitations of liability (representing then much more than their present real value). A. Tobolewski refers to seven of them:³

1) avoiding injustice of serious discrepancies in awards between different countries;

2) catastrophic risks associated with aviation accidents which should not be borne by aviation alone;

3) providing a basis for insuring liability risks which would not be available without limitation;

4) life insurance available to passengers irrespective of air carrier's liability;

5) curtailing litigations by facilitating rapid settlement;

² For a more detailed study see: A. T o b o l e w s k i: *Monetary limitations of liability in Air Law* (1986).

³ A. T o b o l e w s k i: „Just say no to the limitation of liability in air law”. Paper distributed during the ICAO 27 Assembly, 2 and 3 (1989).

- 6) providing a counterpart to the aggravated system of liability imposed on the carrier; and
- 7) protecting a financially weak industry.

3. Evolution and disintegration of the Warsaw System

3.1. Changing economic environment

The Warsaw Convention was a great achievement in international thinking at the time, providing a balance between different interests. But both the world economic environment and civil aviation itself have changed much in the intervening years, and so many arguments have lost their original value that the revision of the system proved necessary to meet changing needs.

As W. Guldemann stated in his presentation at the 45th Annual General Meeting of the International Air Transport Association in Warsaw (1989),⁴ the factual basis of the liability problem developed in its main elements after the Second World War: air transport became a mature industry, it became a big business; the insurance industry grew as well; the differences in the standards of living of different countries, and the differences in their legal systems became more important; the liability limits established in 1929 became clearly insufficient in most of industrialized countries, and the insufficiency was aggravated by the progressive inflation; in the same countries, the claim mentality in the public became more general, progressive and aggressive.

3.2. Consecutive changes and the present status of the Warsaw System

The documents amending or supplementing the Warsaw Convention to meet new economic developments, adopted by the consecutive international conferences, followed one another without always waiting for the entry into force of preceding ones. The new increased limits of air carrier's liability were still found not satisfactory for a relatively large number of states, including those leading in the aviation field.

At present, the Warsaw System consists of the following documents, accepted by different numbers of states (without counting new post-USSR and post-Yugoslavia states whose position has not yet been clarified):⁵

1. The Warsaw Convention of 1929, being the basic document of the system (124 states).
2. The Hague Protocol of 1955,⁶ one of the documents amending the Warsaw Convention which has entered into force (111 states). By this protocol, the War-

⁴ „The Warsaw Convention of 1929, its past – its present – its future”. Paper presented at the 45th AGM of IATA, 2 and 3 (1989).

⁵ For the lists of states parties to each document as of 31 December 1992 see: ICAO Doc. 9605, p. 107ff.

⁶ ICAO Doc. 7632.

saw limit of liability for death or injury of passengers (referred to before) was doubled, the definition of "wilful misconduct" as a premise for the breaking of liability limits was added, the limits were made applicable to air carrier's servants and agents, and the requirements concerning traffic documents were simplified.

3. The Guadalajara Convention of 1961,⁷ supplementary to the Warsaw Convention, and governing the application of the Warsaw rules in cases of carriage performed by a person other than the contracting carrier, including cases of charter and interchange of aircraft. This convention has also entered into force (67 states).

4. The Guatemala City Protocol of 1971,⁸ amending the Warsaw Convention as amended by the Hague Protocol (11 ratifications achieved, with 30 ratifications, including the United States, being required for the entry of the protocol into force). This was another step in the development of the Warsaw System, made chiefly to satisfy the United States which has not ratified the Hague Protocol. By the Guatemala Protocol the passenger liability limit was increased to 1.500.000 Poincaré francs (equivalent of 100.000 SDR) for death and injury, the limit of 62.500 francs was introduced for passenger delay, and 15.000 francs for passenger baggage. Moreover, new provisions were adopted to establish objective liability for death and injury of passengers, to make the liability limit unbreakable irrespective of the circumstances that gave rise to the liability, and to allow for establishment by states of supplemental compensation systems applicable within their respective territories for passenger damages. The United States has not ratified that protocol, and no new ratifications are expected in view of more recent developments.

5. The four Montreal Protocols of 1975 have been the most recent move to amend the previous documents of the Warsaw System. Each protocol needs 30 ratifications to enter into force and no one of them has obtained the number of ratifications required. In all these protocols the Poincaré francs have been replaced by Special Drawing Rights of the International Monetary Fund for determining liability limits, but states which are not members of the IMF may decide to continue application of the old monetary unit. The subject of regulation and the number of states having ratified each of the Montreal Protocols differs, namely:

Protocol No. 1⁹ applies to the Warsaw Convention of 1929 (25 states);

Protocol No. 2¹⁰ applies to the Warsaw Convention as amended at the Hague in 1955 (25 states);

Protocol No. 3¹¹ applies to the Warsaw Convention as amended at the Hague in 1955 and at the Guatemala City in 1971 (19 states). That protocol is of particular importance for reproducing previous amendments, with liability limits fixed

⁷ ICAO Doc. 8181.

⁸ ICAO Doc. 8932.

⁹ ICAO Doc. 9145.

¹⁰ ICAO Doc. 9146.

¹¹ ICAO Doc. 9147.

at 100.000 SDR for passenger death and injury, 4.150 SDR for passenger delay, 1.000 SDR for passenger baggage (irrespective of weight) and 17 SDR per kilogramme of cargo. The protocol does not reproduce the Guatemala provision making entry into force of the document practically dependent on its ratification by the United States;

Protocol No. 4¹² applies mainly to the cargo provisions of the Warsaw Convention of 1929 (21 states). It has no direct importance for this study.

The two last protocols (No. 3 and No. 4) constitute the last stage of the Warsaw System development, with no further stages being presently anticipated.

The Montreal Interim Agreement of 1966¹³ is a document qualified by some lawyers as a part of the Warsaw System. It is not actually an inter-governmental agreement. It was signed by 34 airlines operating international services including a point in the United States, and adhered to by other air carriers concerned. By this agreement, imposed on the carriers by the US government as a condition of its withdrawing the denunciation of the Warsaw Convention, the carriers accepted:

- a) a voluntary increase of the liability limit for passenger damages to 58.000 USD excluding costs or 75, 000 USD including costs;
- b) a voluntary waiver of possible exculpation, thereby making a carrier's liability (within the above limits) non-dependent on its fault, and
- c) an agreed text of advice to international passengers on the limitation of carrier's liability.

Along with other instruments supplementing the Warsaw System, the Montreal Interim Agreement continues to serve its purpose pending the entry into force of new inter-governmental arrangements.

3.3. Co-existence and conflicts of different legal regimes

The coexistence of several documents governing (at the same time but in a different way) the legal relations between the parties of the contract of international carriage by air causes countless conflicts and uncertainties which had to be eliminated according to the original objectives of the Warsaw Convention. The application of the Warsaw Convention in its original text or as amended by one or more protocols depends on which of them is binding upon each of the states concerned, without it being necessarily recognized by other states and their tribunals. And, since the application of each of these documents further depends on the itinerary indicated in traffic documents (point of origin and final destination, and in some cases stopping points as well), irrespective of the actual routing and of the carrier's or customers nationality – different passengers on the same aircraft may be subject to different carrier liability regimes and limits.

¹² ICAO Doc. 9148.

¹³ US CAB 18900 approved by order E 23480 of May 13, 1966, Docket 17325.

There may be about 40 combinations with different Warsaw documents in force now, and that number will be much higher upon entry into force of those still outstanding. In order to reverse that disintegrating trend in the Warsaw System and restore a uniform regime, the international civil aviation community should agree on the acceptance of one single set of documents – preferably that of the Warsaw Convention as amended by Montreal Protocols No. 3 and 4.

3.4. Unsolved policy problems

Most of the improvements to the Warsaw Convention – moving towards the objective (or absolute) liability principle, replacing the old Warsaw currency by SDR, simplifying and modernizing traffic documents, providing proper advice to passengers etc. – would easily obtain general support from the international community. On the contrary, the limitation of liability for passenger death or injury became a matter of deep dissent in an increasing number of countries. It created the main obstacle to the process of creation of new documents or to ratification of those already adopted. It also prompted the leading aviation country – the United States – to denounce the Warsaw Convention in 1965; a denunciation that, unless withdrawn, would certainly be followed by other countries. The Warsaw System survived, but has disintegrated somewhat given that its successive amendments have not met with general acceptance. Limitation of passenger liability remains the main unsolved problem.

4. Limitation of air carrier's liability as a public policy problem¹⁴

4.1. Economic considerations

Before entering the broad area of social (including moral and judicial) policy considerations, it seems useful to examine the economic aspects of the liability limitation problem. One must first recognize the fact that economic damages sustained and the indemnity claims in cases of passenger death or injury vary from very low to multimillion amounts depending on individual circumstances (the nature of injury, cost of medical treatment, loss of income, damage to dependents etc.), and on the socio-economic environment (including the level of social security services). Bearing this in mind, one must state the following:

1. If there is no limit to air carrier's liability, the total amount of compensation is chargeable against the carrier, and the carrier will certainly seek appropriate, possibly unlimited liability insurance.

2. If the carrier's liability is limited, the majority of claims is supposed to be covered by the amount of the limit up to which the carrier was certainly insured. With respect to the minority of potential claimants who would not be satisfied within the established limit, the compensation of damages in excess of that limit

¹⁴ See: also M. Ż y l i c z: *International air transport law*, 93 – 95 (1992).

can be secured to the victim or other claimants from life insurance or similar arrangements individually contracted by the passenger.

3. It can then be assumed that, in all cases, full compensation can be secured to the claimants either from the carrier, insuring its liability and including such insurance costs in all ticket prices, or from life insurance or similar arrangements, the basic difference between the two cases being that:

a) in the case of unlimited carrier liability, the increased liability insurance costs are to be borne equally by all passengers which means that above average claimants will obtain full (higher) coverage at the expense of all paying passengers;

b) in the case of limited carrier liability, all passengers will be charged with lower carrier liability insurance costs (included in the passenger fare), and the additional cost of life insurance or similar arrangements providing compensation above the carrier liability limit will be borne exclusively by those interested in obtaining additional coverage.

4. The limitation of liability has no significant influence on the financial situation of air carriers themselves, since their increased or unlimited liability risk may now be insured without difficulty, with the insurance rates included in the price of the ticket. Experts say that the increase or even removal of the liability insurance limits is likely to produce only a very moderate increase, if any, of liability insurance rates.¹⁵ In fact, in view of uncertainties associated with the co-existence of overlapping legal regimes, or with a possible break of the limit based on alleged wilful misconduct, or to meet the requirements imposed by certain states, it became common practice for international air carriers to insure their liability risks high above the limits that might be applicable under any of the Warsaw System documents in force.

5. The aviation insurers are now fully prepared to provide air carrier liability insurance at any level, including unlimited liability, without being exposed to major financial troubles, while seeking support, wherever necessary, from re-insurance.

6. Concerning the victims or other claimants, expecting full compensation from whatever source, one must conclude that, in principle, their interests may be equally protected as long as such compensation is assured either through air carrier's liability or through insurance or any similar or mixed system. There is, however, a difference in that, in case of limited liability, the excess compensation for "above-average" passengers is secured at their request and expense, while under an unlimited liability system the "below-average" passengers are required to contribute to increased insurance costs for the benefit of their more valuable co-travellers. Therefore, the liability limit dilemma does not really involve the choice between the interests of air carriers on the one hand and the interests of passengers on the other, but rather the choice between the interests

¹⁵ D.A. Kilbride: *Six decades of insuring liability under Warsaw*, 14 *Air Law* 192 (1989).

of an "above-average" minority and those of a "below-average" majority of passengers and claimants. Either way, the economic impact of either option should not be overestimated – the difference may not be more than five dollars per ticket for extra insurance fee to cover the differential compensation cost, if spread over all the passengers.

4.2. Social considerations underlying national solutions

There should be full compensation for damage caused in air transportation; that principle is now recognized in all civilized societies. However, bearing in mind all economic aspects of air carrier liability limits, and possible supplemental insurance or other compensation arrangements, it is submitted that the interests of all parties concerned can easily be reconciled within one single socio-economic and legal system whether or not the unlimited carrier's liability regime is adopted, depending on national public policy considerations. Judicial, moral or other social arguments can be found in favour of either solution, and it is up to the legislator to weigh them. The legislator will decide whether it is fair to ensure full coverage of the highest claims with increased ticket (insurance) prices chargeable against all passengers, or to ask the "above-average" passengers to evaluate and secure increased coverage themselves, and to pay extra insurance or similar costs as they can best afford.

5. Limitation of air carrier's liability as an international problem¹⁶

In order to explain the international aspects of the air carrier liability limitation one must accept the following assumptions.

First, there are highly industrialized, higher income (and higher costs) and higher awards countries, and less industrialized, lower income (and lower costs) and lower awards countries – let them be named respectively developed and developing countries. The average levels of their nationals' claims are differentiated accordingly (differences in the social security protection are overpassed here).

Assuming that air services are operated between a developed and a developing country, the airlines of the two countries are supposed to carry both their own nationals and the nationals of the other country. Unless the air carrier's liability has been limited by law, in the case of passenger death or injury full compensation will have to be paid by the airline concerned reflecting particular losses and, as a rule:

- the nationals of a developed country will obtain higher compensation from their own airline and – which has an international aspect – from the airline of the other (developing) country, and

¹⁶ See: also M. Ż y l i c z: *op. cit.*, 96 and 97.

- the nationals of a developing country, under the same regime, will usually obtain lower compensation from both their own airline and – which again becomes an international issue – from the airline of the other (developed) country.

In both cases, the compensation may be just and fair, taking into account actual losses, yet the cashflow will be moving from developing to developed countries, thus affecting their balance of payments and increasing economic inequalities. If the carrier is insured, the insurance costs will be included in the ticket prices and spread over all travellers from both developed and developing countries – the latter being required in this way to subsidize higher settlements for the benefit of their better situated fellow passengers from developed countries.

Second, the air transport industry is not equally mature in developed and developing countries, and many national airlines, although efficient, have not become large and financially strong enough to support relatively higher risks of major aviation accidents and relatively higher insurance costs (insurance premiums are usually more favourable to larger customers). Therefore, for a number of countries, ensuring protection for a developing airline industry still remains a valid argument to justify a relatively low air carrier's liability limit.

As neither inequalities between developed and developing countries nor differences in size and financial strength of national airlines are likely to disappear in the predictable future, a general agreement on the removal of air carrier's liability limits cannot be expected. And the higher the proposed increases of the existing limits, the smaller the number of states prepared to accept them. It is significant that 89 per cent of the contracting parties of the Warsaw Convention have accepted the Hague increase of limits, whereas the Guatemala City and Montreal 3 Protocols have been ratified, respectively, by 9 and 15 per cent only.

5.1. An international compromise solution needed

A compromise solution is needed to reconcile the positions of developed and developing countries – in the interest of all.

For the developed countries and their nationals, a widely accepted international system is needed to ensure a uniform treatment of claims and recognition of the relevant rules (and awards) by the tribunals of other states. Since there are no prospects for a wide acceptance of a system providing for no limitation of air carrier's liability, or adopting excessively high limits, it might be better for developed countries to agree on reasonable limits, acceptable for the majority of countries, and to seek other (supplemental) systems for full compensation, rather than to destroy the international agreement.

On the other hand, unless appropriate solutions are accepted not only by the majority of developing countries, but also by the most developed ones, which are responsible for the most important volume of international air travel, the international system will be increasingly exposed to real danger of breaking down. If that system is abandoned by the most important minority, the developing

countries and less developed airlines will lose any possible protection against the highest claims and unlimited awards in foreign courts.¹⁷ A compromise solution involving a reasonable increase of air carrier's liability limits (likely to be insured at no excessive cost) would thus be preferable from the point of view of developing countries' interests as well.

6. The problem of saving and consolidating the improved Warsaw System

6.1. Pressures towards destruction or replacement of the system

Needless to say, the system of air carrier's liability limitation is questioned above all in the most developed, high-income, high-cost and high-award countries. There were, in particular, innumerable presentations urging the United States government to finally denounce the Warsaw Convention (the once made denunciation was withdrawn in 1966). The judicial and moral arguments were produced – in most cases disregarding the socio-economic and international aspects discussed in sections 4 and 5, and disregarding the need for uniformity in the international air trade regulation. A number of authors advocated the destruction of the Warsaw System, or solutions tantamount to such destruction, as for example:

- the complete liberalization of the regime of air carrier's liability¹⁸ or deregulation making that liability a matter of freely negotiated private law contracts¹⁹ (which would certainly favour the stronger parties and would be inconceivable under most national laws);
- the modification or amendment of the Warsaw Convention using the procedures provided for, respectively in articles 40 or 41 the Vienna Convention of 1969 on the law of treaties²⁰ (which would help a limited number of most developed states to achieve their objectives, but would add to the present plurality of regimes disintegrating the system); or
- the replacement of the Warsaw System by a new world-wide convention.²¹

A new world-wide convention, however excellent and progressive it might be, would probably need several years for its preparation and several decades to obtain the number of ratifications comparable with that achieved by the Warsaw Convention.

¹⁷ See: also W. G u l d i m a n n: op. cit., 13.

¹⁸ B. C h e n g: *What is wrong with the 1975 Montreal Additional Protocol*, 14 *Air Law* 238 (1989).

¹⁹ H.A. W a s s e n b e r g h: *Liability in air and space law*. Ibidem, p. 263.

²⁰ „Reflections on how to improve civil aviation liability in the interests of passengers. paper prepared in the Federal Ministry of Justice, Bonn”, 17 May 1993, Ref. IB1-9324/2.

²¹ See: comments by W. G u l d i m a n n: op. cit., 12ff.

6.2. The merits of saving and strengthening the system

No one solution bringing about the rejection of the Warsaw System, its replacement or its new revision is likely to create a basis for a consolidated, uniform and world-wide acceptable regime. Each would produce increased disorder, uncertainty and the most difficult problems with respect to conflicts of laws and jurisdictions, that nobody except, perhaps, the most skillful trial lawyers would be able to deal with. In fact, the most violent attacks upon the Warsaw System and upon any limitation of air carrier's liability were asserted by trial lawyers, yet their views did not necessarily respond to the interest of the majority of the public.

The Warsaw System in its modified appearance retains its value for both air carriers and travellers. Such arguments as spreading catastrophic risks, providing a uniform basis for liability insurance with possible additional life insurance when required, curtailing litigation, facilitating prompt settlement and providing a *quid pro quo* for the aggravated (objective) liability principle are still valid. It is relevant to note that even the International Foundation of Airline Passengers Associations recognized the material benefits deriving from the Warsaw System for airline passengers, and thus recommended revitalizing and supplementing the system with increased liability limits rather than dismantling it or removing the passenger liability limits completely.²²

The Warsaw System is still the only one likely to ensure the basic uniformity of rules governing international carriage by air, while allowing for different solutions of the compensation issue within or around the system. What the Warsaw System needs is its consolidation, with possible parallel or combined action at different levels.

6.3. Accelerated and widespread ratification of Montreal Protocols 3 and 4 as the basic measure

The Warsaw System consolidation should start (and end) with fast and widespread ratification of Montreal Protocols No. 3 and 4. This action is continuously recommended by the International Civil Aviation Organization.²³ While the entry into force of these new components of the system will add still further to the multiplicity of liability regimes in a transitory period, it is the price that must be paid for saving the system which other-wise would be disrupted by the withdrawal of most industrialized states. They may still be prepared to accept the Montreal compromise provisions as a minimum standard, but their position may change if the ratification process lasts too long. On the other hand, unless

²² IFAPA, Fair compensation for passengers in aircraft accidents: actions for the 90s. A study for the Netherlands Minister of Transport (1989).

²³ ICAO, Circular letter on the Warsaw System, enclosed to state letter LE3/27, 3/28-91/3 of 16 January 1991. See: also M. M i l d e: *ICAO work on the modernization of the Warsaw System*, 14 *Air Law* 193 – 207 (1989).

the most developed states, including the United States, ratify the two protocols, the majority of other states will be reluctant to do so; they might be prepared to accept the Montreal compromise if accepted by the most developed minority, but they do not need departure from the Warsaw/Hague regime for themselves (for their nationals).

6.4. Supplemental compensation plans

In order to accommodate those countries that are not satisfied with the passenger liability limits set up by the Guatemala/Montreal 3 Protocols, provisions have been made in both these documents for the right of each contracting party to establish and operate in its territory a system to supplement the compensation payable under the Warsaw Convention (as amended). This right is subject to the condition that there will be no extra liability or burden to airlines except for the collection of contributions from passengers, if required, and no discrimination between airlines – the benefits to be available regardless of which carrier a passenger chooses – provided that the passenger has made a contribution to the system. It was envisaged that additional compensation could be secured through insurance-based schemes made mandatory by the states concerned.

An Agreement to establish a US Supplemental Compensation Plan was prepared by the Air Transport Association of America and International Air Transport Association in 1990 for approval of the Department of Transportation, and then submitted to the Congress.²⁴ The proposed plan would cover any person carried in a foreign or international transportation from whom a contribution is collected, and any US citizen or permanent resident in any transportation to which the plan applies. When approved, the plan will ensure world-wide protection to US travellers. It is hoped that this will justify the US decision to ratify the Montreal 3 Protocol. The relevant decisions have not been taken yet. The concepts of similar supplemental compensation plans are being considered in EC member countries and in other countries (including Poland) as well. Supplemental plans are likely to become a key way for the Warsaw System to evolve and thereby maintain real world relevance. The problem remains open as to whether the payment of passenger contribution (added to the normal ticket price) should be made obligatory to all passengers or only to those who actually want to be covered by the supplemental compensation plan.

6.5. Other possible supplementary action at government level²⁵

The enactment of national laws anticipating the introduction of the Montreal 3 regime (e.g. the Italian Law of 1988) is another possible action. However,

²⁴ According to DC letter of 19 January 1994 to the European Civil Aviation Conference, an expedited action is expected in the Senate on ratification of Montreal Protocols, and on congressional approval of the Supplemental Compensation Plan.

²⁵ See: M. Ż y l i c z: *op. cit.*, 98 – 101.

besides action directly related to the Warsaw System, states may also undertake other legislative or administrative measures to strengthen, extend or supplement the liability compensation regime. In particular:

1. The aggravated liability regime may be imposed upon airlines as a condition of their authorization to operate international air services. That has been the case of the Montreal Interim Agreement of 1966 (referred to in Section 3.2); the voluntary acceptance of the aggravated regime by airlines was then necessary to avoid the charge of violation of the Warsaw Convention by the US government.

2. Airlines operating international services to a country may be required under its regulations to provide proof of liability insurance covering passenger liability or similar guarantees of carrier's ability to pay possible indemnity within the limits of the insurance amount – sometimes exceeding the Warsaw/Hague or Montreal Interim or even the Guatemala/Montreal 3 limits (such supplementary insurance is sometimes voluntarily contracted by the airlines taking account of possible breaking applicable legal limits by tribunal awards).

3. Airlines may also be required to arrange for appropriate passenger accident insurance which can be organized through taking a group insurance or contributing to a public compensation fund, or otherwise through collective self-insurance by the air transport industry. Such accident (automatic or "admitted liability") insurance provides the victims or claimants with compensation regardless of the carriers liability.

4. Finally, the state may enact regulations aimed at facilitating passenger life insurance as a means of providing automatic compensation – with insurance policies executed at the ticketing offices or at international airports.

6.6. Supplementary action at the airlines level

The pressures towards destruction of the Warsaw System can also be attenuated by voluntary action at the airlines level:

1. Airlines may develop a scheme of individual and possibly also collective special contracts to stretch liability limits. The provision of article 22, paragraph 1 of the Warsaw Convention, providing for such contracts, disappeared in the Guatemala and Montreal 3 texts, but the absence of that clause cannot prevent voluntary increases of liability limits. That instrument is advocated by aviation lawyers²⁶ and has been adopted by some European airlines.

2. Airlines may also take collective measures by way of a multilateral declaration offering additional compensation on the lines proposed by the International Foundation of Airline Passengers Association.²⁷

²⁶ Ibidem, p. 101 – 102. For insurance aspects: W. Warkalło and M. Żylicz: „Liability and insurance in Polish air law”, in: „Rapports Polonais Présentés au Sixième Congrès International de Droit Comparé”, 172 – 185 (1962).

²⁷ IFAPA, op. cit., p. 30.

The International Air Transport Association will certainly join the efforts to improve and strengthen the Warsaw System.²⁸

7. Conclusion

Bearing in mind the diversity of national, social and individual interests one cannot expect that any one international air carrier's liability regime will satisfy all. It is submitted, however, that the Warsaw System, as updated by Montreal Protocols 3 and 4, may prove the best compromise solution. Fast and widespread ratification of these protocols would benefit both developed and developing countries, and would restore the uniformity of the regime so badly suffering from disintegration. The supplemental compensation plans and other governmental or airlines' action within or around the system (when consistent with international obligations), may reinforce the system and, during a transition period, fill the gaps resulting from delayed ratifications.

²⁸ „Resolutions adopted on the Warsaw System”, in: „IATA, Principal instruments of the Warsaw System”, 3rd ed., 93 – 97 (1991).

Quelques aspects de la participation de la Communauté Européenne aux enceintes internationales et aux accords multilatéraux

NATIVIDAD FERNÁNDEZ SOLA

Introduction

La Communauté Européenne, entité juridique du type "sui generis" possède une personnalité juridique propre, différente de celle de ses Etats membres; personnalité juridique qui est reflétée aussi bien sur le plan interne qu'externe.

Même si l'article 210 du Traité CE (dorénavant TCE)¹ ne parle pas de "personnalité juridique internationale" (non plus l'article 184 du Traité EURATOM), l'interprétation analogique avec l'article 6 du Traité CECA,² ainsi que la jurisprudence³ et la pratique communautaire, nous amènent à cette conclusion.

En tant qu'Organisation composée des Etats, ses compétences n'ont pas un caractère global mais fonctionnel. Il s'agit des compétences d'attribution, c'est à dire, la Communauté Européenne (on parlera seulement de la CE) ne dispose que des pouvoirs qui ont été attribués par les Etats membres en vue de la réalisation des objectifs assignés à l'Organisation.⁴

Ayant une personnalité internationale et un certain nombre de compétences, celles-ci peuvent être exercées, comme on va voir, aussi bien au plan international qu'au niveau interne.

Finalement, et comme tout sujet de Droit International, la Communauté Européenne dispose d'un droit de représentation extérieure (droit de légation active

¹ Le Traité d'Union Européenne, entré en vigueur le 1 novembre 1993, a changé la dénomination de la Communauté Economique Européenne par celle de Communauté Européenne.

² Article 6 du Traité CECA "Dans les relations internationales, la Communauté dispose de la capacité juridique nécessaire pour l'exercice de ses fonctions et la réalisation de ses buts".

³ Voir l'arrêt du 31 mars 1971, Aff. 22/70, *Commission c. Conseil, A.E.T.R.*, *Recueil* 1971, p. 262. Bien que la Cour de Luxembourg a souligné la spécificité de l'ordre juridique communautaire par rapport à l'ordre juridique international (voir Arrêt Aff. 26/62, *Van Gend en Loos*, *Recueil* 1963, p. 3) la Communauté est soumise, comme tout sujet international, au respect de ses obligations internationales (voir U. E v e r l i n g: „The Law of the External Economic Relations of the European Community", dans H i l f, J a c o b s, P e t e r s m a n n: „The European Community and the GATT", 86 ss (1986)).

⁴ Sur les compétences communautaires, voir V. C o n s t a n t i n e s c o: „Compétences et pouvoirs dans les Communautés Européennes. Contribution à l'étude de la nature juridique des Communautés" (1974); et G. I s a a c, *Droit Communautaire Général*, 3 – 43 (1990).

et passive), peut accéder aux mécanismes de solution pacifique des controverses pour les différences dérivées de ses engagements internationaux (sauf devant la Cour Internationale de Justice – art. 35.1 du Statut de la Cour) et elle est responsable internationale pour les éventuelles violations de ses obligations internationales aussi bien qu'elle peut exiger la responsabilité internationale de ses partenaires internationaux.⁵

Dans cette étude on considérera principalement les problèmes qui se posent du fait de l'exercice par la Communauté Européenne de son *treaty-making power*, en particulier par sa participation aux accords multilatéraux et aux Conférences internationales (II)⁶ et par l'insertion de ses accords dans l'ordre juridique communautaire et des Etats membres (III).⁷

Les "accords mixtes" feront l'objet d'une attention particulière.

D'abord on essayera de délimiter les compétences extérieures qui "appartiennent" à la Communauté selon le Droit Communautaire et la jurisprudence de la Cour de Justice de Luxembourg (I).

La pratique conventionnelle communautaire est très vaste, on fera alors plus d'attention à certains accords comme, par exemple, ceux de protection de l'environnement, étant donné l'intérêt du sujet pour un pays comme la Pologne envisageant l'intégration à la CE ou, plus exactement, à l'Union Européenne. Le dernier point (IV) analyse les relations entre la Communauté Européenne et la Pologne.

I. Partage des compétences extérieures entre la Communauté Européenne et ses états membres

Les compétences de la CE, tant internes qu'internationales, relèvent expressément du Traité constitutif mais aussi, selon une interprétation large de celui-ci admise par la Cour de Justice des Communautés Européennes, sont implicites dans ces dispositions constitutives.

Dans ce sens, les attendus 16 et 17 de l'arrêt AETR⁸ affirment que la compétence de la CEE pour conclure l'accord européen de transport routier ne découle pas simplement d'une attribution explicite du Traité mais aussi d'autres disposi-

⁵ J.V. L u i s et P. B r ü c k n e r: „Le Droit de la Communauté Économique européenne. Commentaire du traité et des textes pris pour son application”, vol. 12, Relations extérieures (1980).

⁶ Cet aspect est étudié par U. A y b e r k dans „Le mécanisme de la prise des décisions communautaires en matière des relations internationales”. Organisation internationale et relations internationales (1978).

⁷ Sur la mise en oeuvre des accords internationaux signés par la CEE, voir J.V. L o u i s: „Mise en oeuvre des obligations internationales de la Communauté dans les ordres juridiques de la Communauté et de ses Etats membres”, vol. XIII 1 – 2, *RBDI*, p. 122 – 143 (1977); et J. R i d e a u: „Les accords internationaux dans la jurisprudence de la Cour de Justice des Communautés Européennes: Réflexions sur les relations entre les ordres juridiques international, communautaire et nationaux”, tome 94, *RGDIP*, p. 289 – 418 (1990 – 2).

⁸ Arrêt AETR (supra, note 3), p. 263 – 296.

tions dudit Traité et des actes des institutions de la Communauté; chaque fois que, pour l'application d'une politique commune prévue par le Traité, la Communauté a établi des dispositions créant de règles communes, les Etats membres n'ont plus le droit, ni individuel ni collectif, de s'engager avec des Etats tiers dans le domaine de ces règles.

De cette façon, en plus des accords commerciaux (art.113 TCE) et d'association (art.238 TCE), la Communauté Européenne a conclu aussi, en vertu des compétences extérieures implicites, des accords de pêche, de transports, etc.

Au delà de cela, la Communauté Européenne peut avoir recours à la clause subsidiaire d'élargissement des compétences contenue à l'article 235 TCE. Par application de cette disposition, la Communauté a conclu des accords de recherche et développement, de protection de l'environnement, d'assurance vie, etc.

L'étude de la jurisprudence communautaire montre le parallélisme des compétences internes et extérieures mais l'affirmation de ce principe ne manque pas toujours de poser des problèmes en pratique parce que, qu'est-ce qu'il se passe lorsque la Communauté n'a pas exercé une compétence exclusive? et une compétence concurrente? Quel est, dans ces cas, le rôle qui appartient aux Etats membres sur le plan international?⁹

D'une manière générale on peut dire que les Etats conservent la compétence de légiférer ou de prendre des engagements conventionnels avec les pays tiers aussi longtemps et dans la mesure où les autorités communautaires n'interviennent pas dans le domaine en cause.

Donc, l'exercice effectif des compétences communautaires exclut progressivement la compétence nationale. Seule cette solution est de nature à écarter le risque du vide juridique qui, autrement, résulterait de la manque d'action législative de la Communauté.

La Cour de Luxembourg a contribué à l'élaboration de cette doctrine; ainsi, à l'affaire *Kramer*¹⁰, elle a déclaré qu'aussi longtemps que la Communauté n'a pas encore exercé sa compétence, les Etats sont autorisés à maintenir où à prendre les mesures appropriées – bien sur, soumis à l'obligation de coopération résultant, notamment, de l'article 5 TCE.

Dans ce cas, les Pays Bas ont édicté des normes en fixant des quotes de capture pour les pêcheurs, en application des recommandations données, dans ce sens par la Commission des Pêcheries – organe international institué par la Convention sur les pêcheries de l'Atlantique Nord-oriental. La Cour admet qu'à l'expiration du délai fixé à l'article 102 de l'Acte d'Adhésion de 1972, c'est-à-dire, à compter du 1^{er} janvier 1979, la Communauté avait une compétence exclusive pour prendre des mesures de conservation des ressources biologiques de la

⁹ Dans ce sens, voir J.V. L o u i s : „Quelques réflexions sur la répartition des compétences entre la Communauté européenne et ses Etats membres”, *Revue d'intégration européenne*, 355 (1979).

¹⁰ Arrêt du 1 juillet 1976, Aff. jtes. 3, 4, 6/76, *Recueil* 1976, p. 1279.

mer, dans le cadre de la politique commune de pêche, tant de manière autonome que sous la forme d'engagements contractuels avec les pays tiers.

Selon l'avis de la Cour de Justice, les Etats doivent prendre des précautions notamment quant à la durée de leur engagement, afin de ne pas compromettre leur remplacement par des accords communautaires ultérieurs.

Les Etats ont, en plus, l'obligation d'utiliser tous les moyens juridiques et politiques dont ils disposent pour aider les institutions communautaires à se substituer aux Etats membres aux conventions internationales auxquelles ils sont parties ou aux Organisations internationales dont ils sont membres.

La compétence des Etats a dans ce sens un caractère transitoire.

Du moment où la Communauté a complètement exercé sa compétence dans un certain domaine, l'action internationale des Etats membres est exclue.¹¹

Ainsi dans un autre exemple, l'adoption de la directive sur la conservation des oiseaux sauvages privait les Etats membres de toute compétence externe en la matière et c'est donc la CEE qui a conclu la Convention sur la conservation des espèces migratrices appartenant à la faune sauvage.¹²

D'autre part, la conclusion par la Communauté d'une convention internationale interdit aux Etats membres de s'engager internationalement en la matière mais aussi de légiférer d'une façon divergente à celle-là.

A son avis 1/76, la Cour déclare que le *treaty-making power* de la CEE peut s'exercer au niveau international et au plan interne.¹³

Tous ces problèmes ont un caractère tout à fait différent lorsqu'on parle de la protection de l'environnement. Les accords multilatéraux de la Communauté dans ce domaine sont, presque toujours, des accords mixtes, c'est à dire, conclus à la fois par la Communauté et par ses Etats membres.

Les premières Conventions de protection de l'environnement auxquelles la Communauté a adhéré étaient celles déjà conclues par plusieurs, voire tous les Etats membres. Ensuite, la conclusion des nouveaux accords ne trouvait pas une base juridique explicite dans le Traité CEE donc, bien qu'on ait eu recours à l'article 235 du Traité, les Etats membres n'ont pas voulu laisser ce domaine à la compétence unique de la Communauté.

L'Acte Unique européen a introduit les articles 130.R, S et T qui donnent une compétence expresse à la Communauté européenne dans la matière. Pour la réalisation des objectifs visés à l'article 130.R.1, la Communauté peut conclure des accords internationaux dans ce domaine et coopérer avec d'autres organisations internationales mais cela sans préjudice du principe de subsidiarité

¹¹ Arrêt A.E.T.R., *cit. supra*, p. 263.

¹² JOCE n° L 210 du 19 juillet 1982.

¹³ Avis du 26 avril 1977 sur le Projet d'Accord relatif à l'institution d'un Fonds européen d'immobilisation de la navigation intérieure sur le Rhin, *Recueil* 1977, p. 741. Le fondement juridique est très clair à ce respect lorsqu'il déclare que les mesures communautaires internes peuvent être adoptées à l'occasion de la conclusion et de l'entrée en vigueur de l'accord international.

de l'action communautaire,¹⁴ présent partout quand on parle de protection de l'environnement.¹⁵

Le rôle international des Etats membres n'est pas complètement exclu, même si la CEE a exercé ses pouvoirs.

L'article 130.R § 5 consacre, toujours dans le domaine de protection de l'environnement, le principe de subsidiarité au niveau international "... sans préjudice de la compétence des Etats membres pour négocier dans les instances internationales et conclure des accords internationaux".

A mon avis, il y a un certain degré d'incertitude pour la mise en oeuvre par les Etats membres de son rôle international en matière d'environnement parce qu'il y a des importants désaccords entre eux sur les sujets qui n'ont pas fait l'objet d'une régulation communautaire.

Quel serait alors le résultat d'une action conventionnelle indépendante d'un Etat membre pour s'engager aux niveaux de protection plus élevés que prévus par la norme communautaire? Cela pourrait donner lieu à la conclusion des accords bilatéraux prévoyant des niveaux de protection différents dans chaque Etat membre. Dans ce cas, la production nationale devrait s'adapter à ces niveaux plus élevés. La production des Etats membres non signataires des accords bilatéraux resterait au niveau communautaire, alors considéré "minimale" et les Etats tiers devraient souffrir le manque d'uniformité des exigences environnementales des Etats membres au moment d'exporter leurs produits vers la Communauté Européenne.

L'aboutissement pratique d'une telle situation peut être l'unification "de fait" sur les standards les plus élevés ou, plutôt, la déviation du commerce vers les pays aux exigences environnementales moins strictes. Ceci aurait des conséquences sur la production, la croissance économique et l'emploi des Etats plus "écologiques", et la perturbation du marché intérieur.

Déjà dans les affaires 3, 4 et 6 du 1976, Arrêt *Kramer*, la Cour avait inclus implicitement un aspect de la protection de l'environnement – la protection des ressources vivants de la mer – parmi les points prévus par l'article 30 TCE, en l'absence de législation communautaire dans ce domaine, pour justifier l'application des mesures nationales qui peuvent avoir des incidences sur le commerce entre Etats membres.

¹⁴ Principe repris de façon générale par le Traité d'Union Européenne, à l'article 3.B. Sur ce principe, la Conférence interinstitutionnelle du 25 Octobre 1993 entre la Commission, le Conseil et le Parlement Européen, réunie à Luxembourg, a adopté un accord sur les procédures pour la mise en oeuvre du principe de subsidiarité lesquelles "ne remettent en cause ni l'acquis communautaire, ni les dispositions des traités relatives aux attributions des institutions, ni l'équilibre institutionnel", *Bull.CE* 10-1933, point 2.2.1.

¹⁵ Le paragraphe 4 de l'article 130.R du Traité de la Communauté Européenne énonce le principe de subsidiarité au niveau interne "la Communauté agit en matière d'environnement dans la mesure où les objectifs visés au paragraphe 1 peuvent être mieux réalisés au niveau communautaire qu'au niveau des Etats membres pris isolément...". Le Traité de l'Union européenne étend ce principe à toute action communautaire même internationale.

Dans ces cas, selon la jurisprudence de la Cour (*AETR* et autres) les accords ou mesures prises par les Etats membres ne peuvent être contraires aux normes du marché intérieur; elles doivent être proportionnelles, non arbitraires, etc.

Ceci dit, l'interprétation du principe de subsidiarité doit se faire selon les critères d'opportunité et d'efficacité et, en général, l'action internationale de la Communauté paraît plus adéquate que celle des Etats membres en matière d'environnement (notamment l'action internationale revêt un intérêt tout spécial pour la lutte contre la pollution atmosphérique).

Deux éléments encore peuvent nous donner une idée plus exacte du rôle international des Etats membres en matière de protection de l'environnement.

1. L'action de la Communauté ne doit pas interférer avec les politiques nationales d'exploitation des ressources énergétiques, selon la déclaration annexée à l'Acte Unique Européen qui a la valeur d'une déclaration interprétative.

On pourrait demander si cela suppose une restriction au principe d'utilisation rationnelle des ressources. La réponse doit être négative du fait de l'obligation de coopération aux buts de la Communauté qu'impose aux Etats membres l'article 5 TCE.

2. Les Etats membres assurent le financement et l'exécution des mesures prises – également en vertu d'accords multilatéraux – cela sans préjudice de l'apport des Fonds structurels pour des actions de protection de l'environnement.

D'autre part, la Communauté Européenne applique quelques accords conclus par ses Etats membres. Tel est le cas de la Convention de Washington de 1983 sur le commerce international des espèces menacées de la flore et la faune sauvages, de la Convention d'Oslo pour l'Atlantique Nord-Est et la mer du Nord pour laquelle les compétences communautaires ne sont encore complètement claires. Les Etats membres riverains y sont parties et la Communauté a un statut d'observateur à la Commission créée par la Convention. L'adhésion de la Communauté à la Convention d'Helsinki pour la protection du milieu marin dans la zone de la mer Baltique avait rencontré l'opposition de la Suède et de l'URSS (avant la prise du pouvoir de Gorbatchev). Après les décisions du Conseil du 12 février 1994, la Communauté Européenne a adhéré à cette Convention de 1974 et ratifié la modification de celle-ci de 1992¹⁶.

Tout cet ensemble de circonstances qui montrent la difficulté de délimiter les compétences extérieures pour la protection de l'environnement amènent, en pratique, à la conclusion des accords multilatéraux mixtes dans ce domaine, sauf les accords de protection des ressources marines signés uniquement par la Communauté en tant que compétente exclusive en matière de pêche (article 43 TCE).

¹⁶ *JOCE* n° L 243 du 16 mars 1994, p. 1 – 45.

II. Participation de la Communauté Européenne aux accords multilatéraux et aux conférences et organisations internationales. Les „accords mixtes”

La Communauté Européenne peut conclure des accords avec d'autres Organisations internationales, avec un ou plusieurs Etats tiers et participer aux Conférences internationales¹⁷ lesquelles, éventuellement, peuvent donner lieu à des accords ou conventions internationales.

Ainsi, elle a passé des accords avec l'Office de secours et de travaux pour les réfugiés de Palestine (UNRWA), avec le Fonds des Nations Unies pour l'enfance (UNICEF) ou avec le Programme alimentaire mondial (PAM).¹⁸

Tant au sein des Organisations internationales comme des organes de gestion des accords multilatéraux auxquels la Communauté Européenne participe, elle peut devenir membre à part entière. Tel est le cas à ces derniers – les organes de gestion – mais, pour ce qui touche les Organisations internationales, celles qui sont "traditionnelles" ne sont pas conçues que pour les Etats. Il a fallu parfois modifier certains traités constitutifs pour admettre la Communauté. Ainsi, on a modifié l'Acte constitutif et le règlement général de la FAO pour permettre l'adhésion de la Communauté européenne, demandée depuis juin 1989.¹⁹

En cas contraire, c'est-à-dire, lorsqu'elle n'est pas admise en qualité de membre, elle est représentée par ses Etats membres – p.ex. à l'ONU.

Parfois, la Communauté Européenne s'est substituée en pratique, pas formellement, aux Etats membres. Tel est le cas du GATT et des conventions douanières internationales.²⁰

D'habitude, la participation de la Communauté aux organisations internationales est une participation complémentaire à celle de ses Etats membres. Tel est le cas à la FAO du fait du partage des compétences dans les domaines objet d'attention de la part de l'Organisation pour l'alimentation et l'agriculture.

Dans ce cas, la Communauté a affirmé clairement que la répartition des compétences n'est pas définitive et qu'elle a un caractère évolutif.²¹

Pour ce qui concerne les accords mixtes,²² c'est-à-dire, des accords conclus avec un Etat tiers ou une Organisation internationale auxquels sont parties, outre

¹⁷ Participation de la CEE à la Conférence de Rio de Janeiro, en juin 1992, pour la protection de l'environnement, organisée au sein du PNUE

¹⁸ JOCE n° L 243 du 5 septembre 1974, p. 6 et 107.

¹⁹ JOCE n° C 292 du 9 novembre 1991, proposition de décision du Conseil relative à l'adhésion de la Communauté européenne à la FAO. Voir, F. de P a s c a l e, „L'ammissione della CEE alla FAO: Cronaca di un negoziato”, 47 *La Comunità Internazionale*, 477 – 492 (1992); et J. S c h w o b: „L'amendement à l'acte constitutif de la FAO visant à permettre l'admission en qualité de membre d'organisations d'intégration économique régionale et la Communauté économique européenne”, *RTDE* (1993).

²⁰ Arrêt "International Fruit Co.", Aff. jtes. 41 – 44/70, *Recueil* 1971, p. 411.

²¹ JOCE du 9 novembre 1991, *cit. supra*.

²² Sur les accords mixtes voir D. O'K e e f f e et H.G. S c h e r m e r s (ed.), *Mixed Agreements* (1983).

la Communauté, un ou plusieurs Etats membres, leur utilisation est générale dans la pratique des trois Communautés.

Les raisons de cette pratique sont techniques et juridiques, d'une part, et politiques, d'autre.

En effet, s'il est vrai que souvent l'objet d'un accord international surpasse le domaine des compétences communautaires, il est aussi certain que les Etats membres éprouvent des réticences face à l'assomption d'un grand nombre des compétences par la Communauté (notamment s'il s'agit des compétences extérieures, noyau dur de la souveraineté étatique).²³

Cette technique dont on doit critiquer l'abus, pas l'usage,²⁴ pose des problèmes au stade de la négociation, de la conclusion et de l'application pratique de l'accord, étant donné que, pas toujours, les intérêts communautaires et ceux étatiques peuvent être conciliés aisément.

En plus de la coordination des intérêts au moment de négocier, la conclusion de l'accord est subordonnée à celle des Etats membres (tous ou ceux qui vont participer à l'accord). Tel est le cas pour la Convention des Nations Unies sur le Droit de la Mer laquelle exige la signature de la part d'une majorité des Etats membres de la Communauté avant de la signature de celle-ci.²⁵

Cependant, bien que la Communauté Européenne et presque tous les Etats membres aient signé la Convention de Montego Bay de 1982, l'opinion communautaire est de ne pas la "ratifier" que du moment où ces deux Etats – l'Allemagne et le Royaume Uni – l'auront fait.

D'autre part, le manquement aux obligations y contenues implique la responsabilité de la part qui a la compétence pour la mise en oeuvre de la disposition en question, la Communauté Européenne ou les Etats membres²⁶ (il faut dire que jamais la Communauté a ou n' a pas mise en question sa responsabilité internationale).

Finalement, il faut remarquer que, parfois, ces accords contiennent des dispositions qui relèvent de la compétence communautaire et d'autres qui relèvent

²³ Sur ces problèmes de partage des compétences extérieures, voir N.F. Sola: „El reparto de competencias entre la Comunidad europea y sus Estados miembros en el ámbito de las relaciones exteriores, con especial referencia a los acuerdos internacionales" (1988).

²⁴ La Cour de Justice des Communautés Européennes a validé cette pratique mais s'est forcée d'en limiter les abus. Voir la délibération 1/78 sur le projet de Convention de l'AIEA sur la protection physique des matières, installations et transports nucléaires (*Recueil* 1978, p. 1978, p. 2151). A l'avis 1/78 sur l'accord international sur le caoutchouc, la Cour estime que la conclusion mixte n'est possible que dans la mesure où des dispositions essentielles échappent à la compétence communautaire; en l'espèce, tout dépend des modalités du financement des opérations du stock régulateur: si les charges y afférentes étaient supportées par les Etats membres, ceci impliquerait la participation de ces Etats à l'accord ensemble avec la Communauté (avis du 4 octobre 1978, *Recueil* 1979, p. 2871).

²⁵ Articles 2 et 3 de l'annexe IV de la Convention de Montego Bay exige la signature et la confirmation formelle ou l'adhésion de la majorité des Etats membres d'une Organisation internationale pour que celle-ci puisse signer ou adhérer à la Convention.

²⁶ Dans ce sens, on peut voir, p. ex. l'article 6 de l'annexe IX de la Convention de Droit de la Mer.

de la compétence de quelques Etats membres. Par exemple, à la Convention de Barcelone pour la protection de la Méditerranée contre la pollution à laquelle peuvent être parties contractantes les Etats riverains de cette mer, ou à la Convention pour la protection du Rhin contre la pollution²⁷ à laquelle seulement quatre Etats communautaires sont parties.

Dans ces cas, la participation de la Communauté implique indirectement celle de ses Etats membres qui ne sont pas envisagés par la Convention en question.²⁸

Evidemment ces Etats membres de la Communauté qui ne sont pas parties en tant que tels à la Convention sont obligés et tirent des droits des dispositions de celle-ci qui dérivent de la compétence communautaire.

III. Effets des accords multilatéraux conclus par la Communauté Européenne. Leur insertion dans les ordres juridiques communautaire et des Etats membres²⁹

L'article 228 § 7 du Traité de Rome (selon la nouvelle numération donnée par le TUE) déclare que "les accords conclus selon les conditions fixées au présent article lient les institutions de la Communauté et les Etats membres".

Il n'y a plus de dispositions sur les effets des accords communautaires et la jurisprudence de la Cour de Justice des Communautés Européennes n'ajoute pas beaucoup de précisions à cet égard.³⁰

En tout cas, il est clair que les accords internationaux conclus par la Communauté Européenne constituent une source de droit communautaire.

a) Intégration des accords multilatéraux conclus par la Communauté Européenne dans l'ordre juridique communautaire

Il n'y a pas besoin d'aucun acte législatif de "transposition" pour l'intégration des accords multilatéraux dans l'ordre juridique communautaire.

L'acte – règlement ou décision "sui generis" – par lequel le Conseil décide la célébration de l'accord n'a pas un caractère normatif. Il s'agit tout simplement de l'acte qui permet à la Communauté de s'engager internationalement.

²⁷ Convention de Barcelone du 16 février 1976, et Convention du Rhin du 3 décembre 1976 et accord associant la CEE à la Commission pour la protection du Rhin contre la pollution, du 1963, *JOCE* n° L 240 du 19 septembre 1977.

²⁸ *JOCE* n° L 240/77, p. 17 et 48 respectivement. Voir aussi J. A u s s a n t : „Conventions régionales contre la pollution marine: contenu et problèmes, participation de la Communauté”, *RMC* n° 303, 1987, p. 22 – 24.

²⁹ On ne fera pas ici aucune référence aux accords conclus par les Etats membres dont les effets sont régulés par l'article 234 du Traité CEE. Voir à ce respect J. P. P i e t r i : "La valeur juridique des accords liant la Communauté Economique européenne", n° 1 *RTDE*, 64 – 75 (1976).

³⁰ Arrêts *International Fruit*, *cit. supra*; aff. 9/73 *Schlüter*, *Recueil* 1973, p. 1135; aff. 87/75 *Bresciani*, *Recueil* 1976, p. 129; aff. 181/73 *Haegeman*, *Recueil* 1974, p. 459; aff. 270/80 *Polydor Ltd. et RSO Records Ltd.*, *Recueil* 1982, p. 329; aff. 17/81 *Pabst et Richard K.G.*, *Recueil* 1982, p. 1331; aff. 104/81 *Hauptzollamt de Mayence c. Ch. Kupferberg et Cie*, *Recueil* 1982, p. 3659.

Ces accords sont obligatoires pour la Communauté depuis leur entrée en vigueur selon le droit international, bien que la publication au Journal Officiel des Communautés Européennes soit requise pour être opposables aux particuliers.

Un phénomène tout à fait différent qui se produit parfois consiste à donner la force d'une norme communautaire à un accord international auquel la Communauté n'est pas formellement partie. Tel est le cas de la Convention de Washington relative au commerce international des espèces menacées de la flore et la faune sauvage.³¹ Dans ces circonstances, il est possible de présenter un recours devant la Cour de Luxembourg du fait du manquement des dispositions de cette Convention; ainsi, ces dispositions ont une efficacité en droit communautaire qu'elles n'auraient autrement.

Même si l'article 228 affirme que les accords "... lient les institutions communautaires et les Etats membres", à mon avis, le caractère obligatoire de ces accords dans l'ordre juridique communautaire découle du droit international auquel la Communauté Européenne, est liée en tant que sujet international.. En particulier, la Convention de Vienne de 1986, qui codifie le droit des traités entre organisations internationales et Etats et entre Organisations internationales et le principe "pacta sunt servanda", suppose l'obligation juridique de respect des engagements internationaux de la part de ces sujets de droit international.

Malgré les efforts déployés lors de l'élaboration de cette Convention pour déterminer la nature de la relation juridique qui lie les Etats membres d'une Organisation internationale aux accords conclus par celle-ci, une telle question n'est pas tranchée dans le texte de ladite Convention (article 74.3).

En tout cas, les Etats membres des Communautés Européennes sont liés par les dispositions de ces accords en tant que normes (conventionnelles) du droit communautaire.

En plus, s'il s'agit des accords mixtes – tel est le cas des accords de protection de l'environnement – il sont liés, le cas échéant, aussi en tant que tels Etats, parties à l'accord.

L'ordre hiérarchique des accords multilatéraux conclus par la Communauté se situe au dessous du droit primaire (Traité constitutifs) mais au dessus du droit dérivé ou autonome de la Communauté Européenne, étant donné qu'il s'agit d'une source conventionnelle. En tant que source du droit communautaire, on ne peut affirmer la primauté des dispositions conventionnelles par rapport au droit national. Ceci implique que les tribunaux nationaux doivent appliquer les dispositions qui ont un effet direct et garantir leur supériorité, tant par rapport au droit national qu'au droit communautaire autonome.³²

³¹ Règlement n° 362/82 concernant l'application de la CITES dans la CEE, *JOCE* n° L 304/82, p. 1.

³² R. K o v a r : „La contribution de la Cour de Justice au développement de la condition internationale de la Communauté Européenne”, *Cahiers de Droit Européen* n° 5 – 6. 1978, p. 355. A l'arrêt du 19 novembre 1975 aff. 38/75 „Douaneagent der NV Nederlandse Spoor-

Pour appuyer cette affirmation on doit rappeler que ces accords peuvent faire l'objet d'un avis préalable de la Cour de Justice des Communautés européennes pour déterminer sa compatibilité avec les Traités constitutifs.³³

Egalement, en tant que source du Droit communautaire, ils peuvent faire l'objet d'un recours "à posteriori", mais la réussite d'un tel recours poserait sérieux troubles à la Communauté face aux tiers parties contractantes.

Eventuellement, les dispositions des accords internationaux conclus par la Communauté peuvent avoir un effet direct, c'est à dire, créer des droits et des obligations dont les individus peuvent se prévaloir devant les tribunaux nationaux.

La production d'un effet direct doit être l'objet d'appréciation par les institutions communautaires et, les cas échéant, par la Cour de Justice, pas pour les Etats membres.³⁴

b) La mise en oeuvre des accords internationaux conclus par la Communauté Européenne

La mise en oeuvre d'un accord international peut être confiée à un organe établi par cet accord ou bien les mesures à prendre pour y procéder, peuvent être directement déterminées par celui-ci.

Dans ce dernier cas, il est possible que les Etats membres ou une institution communautaire³⁵ s'y occupent.

La mise en oeuvre de ces Conventions de protection de l'environnement par les Etats membres qui y sont parties peut donner lieu à certaines contradictions entre eux et, alors, il est possible pour la Communauté d'édicter une norme communautaire, normalement une directive, qui harmonise les législations nationales sur la mise en oeuvre de la Convention et qui donne cohérence à celle-ci dans l'ensemble de la Communauté.

Quand la mise en oeuvre est confiée à des organes de gestion, ceux-ci vont s'attribuer des pouvoirs assez diverses selon la Convention en question. La Cour de Luxembourg a admis la délégation de pouvoirs des la Communauté Européenne

wegen", (*Recueil* 1975, p. 1439-1458) la Cour a confirmé la primauté des accords sur le reste du Droit Communautaire.

³³ Article 106 du règlement de procédure de la Cour de Justice de Luxembourg.

³⁴ Par exemple, la Cour de Justice a été interrogée par la *Commercial Court of Queen's Bench Division* sur l'effet direct de quelques dispositions de l'accord CEE-Israel de 1975; Arrêt du 18 février 1986 Aff. 174/84, *Bulk Oil*, *Recueil* 1986, p. 559.

³⁵ Normalement la Commission à travers des règlements d'exécution dont l'application correspond aux Etats. Par exemple, pour la mise en oeuvre de la Convention sur les pêcheries de l'Atlantique Nord-Ouest, le Conseil adopta un règlement établissant des mesures techniques de conservation des ressources de pêche applicables aux navires battant pavillon d'un Etat membre travaillant dans la zone d'application de la Convention (Règl. du 23 novembre 1979, *JOCE* n° L 303/79, p. 1). En application de cette norme communautaire conventionnelle, le gouvernement espagnol approuve la résolution du 26 janvier 1987 procédant à la révision du cense des navires de pêche de plus de 100 tonnes qui opèrent dans les limites de la Commission NEAFC.

nne à ces organes internationaux indépendants et donc l'applicabilité de leurs actes normatifs dans l'ordre juridique communautaire.³⁶

A ces organes peuvent être représentés ou pas les Etats membres. Dans ce sens, la pratique nous montre que cette présence mixte aux organes de gestion des accords internationaux ne donne pas toujours l'efficacité désirée.³⁷ Quelque fois, ces disfonctions sont dues à la divergence entre une norme communautaire en la matière et celle qu'on est en train de négocier avec des tiers. Alors ou après la conclusion de l'accord, l'adaptation de la normative communautaire s'impose.

En effet, bien que d'habitude, lors de la conclusion d'une convention internationale, la Communauté Européenne a déjà légiféré dans la matière, parfois il n'y a pas de norme communautaire à l'avance; d'où la nécessité d'y procéder selon les termes de la Convention en question.

Si la Communauté Européenne a déjà une norme interne,³⁸ la conclusion d'un accord international suppose la confirmation de ces engagements au niveau international et peut amener à la conclusion de celui-ci de la part d'autres Etats. Donc, la participation de la Communauté à un accord international peut jouer le rôle accélérateur de l'entrée en vigueur dudit accord.

Si la Communauté Européenne n'a aucune norme interne lors qu'elle adhère à un accord ou convention internationale ou bien la norme interne n'est pas conforme aux dispositions conventionnelles envisagées, celles-ci vont lier directement la Communauté et ses Etats membres sans qu'il soit précise aucune norme spéciale de transposition.

Lorsque la Communauté Européenne est engagée par un accord qu'elle n'a pas signé mais au titre de succession à ses Etats membres du fait du transfert des compétences à l'Organisation, cet accord s'applique uniformément dans tous les Etats membres. Tel est le cas pour le GATT comme a été mis en relief par la Cour de Justice à ses arrêts *Nederlandse Spoorwegen* et *Kupferberg*.³⁹

Dans le cas des accords simplement appliqués par la Communauté Européenne, les Etats contrôlent leur application. Celle-ci peut être divergente; tel

³⁶ Avis I/78, *cit. supra*, p. 2871. Voir aussi, P. G i l s d o r f: „Les organes institués par des accords communautaires: effets juridiques de leurs décisions. Observation à proges notamment de l'arrêt de la Cour de Justice des Communautés Européennes dans l'affaire C-192/89" n° 357 *RM CUE*, 329 – 338 (1993).

³⁷ P. ex. à la Commission instaurée pour la Convention de Paris de 1974 contre la pollution marine d'origine tellurique, au moment d'arriver à une décision sur le cadmium en vue de l'élaboration d'un protocole, la participation des Etats membres parties à la Convention à côté de la CEE a impliqué un retardement de la prise des décisions parce que la Communauté devait procéder à des consultations avec le Conseil.

³⁸ Par exemple, l'adhésion de la CEE au Protocole à la Convention de Genève relative à la lutte contre l'émission d'oxydes de nitrogène ou leurs flux transfrontières (NOX) compte déjà sur l'existence d'une directive communautaire plus rigide encore. Décision 93/361/CEE du 17 mai 1993, *JOCE* n° L 149 du 21 juin 1993, p. 14..

³⁹ Arrêts du 19 novembre 1975, Aff. 38/75, *Nederlandse Spoorwegen*, *Recueil* 1975, p. 1439; et *Kupferberg*, *cit. supra*.

est le cas de la Convention internationale sur le commerce des espèces sauvages menacées (CITES), ci-dessus nommée, par la présence des intérêts commerciaux nationaux divergents et des niveaux différents de préoccupation environnementale et de protection donnée aux espèces menacées de la flore et de la faune. Bien que la Communauté ne soit pas formellement partie à cette Convention, elle a procédé par règlement à l'application uniforme de ses dispositions dans tous les Etats membres, même dans ceux qui ne sont pas parties à ladite Convention.

En résumé, la participation de la Communauté Européenne aux conférences et aux accords multilatéraux, n'est qu'une conséquence de l'assomption de vastes compétences attribuées par ses Etats membres pour la réalisation des buts qui lui ont été fixés. Dans cette mesure la Communauté Européenne agit comme tout autre sujet de droit international, avec ses droits et ses obligations, mais avec la force des Douze Etats membres.

IV. Les relations de la Pologne avec la Communauté Européenne

Le premier pas vers des relations officielles entre la Communauté et les pays de l'Europe Centrale et Orientale a été la déclaration conjointe entre la Communauté Européenne et le CAEM (Conseil d'assistance économique mutuelle) de 1988.⁴⁰

Tout de suite des négociations ont été entamées avec ces pays en vue de la conclusion des accords commerciaux. C'est ainsi que la Pologne a eu son premier accord global avec la CEE: l'accord sur le commerce et la coopération commerciale et économique, du 30 octobre 1989.⁴¹

Il s'agissait d'un accord non préférentiel, avec la clause de la nation la plus favorisée (NPF) et dont l'objectif était le développement et la diversification du commerce bilatéral. La Communauté a essayé de contribuer par cet accord au rétablissement de la démocratie et à l'instauration d'une économie de marché.

Au delà des rapports conventionnels, la Communauté Européenne applique le système de préférences généralisées (SPG) à la Pologne depuis le 1^{er} janvier 1990. En plus, dans le cadre du programme PHARE, la Communauté a décidé d'accélérer, pour sa part, le processus de libéralisation prévu à l'accord.

Bien que cet accord eût une durée de cinq années, vue la réalisation du marché unique communautaire, le 16 décembre 1991 a été signé un accord dit "de deuxième génération" ou "accord européen" entre la Communauté Européenne et ses Etats membres, d'une part, et la Pologne, d'autre part.⁴² Il s'agit d'un accord mixte étant donné son contenu plus vaste que l'accord commercial précédent.

⁴⁰ JOCE n° L 157/88, p. 35.

⁴¹ JOCE n° L 339 du 22 novembre 1989, p. 1.

⁴² A la même date, la CEE a conclu les accords européens avec la Hongrie et la République Fédérative Tchèque et Slovaque.

Cet accord, d'une durée illimitée, est entré en vigueur le 1^{er} février 1994, c'est à dire, le premier jour du deuxième mois suivant la fin de la procédure de ratification par tous les Parlements impliqués.⁴³

Jusqu'à l'entrée en vigueur de l'accord européen on a appliqué l'accord intérimaire⁴⁴ qui contienne la partie commerciale et de la compétence communautaire de celui-là.

Du point de vue juridique, l'accord européen est un accord d'association à la Communauté Européenne (art. 238 du Traité CE) en deux étapes; une première étape de cinq ans est celle de l'approche de l'économie polonaise aux économies communautaires. Sur ce point, la Pologne a plus de droits que de devoirs. C'est la Communauté qui doit procéder à une libéralisation plus rapide que son partenaire. Une deuxième étape de cinq ans peut aller jusqu'à l'adhésion à l'Union européenne.

Dans cet accord on peut distinguer quatre éléments fondamentaux: le libre commerce, la coopération économique et technique, l'aide financière et, surtout, l'établissement d'un dialogue politique.

A l'accord d'association, la Communauté reconnaît l'objectif final de l'adhésion de la Pologne à la Communauté Européenne.

Au présent, depuis l'entrée en vigueur du Traité d'Union Européenne (Traité de Maastricht) le 1^{er} Novembre 1993, il faut remarquer que selon l'article O de celui-ci tout nouveau élargissement communautaire se produira par l'adhésion à l'Union, non plus à la Communauté Européenne. Cela suppose que la Pologne devra satisfaire des conditions plus dures qu'auparavant pour accéder à l'Union Européenne étant donné que l'acquis à assumer est plus vaste (Politique extérieure et de sécurité commune, Coopération judiciaire et policière, Union économique et monétaire).

Dans cette situation, la Commission des Communautés Européennes a envisagé des mesures pour aller au delà des dispositions des accords européens vers un espace politique européen⁴⁵ ce qui fera plus facile, les cas échéant, l'adhésion de la Pologne à l'Union. Pour la première fois, le Conseil Européen de Copenhague (juin 1993) déclarait que les pays de l'Europe Centrale et Orientale pourront devenir membres de l'Union s'ils remplissent les conditions politiques et économiques nécessaires.

⁴³ La Diète polonaise l'a ratifié le 6 juillet 1992. Le Parlement Européen a donné son avis favorable le 15 septembre 1992. En décembre 1993 les procédures de ratification des douze parlements nationaux se sont achevées.

⁴⁴ Décision du Conseil de la CEE, du 7 décembre 1992 relative à la célébration de l'accord sous forme d'échange de lettres qui prorogue l'accord intérimaire sur le commerce et les mesures d'accompagnement entre la CEE et la Pologne, n° L 408 JOCE du 31 décembre 1992, p. 1.

⁴⁵ Voir "Vers une association plus étroite avec les pays d'Europe Centrale et Orientale", Rapport de la Commission au Conseil européen d'Edimbourg, 11 - 12 décembre 1992, SEC (92) 2301 final, Bruxelles 2 décembre 1992. L'avis de la Commission a été réitéré au Conseil européen de Copenhague, "Towards a Closer Association with the Countries of Central and Eastern Europe", communication by the Commission to the Council in view of the meeting of the European Council in Copenhagen, 21 - 22 June 1993, Bruxelles 3 Mai 1993.

Par ailleurs, un accord rendant possible la connexion de la Pologne au réseau BC (Réseau de coopération commerciale) à l'échelle de l'Union a été signé. La Pologne est aussi raccordée à Euro-Info-Centre et au Bureau de Rapprochement des Entreprises (BRE).⁴⁶

Avec ses perspectives, il nous paraît utile pour la Pologne d'approfondir ses relations dans le groupe de Visegrad dont la première réunion a eu lieu le 15 février 1991. A ce sommet, les trois pays (quatre aujourd'hui après la division de la République Fédérative Tchèque et Slovaque) ont fait une déclaration générale de coopération et ont pris la décision d'établir entre eux une zone de libre échange et se concerter pour leur action internationale. A une déclaration de septembre 1992 ils ont manifesté leur volonté de renforcer la coopération avec la Communauté Européenne.

Cette intégration régionale appuyée par la Communauté Européenne donnera, sans doute plus des chances à la Pologne pour une plus rapide adhésion à l'Union Européenne.

⁴⁶ Pour plus de détails voir "Relations de l'Union Européenne avec les pays d'Europe Centrale et Orientale", Background Brief BB 19 (mise à jour janvier 1994), European Commission, p. 6 – 9.

L'association dans la théorie et la pratique de l'Union européenne

PAVEL SVOBODA

1. Introduction

Le 1er novembre 1993, avec un retard de dix mois est entré en vigueur le Traité sur l'Union européenne. Ce document historique de l'intégration européenne n'a pas influencé seulement l'approfondissement intérieur de l'ancienne Communauté européenne, mais il a en même temps touché la réglementation des relations externes de l'Union.

Un des instruments les plus importants de régulation des relations de l'Union avec certains pays tiers qui présentent un territoire d'un intérêt particulier est sans doute l'institut d'association en vertu de l'article 238 du Traité CE¹ est ainsi conçu:

„La Communauté peut conclure avec un ou plusieurs Etats ou organisations internationales des accords créant une association caractérisée par des droits et obligations réciproques, des actions en commun et des procédures particulières.”

Le contenu de cette notion diffère substantiellement de tout ce qui est lié à la notion d'association dans la pratique d'autres organisations internationales. C'est uniquement en comprenant ces distinctions que nous pouvons correctement apprécier les formulations trop souvent pragmatiques des Accords d'association, leur variabilité quant aux types et leur mode d'emploi.

Pour évaluer la portée que la CE donne à un accord d'association concret ou à la notion d'association en général dans le cadre d'une échelle d'instruments réglant ses relations externes, il faut connaître au moins les caractéristiques principales d'autres accords d'association que la CE conclut ou a conclu souvent sous une appellation différente.

L'analyse des accords d'association a finalement une autre portée: ces accords servent comme baromètre de l'approfondissement de la CE dans le sens qu'ils présupposent régulièrement le développement du partage des compétences entre la CE et ses Etats-membres. L'étude des derniers accords européens en comparaison avec le Traité de Maastricht en est un exemple par excellence.

¹ L'article 206 du Traité CEEA est rédigé de même manière, le traité CECA ne prévoit pas expressément une association.

2. Notion d'association

Afin de pouvoir répondre à la question en quoi consiste la nature de l'association il sera utile de distinguer trois types de délimitation de cette notion par définitions de droit positif, définition doctrinales, et enfin par la notion d'association telle qu'elle a été développée dans la pratique communautaire.

2.1. Définition de droit positif

La définition de droit positif est incorporée dans l'article 238 du traité C.E. selon lequel l'association „avec un ou plusieurs Etats tiers ou une organisation internationale” est „caractérisée par des droits et obligations réciproques, des actions en commun et des procédures particulières”. Les éléments d'une telle définition ne suffisent pas pour caractériser ce type de relations de la Communauté, pour les raisons suivantes:

- (a) beaucoup d'accords comportent en effet des „droits et obligations réciproques”, des „actions en commun” et des „procédures particulières”, et
- (b) l'exigence de „droits et obligations réciproques” a toujours posé des problèmes vis-à-vis de plusieurs types d'accords d'association² qui tendent à faire disparaître le principe de réciprocité au profit du principe d'asymétrie ou d'un mécanisme des préférences généralisées et de l'octroi d'aides financières.

La conformité de ces circonstances au Traité à l'égard de la convention de Yaoundé était affirmée par la Cour de Justice des Communautés Européennes (ci-après C.J.C.E.) qui dédida que „le déséquilibre dans les obligations assumées par la Communauté vis-à-vis des Etats associés ... est dans la logique du caractère spécifique de la Convention³.”

Il est nécessaire de garder à l'esprit que l'article 131 du traité C.E. nous fournit une autre définition d'association dans le sens des relations extérieures de la Communauté, valable pour „les pays et territoires non européens entretenant avec la Belgique, le Danemark, la France, l'Italie, les Pays-Bas et le Royaume-Uni des relations particulières et caractérisées par leur but qui est „la promotion du développement économique et social des pays et territoires, et l'établissement de relations économiques étroites entre eux et la Communauté dans son ensemble”, ce qui présente un type d'association, (octroyée – sans consentement des territoires concernés) appelé par certains à la suite de son caractère octroyé „une modalité particulière de l'extension territoriale du traité”⁴ ou directement „l'adhésion”⁵.

Une définition jurisprudentielle complexe n'est pas disponible, bien que la rédaction vague de l'article 238 nécessite une interprétation de la Cour. En effet,

² Tel de Yaoundé ainsi que les accords de coopération de Lomé I – IV ; voir section 4. de ce chapitre, § 1/I.

³ C.J.C.E. du 5.2.1976, aff. 87/75 *Bresciani*., point 23.

⁴ G. I s a a c: *Droit communautaire*, 3ème édition, 26 (1990).

⁵ L. C a r t o u: *Communautés européennes*, 9e édition, 756 (1989).

la Cour a été amenée une seule fois à se prononcer – et, ce qui est plus, indirectement – sur la notion d'association. Dans l'affaire *Demirel*⁶ elle a déterminé qu'elle comprenait sous la notion d'un accord d'association un „accord créant des liens particuliers et privilégiés avec un Etat tiers, qui doit, du moins partiellement, participer au régime communautaire”.

Fidèle à son principe de ne pas se prononcer sur les questions qui ne nécessitent pas d'arrêt définitif afin de pouvoir résoudre une affaire respective, la Cour a ainsi seulement souligné certains caractères de l'accord d'association conclu entre la C.E. et la Turquie, sans vouloir vraiment définir la notion d'association. Cette absence de volonté de définir peut être vue sous l'angle des trois observations suivantes:

- a) la Cour n'explique pas ce qu'elle entend sous „participer au régime communautaire”. Par comparaison avec l'article 238 on peut seulement constater que la Cour utilise cette expression à la place des „droits et obligations réciproques”⁷, précisant un peu le contenu des rapports interprétés;
- b) si la Cour voulait vraiment définir l'association, elle ne pourrait pas omettre le fait qu'un tel accord peut être conclu aussi avec une union d'Etats ou une organisation internationale⁸;
- c) la non-volonté de définir l'association découle aussi de l'utilisation de l'expression assez inexacte „du moins partiellement”:
 - il n'existe pas d'association où l'associé ne participe pas *du moins* partiellement au régime de l'organisation à laquelle il est associé: sinon, il ne s'agirait pas d'une association;
 - si l'associé participe plus que *du moins* partiellement, i.e. complètement, au régime communautaire, il s'agit déjà d'une adhésion.

2.2. Définitions doctrinales

A défaut d'une définition de droit précise il convient de rechercher les caractéristiques juridiques parmi les définitions doctrinales qui définissent l'association soit

- I. *négativement*: „l'association, c'est l'adhésion moins un et l'accord commercial plus un”⁹, soit
- II. *positivement*:

- (a) „un lien permanent, général et institutionnalisé, de coopération qui consacre une participation des pays tiers aux objectifs communautaires”¹⁰,

⁶ C.J.C.E. du 30.9.1987, aff. 12/86, point 9.

⁷ Utilisé par l'art. 238 du traité C.E.E.

⁸ Ibidem.

⁹ W. H a l l s t e i n: „Österreich und die EWG”, Das Salzburger Expertengespräch (Wien o.J.), p. 30.

¹⁰ P. P e s c a t o r e: „Les relations extérieures des Communautés européennes”, R.C.A.D.I. 1961; cette définition est particulièrement adaptée aux accords d'association préparatoires à l'adhésion.

- (b) „un lien contractuel permanent et spécifique conclu en vue d'objectifs communs pour la poursuite desquels les parties créent des institutions paritaires”¹¹,
- (c) „une formation d'un grand ensemble économique”¹²,
- (d) „un lien durable et spécifique entre un Etat tiers et la Communauté qui organisent leur coopération économique au sein d'organes paritaires”¹³,
- (e) „une adhésion politique à une communauté de vues et une acceptation délibérée du système économique et social en vigueur dans la Communauté”¹⁴.

Une analyse de ces définitions pourrait faire l'objet d'un mémoire à par soi-même. Sans aller dans le détail il faut constater que – seulement les définitions indiquées sous (a), (b) et (c) conviennent au contenu des accords européens qui est incompatible avec une délimitation purement économique,

– les éléments juridiques importants évoqués par les définitions précitées sont les suivants:

- * permanent, durable traduisent la vocation à la permanence qui s'exprime soit par l'existence de clauses prévoyant l'ouverture de négociations pour une période postérieure à la durée limitée de validité d'un accord, soit par la durée illimitée, ce qui est le cas des accords européens;
- * spécifique souligne le caractère extérieur des relations en question;
- * institutionnalisé, au sein d'organes paritaires touchent la création d'organes propres avec les tâches de gérer l'accord, résoudre les difficultés dans son application mettre en oeuvre la coopération et d'en promouvoir le développement;
- * participation aux objectifs communautaires, acceptation du système économique et social en vigueur attirent l'attention aux bases propres de chaque association;
- * contractuel distingue l'association en vertu de l'article 238 de celle fondée sur articles 131 – 136 bis du traité C.E.E. octroyant certains rapports spécifiques.

2.3. Notion d'association selon la pratique communautaire

L'ensemble des accords d'association communautaire comporte plusieurs accords qui ne sont pas obligatoirement appelés „d'association”. Compte tenu de toutes ses spécificités, il reste de constater que le développement des accords

¹¹ E.M. Colombo: „La nature juridique de l'association à la C.E.E.”, in: L'association à la Communauté économique européenne, aspects juridiques, p. 14 (1968); cette définition apporte un correctif qui permet d'appliquer la notion aux accords du type de conventions de Yaoundé I, II.

¹² F. Lachaire: „Les associations à la C.E.E.”, R.C.A.D.I. 247 ss, spéc. 287 (1975 – I).

¹³ J.-V. Louis et P. Brückner: „Relations extérieures”, in: Le droit de la Communauté Economique Européenne, vol. 12, (1980).

¹⁴ Ra u x, p. 12.

d'association communautaires a donné naissance à un nouveau type d'accords dans le cadre international. A fin de l'apprécier, il convient d'examiner – dans les grandes lignes – la substance de la pratique d'association, créée par l'Accord sous l'angle du statut d'Etat associé. Dans cette optique, les accords européens ont prolongé la pratique communautaire préalable.

Réglant les rapports juridiques d'association, les auteurs des traités de Rome (c'est-à-dire des traités C.E.E. et C.E.E.A. sous silence du traité C.E.C.A.) avaient à choisir entre deux possibilités découlant de la pratique des organisations internationales et du droit international: l'association communautaire pouvait prendre la forme soit de

(a) l'**association interne** où l'associé participe avec des droits réduits à toutes ou certaines des activités des organisations avec des droits égaux à ceux des Etats membres; dans les deux cas l'associé occupe toujours une place à l'intérieur de l'organisation¹⁵; soit de

(b) l'**association externe** où l'associé reste en dehors de l'organisation, bien qu'il participe avec cette organisation à des organes mixtes.

C'est cette dernière possibilité qui a été choisie par la Communauté. Cette situation se justifie par la finalité propre de l'intégration de la Communauté: la qualité d'Etat membre de la Communauté suppose un ensemble de droits, auxquels correspondent des obligations, nécessairement égales pour tous.

A la suite des observations invoquées il est possible de conclure en constatant que pour une association communautaire le manque de connexité institutionnelle directe est une condition *sine qua non*. Ce principe de reconnaissance commune de la Communauté explique l'absence d'un rapport institutionnel direct aux institutions communautaires, même si la doctrine propose plusieurs possibilités, par exemple une qualité de membre exceptionnel, ou celle aux droits limités, ou avec une participation aux activités de certains organes communautaires¹⁶.

La qualité de non-Etat membre du pays associé remplit néanmoins une fonction protectrice de ce pays contre des influences forcées (économiques ou politiques) de la part de la Communauté ou ses Etats membres, influences qui seraient dommageables à l'économie faible du pays en question.

2.4. Points faibles de la notion d'association communautaire

Les trois paragraphes précédents de cette section ont montré que la notion d'association n'est pas sans défauts. Le premier est du manque d'une définition précise, présentée soit par le traité, soit par la jurisprudence de la Cour. Le deuxième problème découle du premier: le contenu d'un accord d'association n'est pas précisément délimité en raison du manque de la notion d'association elle-même.

¹⁵ Par exemple l'Unesco, l'O.M.S.

¹⁶ Louis, p. 87, M. Schweitzer et W. Hummer: *Europarecht; Das Recht der europäischen Gemeinschaften* (1990).

Le troisième point faible concerne une lacune du traité: la pratique communautaire a déjà plusieurs fois prouvé que l'association au sens communautaire souffre d'une faiblesse principale: du manque de toute disposition permettant de dissoudre le rapport avec l'associé, de dénoncer un accord d'association.

L'histoire avait offert au moins deux exemples de situations où la possibilité d'utiliser une disposition mettant fin à un tel accord aurait pu mener la Grèce de colonels (1971 – 1974) ou la Turquie après le coup d'Etat (1980) à un comportement plus raisonnable.

Si la Communauté prouvait son attachement aux principes démocratiques face à tous les candidats d'association inconvenients (l'Espagne de Franco, le Portugal de Salazar), elle se prive – lorsqu'un Etat est une fois devenu associé – des mesures permettant de mettre en évidence ses convictions démocratiques d'une manière plus efficace.

Après les trois premiers accords européens¹⁷ qui ont laissé cette lacune ouverte, les accords¹⁸ récents ont essayé de trancher ce problème par une clause suspensive. Cette clause est liée à l'article 6 de l'Accord: „Le respect des principes démocratiques et des droits de l'homme établis par l'Acte de conclusion de Helsinki et par la Charte de Paris pour l'Europe nouvelle, ainsi que des principes de l'économie du marché inspirent la politique interne et externe des Parties et crée des éléments substantiels de cette association.” Cet article est prolongé par l'article 117 alinéa 2: „En cas où une Partie considère que l'autre partie n'a pas rempli une obligation en vertu de cet Accord, elle peut prendre des mesures appropriées. Avant d'ainsi agir – sauf les cas d'urgence spéciale – elle fournit au Conseil d'association les informations demandées pour une évaluation profonde de la situation afin de trouver une solution acceptable pour les deux Parties.” La clause suspensive, elle-même, est établie par la Déclaration conjointe N° 2 relative à l'article 117, alinéa 2 de l'Accord: „Les parties contractantes conviennent aux fins d'une interprétation et application juste que la notion „les cas d'une urgence spéciale” contenue à l'article 117 signifie un cas de violation matérielle de l'Accord par une des Parties. Une violation matérielle de l'Accord repose sur (a) la répudiation de l'Accord non sanctionné par des règles générales du droit international, ou (b) des violations des éléments substantifs de l'Accord, surtout conformément à l'article 6.”

Cette clause mérite notre attention pour plusieurs raisons. En omettant le fait qu'elle avait été une source de négociations lourdes à la suite de sa rédaction comprise comme une expression de méfiance à l'égard de la stabilité et du développement futurs des nouvelles démocraties de l'Europe centrale et orientale, nous pouvons constater que:

- (a) le terme vague „prendre des mesures” n'est pas une solution juridique du problème, car il manque de nouveau les dispositions en vue de la résiliation de l'Accord comme conséquence substantielle du non-respect

¹⁷ Avec la Pologne, la Tchécoslovaquie et la Hongrie.

¹⁸ Avec La République tchèque, la Slovaquie, la Bulgarie et la Roumanie.

des droits de l'homme; vu qu'il s'agit ici d'un accord conclu à durée illimitée, c'est une lacune considérable;

- (b) les accords d'association font partie du droit communautaire. Si l'accord contient des dispositions claires et juridiquement précises, n'exigeant pas d'autres précisions par un acte communautaire, celui-ci bénéficie de l'effet direct, i.e. il est directement invocable devant les juges nationaux des Etats membres par des ressortissants du pays associé¹⁹.
- (c) l'élargissement de la Communauté va augmenter le danger et la probabilité statistique des changements anti-démocratiques dans le cadre de la Communauté et de ses associés. L'exemple de la Yougoslavie ne nécessite aucun commentaire.

Il est vrai que ce problème est plus profond qu'on ne pouvait le montrer ci-dessus. Il est vrai par ailleurs que la suppression progressive du vote unanime au sein des institutions communautaires empêchera un Etat de bloquer des décisions démocratiques. Mais il est aussi vrai qu'un jour la Communauté, déclarant partout ses idées démocratiques, pourrait se voir déshonorée par la présence d'un Etat membre ou associé *non grati*, se livrant à des pratiques anti-démocratiques sans qu'elle puisse se défendre effectivement. L'exemple yougoslave n'a pas besoin d'être illustré davantage.

3. Conclusion des accords d'association

Chaque projet d'association doit satisfaire à plusieurs exigences de droit encadrant sa création. Son contenu sera examiné sous l'angle de la compétence de la Communauté de conclure un tel accord. Cette évaluation produit des conséquences qui influencent non seulement la mise en oeuvre d'un tel accord, mais déjà sa naissance dans la procédure de conclusion. Et c'est dans cette optique que les traités communautaires se trouvent à la fois vagues et incohérents. La Cour et la pratique ont contribué à pallier ces lacunes pour que la Communauté puisse réaliser ses buts aussi par le biais des relations externes, spécialement celles d'association.

La conclusion des accords externes comporte deux aspects qui méritent une analyse séparée: le droit de traiter (i.e. de négocier et de conclure ces accords) et la procédure de conclusion. Une telle attention est devenue plus importante après l'adoption du Traité sur l'Union européenne qui a influencé les deux problèmes d'une manière substantielle.

3.1. Droit de traiter

Les Etats fondateurs ont formellement accordé à chacune des Communautés la personnalité juridique internationale. Une telle qualité découle de l'article

¹⁹ Voir chapitre 4.2. „Effet direct”: régulièrement cet effet concerne la circulation des travailleurs. Imaginons une situation où le ressortissant d'un pays irrespectueux des droits de l'homme invoque lui-même ces droits devant une juridiction dans la Communauté.

210 du traité C.E., de l'article 6 du traité C.E.C.A. et de l'article 184 du traité C.E.E.A.. Toutefois, la création de sujets supranationaux couvrant les territoires de ses états membres n'a pas mis en cause la personnalité internationale juridique de ces derniers.

Sujets du droit international, les Communautés bénéficient de tous les moyens d'action reconnus par le droit international à ses sujets, notamment du droit de conclure des conventions.²⁰

Une déclaration de création d'un nouveau sujet du droit international ne suffit pas elle-même pour l'exercice des droits sus-mentionnés. Une reconnaissance *de jure* par les autres sujets du droit international – les Etats ou les organisations internationales – est nécessaire.

Il en est de même pour le droit de conclure des conventions. Dans le cas des Communautés la mise en oeuvre de ce droit posait un double problème:

A. Premièrement il s'agit de l'**aspect externe**: la reconnaissance par tous les autres sujets du droit international s'est achevée après le 25 juin 1988 avec la Déclaration conjointe entre la C.E.E. et le C.A.E.M. (Conseil d'assistance économique mutuelle), date à laquelle les deux blocs économiques se sont officiellement et mutuellement reconnus;

B. Deuxièmement, l'**aspect interne** repose sur une délimitation du cadre des compétences attribuées aux Communautés, parfois assez vagues:

(a) Le droit de la C.E.E. de traiter les accords d'association avec les Etats tiers restait toujours incontestable car ce droit relève de quatre domaines de **compétences expresses**, parfois dites **explicites** (à côté du domaine de la politique commerciale, de recherche et de l'environnement) qui habilitent cette Communauté à conclure les accords respectifs. Dès les négociations des premiers accords d'association cette compétence se heurtait au fait que l'article 238 du traité C.E.E. – le fondement juridique de ces accords – ne contribue pas à une délimitation matérielle du contenu de tels accords. En effet, sa caractéristique par „des droits et obligations réciproques, des actions en commun et des procédures particulières” évite toute indication des domaines pouvant faire l'objet de l'accord d'association.

Cette lacune qui avait causé des différends entre le Conseil et la Commission, était comblée par l'arrêt de la Cour du 30.9.1987 dans l'affaire *Demirel*. Cet arrêt donne à l'article 238 une portée quasi générale: les accords d'association peuvent régir toutes les matières couvertes par le traité, leur contenu ne doit pas se borner nécessairement aux dispositions commerciales²¹.

²⁰ Voir la Convention de Vienne de 1986 sur le droit de traiter entre les organisations internationales et les Etats ou entre les organisations internationales – pas encore ratifiée.

²¹ C.J.C.E. du 30.9.1987, aff. 12/86, p. 3747, point 9: „... s'agissant d'un accord d'association créant des liens particuliers et privilégiés avec un Etat tiers qui doit, du moins partiellement, participer au régime communautaire, l'article 238 doit nécessairement confirmer à la Communauté compétence pour assurer des engagements vis-à-vis d'Etats tiers dans tous les domaines couverts par le traité.”

Mais quelle est la vraie étendue des matières couvertes par le traité? C'est la théorie des *compétences implicites*, développée par la jurisprudence de la Cour qui répond à cette question. Par une série de décisions la Cour écarte le principe (soutenu par le Conseil) selon lequel la Communauté n'avait que les compétences externes expresses: (i) Dans son arrêt *A.E.T.R.* la Cour constate que lorsque la Communauté a la personnalité juridique, cela „signifie que, dans les relations extérieures, la Communauté jouit de la capacité d'établir des liens contractuels avec les Etats tiers dans toute l'étendue du champs des objectifs définis dans la première partie du traité". Et la Cour ajoute encore qu' „il convient de prendre en considération le système du traité aussi bien que ses dispositions matérielles" ce qui permet de stipuler qu' „une telle compétence résulte non seulement d'une attribution explicite par le traité ... mais peut découler également d'autres dispositions du traité et d'actes pris par les institutions de la Communauté".

A l'appui de ce constat de la Cour signalant que le traité lui-même compte sur un certain cadre implicite du contenu „matériel" de la notion „d'association" deux arguments d'interprétation systématique peuvent être invoqués:

- le traité utilise – au sens de lien externe, outre l'article 238 – la notion d'association surtout dans les articles 131 – 136 bis, où cette notion comporte un contenu considérablement plus étendu que celui des accords fondés sur l'article 238. Si l'on n'admet pas l'interprétation par analogie, on arrive nécessairement à la conclusion que la pratique communautaire a complètement bouleversé le contenu original de cette notion donné par la quatrième partie du traité²²; vu les réserves de la doctrine par rapport à l'association au sens des articles 131 – 136 bis du traité C.E.E., on conclurait que ce que le traité appelle expressément „l'association" n'a rien à voir avec l'association la plus fréquente dans la pratique communautaire;

- installé après l'article 236 (modification du traité – aujourd'hui abrogé et réinstallé à l'article N du Traité sur UE) et 237 (l'adhésion – aujourd'hui article O), les deux dernières dispositions ayant dans une situation concrète aussi un contenu bien encadré, l'article 238 en tant que l'antichambre d'adhésion doit nécessairement être interprété dans ce contexte global, dont les limites sont prédéterminées par la totalité du traité lui-même.

Mais la Cour va encore plus loin. Par le même arrêt elle consacre le principe du *parallélisme des compétences internes et externes* de la C.E.E. qui repose sur le constat que pour la mise en oeuvre d'une politique commune prévue par le traité, où la Communauté a déjà établi des règles communautaires, un tel domaine reste désormais fermé à tout acte des Etats membres. Une telle matière relève de la compétence exclusive de la Communauté, y compris le droit de conclure des accords avec les Etats tiers.

²² Cette partie du traité s'appelle expressément „L'association", tandis que l'article 238 ne parle que des „accords ... créant une association".

En confirmant cette conclusion par l'arrêt *Kramer*²³, la Cour a répondu à la question si l'attribution de compétences externes à la Communauté était subordonnée à l'exercice réel et préalable de ses compétences internes dans le domaine en question. Cette réponse, présentée par l'avis 1/76²⁴ conclut que „chaque fois que le droit communautaire a été établi dans le chef des institutions de la Communauté des compétences sur le plan interne en vue de réaliser un objectif déterminé, la Communauté est investie de la compétence pour prendre les engagements internationaux nécessaires à la réalisation de cet objectif, même en l'absence d'une disposition à cet égard". Il en résulte que la Communauté est investie du droit de choisir, si elle exerce sa compétence en commençant par la voie d'une action interne ou externe: l'établissement de règles intracommunautaires n'est plus une condition préalable à la conclusion d'accords externes en la matière. Il faut néanmoins garder à l'esprit, comme le souligne le Professeur Isaac, que le parallélisme des compétences internes et externes réside dans le prolongement automatique de la compétence interne ce qui exige qu'une telle compétence soit d'ordre normatif, afin que la Communauté puisse conclure des accords internationaux²⁵.

Il y a enfin une troisième catégorie de **compétences**, dites **subsidiaries** reposant sur l'article 235 du traité C.E.E. L'arrêt *A.E.T.R.* confirme que cet article est aussi applicable aux relations externes. Ces compétences s'appellent subsidiaires parce que le recours à l'article 235 doit être écarté dès lors qu'il existe une compétence externe de la Communauté, même si elle est seulement implicite.

Il sera intéressant de suivre les résultats de cette jurisprudence afin de savoir s'ils seront affaiblis par le nouveau (sauf le domaine de l'agriculture) principe de subsidiarité²⁶ ne demandant l'action communautaire qu'au cas où les Etats membres ne peuvent agir d'une manière plus efficace.

(b) Quant aux traités C.E.C.A. et C.E.E.A., ils comportent des dispositions prévoyant expressément le parallélisme des compétences internes et externes:

(i) l'article 2, sous (h) du traité C.E.E.A. charge la Communauté (habilitée à conclure des accords d'association par son article 206 qui reprend la formulation vague de l'article 238 du traité C.E.) d' "instaurer avec les autres pays et avec les organisations internationales toutes liaisons susceptibles de

²³ C.J.C.E. du 14.7.1976, affaires jointes 3, 4 et 6/76, Rec. p. 1308.

²⁴ C.J.C.E. du 26.4.1977, Rec. p. 754.

²⁵ Isaac, p. 94.

²⁶ Cf. art. 3b, par. 2 du Traité UE: „Dans les domaines qui ne relèvent pas de sa compétence exclusive, la Communauté n'intervient, conformément au principe de subsidiarité, que si et dans la mesure où les objectifs de l'action envisagée ne peuvent pas être réalisés de manière suffisante par les Etats membres et peuvent donc, en raison des dimensions ou des effets de l'action envisagée, être mieux réalisés au niveau communautaire." Néanmoins les fonctionnaires de Bruxelles ne sont pas très optimistes quant à ce principe qui a toujours pu être réalisé au sein du Conseil à savoir qu'il n'est qu'une question de volonté politique de trouver le sens voulu du contenu de n'importe quel acte à adopter par le Conseil.

promouvoir le progrès dans l'utilisation pacifique de l'énergie nucléaire", et après un chapitre consacré aux relations extérieures, l'article 101 établit que „dans le cadre de sa compétence, la Communauté peut s'engager par la conclusion d'accords ou conventions avec un Etat tiers, une organisation internationale ou un ressortissant d'un Etat tiers”.

(ii) L'article 6 du traité C.E.C.A. stipule que „dans les relations internationales, la Communauté jouit de la capacité juridique nécessaire pour exercer ses fonctions et atteindre ses buts.” Cette disposition générale – lue à la lumière de l'article 71 qui réserve la politique commerciale aux Etats membres – concerne néanmoins plutôt la sphère de gestion que celle de législation.

Il en résulte que les Communautés sont dotées d'une compétence suffisamment large pour conclure avec des Etats tiers des accords d'association qui peuvent refléter le développement intracommunautaire des compétences. En d'autres termes, les accords d'association sont susceptibles de traduire l'état actuel de répartition de compétences entre les Communautés et les Etats membres. De plus, en utilisant la technique des accords mixtes²⁷, les accords d'association signalent parfois des changements en vue d'une telle répartition²⁸.

3.2. Procédure de conclusion

Les dispositions principales réglant la procédure de négociation et de conclusion des accords d'association sont incorporées dans les traités C.E. et C.E.E.A., le traité C.E.C.A. n'utilisant que certaines dispositions générales.

3.2.1. Régime du traité C.E.

La procédure conformément au traité C.E. est dressé sur les dispositifs de l'article 228 et à titre accessoire sur l'article N²⁹ du Traité sur UE.

Selon ces dispositions on voit que la procédure comporte les phases suivantes:

- 1) l'initiative d'un ou plusieurs Etats tiers ou d'une organisation internationale (demande d'association) ou l'initiative de la Communauté;
- 2) les contacts exploratoires de la Communauté;
- 3) la Commission adresse habituellement au Conseil une recommandation d'ouverture des négociations;
- 4) le Conseil statuant à l'unanimité
 - i. décide d'ouvrir les négociations et habilite la Commission de les mener,
 - ii. adopte les directives liant la Commission pendant le négociations,

²⁷ Voir section 3.2.4. *Accords mixtes*.

²⁸ Cette observation résulte de la comparaison des accords européens avec le traité de Maastricht.

²⁹ Le Traité sur UE avait éclairci les fondements de la procédure de conclusions des accords. Auparavant il fallait consulter les articles 238 (dispositions spéciales de l'association), 228 (règles générales) et 133 (certaines règles généralisées pour la conclusion de tout accord externe de la C.E.).

- iii. nomme un comité spécial composé des représentants des Etats-membres qui assiste la Commission pendant les négociations (i.e. surveiller la Commission – art.228 al. 1);
- 5) la Commission mène les négociations dont le résultat est un projet de l'accord paraphé;
- 6) rapport de la Commission au Conseil proposant d'engager la Communauté;
- 7) en cas de besoin d'amendement d'un Traité un tel changement doit être effectué conformément à l'article N du Traité UE³⁰ (art. 228, par. 5);
- 8) un pas non obligatoire: l'avis préalable de la C.J.C.E. sur la compatibilité de l'accord d'association envisagé avec les dispositions du traité C.E.E. (art. 228, par. 6);³¹
- 9) l'avis conforme du Parlement³²; pour cet avis le Conseil et le Parlement peuvent s'accorder à un délai dont le non-accomplissement ne change néanmoins rien à l'exigence absolu d'un tel avis;
- 10) consentement du Conseil statuant à l'unanimité ;
- 11) la fin des négociations sous la forme d'une *procédure solennelle* comportant
 - (aa) la signature de l'accord paraphé³³,
 - (ab) l'adoption d'un acte de conclusion du Conseil C.E.³⁴,
 - (ac) la conclusion qui en ce sens correspond à la ratification par les Etats,

³⁰ 1. Le gouvernement de tout Etat membre, ou la Commission, peut soumettre au Conseil des projets tendant à la révision des traités sur lesquels est fondée l'Union.

Si le Conseil, après avoir consulté le Parlement européen et, le cas échéant, la Commission, émet un avis favorable à la réunion d'une conférence des représentants des gouvernements des Etats – membres, celle-ci est convoquée par le président du Conseil en vue d'arrêter d'un commun accord les modifications à apporter auxdits traités. Dans le cas de modifications institutionnelles dans le domaine monétaire, le Conseil de la banque centrale européenne est également consulté. Les amendements entreront en vigueur après avoir été ratifiés par tous les Etats membres conformément à leurs règles constitutionnelles respectives.

³¹ Un avis négatif de la Cour lie la Commission et il ne peut être détourné que par le biais de l'article N du Traité UE.

³² Avant l'Acte unique européen, le Parlement intervenait pour émettre un **avis simple**: le Conseil avait l'obligation de le consulter **avant** de statuer, mais il le faisait **après la signature** de l'accord par le représentant de la Commission. A la suite de cette pratique, l'avis du Parlement ne pouvait avoir aucune incidence sur le contenu de l'accord. La modification introduite par l'article 9 de l'Acte unique européen a doté le Parlement du pouvoir d'empêcher le Conseil de conclure un accord d'association (voir le refus du Parlement de donner un avis conforme, J.O.C.E. N° C 94/55 du 11 avril 1988). Le Parlement est toujours informé en ce qui concerne les cas des traités autres que fondés sur l'article 238 du traité C.E.E. sur la base d'un accord interinstitutionnel „Déclaration commune de l'Assemblée, du Conseil et de la Commission”, adopté le 4 mars 1975 (J.O.C.E. N° L 89 du 22 mars 1975).

Il est toutefois intéressant de noter que la Commission a jugé que l'accord C.E.E. – Tchécoslovaquie du 1988, fondé sur l'article 113, constituait „un accord international d'importance significative” et a, à ce titre, demandé l'avis du Parlement alors que le fondement de l'accord ne l'exigeait pas (voir Doc. Com. (88) 673 final).

Du point de vue du Parlement il s'agit d'un cas spécial de co-décision hors de l'article 189c du Traité CE.

³³ Toujours autorisée par le Conseil qui désigne le ou les mandataires habilités à y procéder.

³⁴ La forme de l'acte de conclusion est soit le règlement, soit la décision sans destinataire: il

- (ad) l'échange, le dépôt ou la notification de l'acte d'approbation qui seul a pour effet l'engagement de la Communauté au regard du contractant;³⁵
- (b) *procédure simplifiée* (en vertu de l'article 113 du traité C.E.E.) où la signature de l'accord à elle seule porte l'engagement de la Communauté.

Il convient ensuite de résumer les différents rôles des institutions communautaires dans cette procédure:

- (i) le Conseil joue le rôle principal (voir les points 4, 10, 11.),
- (ii) la Commission est le „moteur” des négociations (points 3, 5, 6),
- (iii) le Parlement joue le rôle d'un contrôleur général, spécialement politique (point 8),
- (iv) la C.J.C.E. n'accomplit qu'un rôle auxiliaire (point 9).

3.2.2. Régime du traité C.E.E.A.

C'est la Commission qui joue le rôle le plus important en négociant et en concluant les négociations elle-même³⁶.

3.2.3. Régime du traité C.E.C.A.

Le traité C.E.C.A. ne prévoit pas expressément la conclusion des accords d'association³⁷, le plus souvent, systématisant la règle contenue à l'article de la Convention relatif aux dispositions transitoires, la Commission négocie en qualité de „mandataire commun” des gouvernements des Etats membres; ceux-ci concluent ensuite l'accord d'association avec l'Etat tiers conjointement avec la C.E.C.A.³⁸ Cette caractéristique évoque quelques ressemblances avec la procédure d'accords mixtes en vertu du traité C.E.E.

3.2.4. Accords mixtes

La procédure décrite doit être complétée par d'autres éléments dans le cas où le projet d'accord soit

– implique un financement par les Etats membres, soit

apparaissait, en effet, à l'examen des accords que, après une période d'hésitation, le Conseil privilégiait le recours au règlement (voir le tableau comparatif dans C. F l a e s c h-M o u g i n: *Les accords externes de la C.E.E.*, R.T.D.E., pp. 273 – 311 (1987), mais l'analyse des trois dernières années ne confirme pas les conclusions de cet auteur. Cet acte ne conclut pas l'accord: il porte l'approbation interne de l'accord, l'habilitation à signer, ou à notifier que l'approbation interne a eu lieu, et contient parfois des dispositions concernant l'exécution de l'accord à l'intérieur de la Communauté. Une telle intervention du Conseil ne modifie pas la nature primaire internationale d'un tel accord.

³⁵ C'est ici où le droit international public prend tout son sens, notamment la Convention de Vienne sur le droit de traités entre les Etats, de 1969.

³⁶ Pour plus de détails, voir 67 R.G.D.I.P. 1019 (1963).

³⁷ Cf. article 6 du traité C.E.C.A.

³⁸ Par exemple l'accord entre la C.E.C.A. et le Royaume-Uni du 21 décembre 1954.

– dépasse, par son objet, les matières qui relèvent strictement de la compétence communautaire³⁹.

La technique des accords mixtes (mentionnée seulement dans le traité C.E.E.A. à l'article 102 dont l'utilisation était généralement acceptée dans la pratique des trois Communautés) réside dans le fait que ce sont à la fois les Communautés et les Etats membres qui prennent part à la négociation du traité par leurs représentants, signent le traité et ratifient celui-ci.

Pratiquement, la Communauté ne peut procéder à la conclusion que lorsque la totalité des Etats membres a ratifié le traité, ce qui restitue à chacun des Etats „un droit de veto”⁴⁰, même si l'accord du point de vue de la Communauté peut être conclu par le Conseil statuant à la majorité.

La justification juridique donnée à l'origine à cette procédure, suivie dès la conclusion du premier accord d'association, l'accord d'Athènes avec la Grèce, réside notamment dans l'assistance financière, impliquée par ces associations. Cet argument – qui a joué un rôle important dans le passé⁴¹ – est admissible actuellement en cas des accords européens prévoyant l'aide financière partiellement non budgétisée⁴².

En réalité, on peut voir que les raisons d'utilisation de la technique de l'accord mixte relèvent du domaine politique, motivées par „la réticence des Etats membres à s'effacer derrière la Communauté”⁴³.

4. Application de principes généraux du droit communautaire

La conclusion des accords d'association établit la base juridique pour l'exercice des droits et des obligations en découlant. La mise en oeuvre des accords extérieurs communautaires est liée à des difficultés causées par le fait que ces actes sont assujettis à un double régime juridique: celui des actes internationaux (ce qui correspond à l'optique de toutes les parties à l'accord) et celui des actes pris par les institutions communautaires (ce qui est une prolongation logique de la conception moniste de la doctrine du droit communautaire). Cette schizophrénie (du point de vue communautaire) des accords extérieurs provoque ses conséquences notamment dans deux domaines juridiquement sensibles: dans le domaine d'interprétation et dans celui de l'effet direct des accords.

³⁹ Le caractère mixte des accords européens est justifié par les deux arguments susmentionnés: voir chapitre „Coopération” qui comporte des volets méconnus aux accords communautaires d'association précédents.

⁴⁰ I s a a c, p. 99.

⁴¹ Malgré la partie IV qui montre que l'assistance financière peut être inhérente à certains types d'association.

⁴² Voir la réponse du Conseil à la question écrite N° 396/77 de M. Dodlinger, J.O.C.E. N° C 277 du 17 novembre 1977, p. 7 – 8: „... dans la mesure où des aides accordées à un pays tiers par un accord avec celui-ci sont alimentées par le budget communautaire, la Communauté est seule compétente pour conclure cet accord. Ceci est vrai, quelle que soit l'origine des fonds alimentant le budget communautaire (contributions nationales ou ressources financières propres).”

⁴³ I s a a c, p. 99.

4.1. Interprétation de l'accord d'association

L'économie de la rédaction des accords extérieurs de la Communauté ne permet pas toujours de donner aux expressions utilisées une signification précise. Les notions et dispositions d'un accord exigent ainsi une interprétation qui prend habituellement soit la forme d'une interprétation textuelle, soit celle d'une interprétation constructive.

L'interprétation textuelle (littéraire) se réalise soit

- (a) par explications à l'intérieur du texte par le biais du renvoi à une partie de l'accord où les notions vagues sont cumulativement interprétées⁴⁴,
- (b) par l'interprétation donnée par les annexes, protocoles, déclarations conjointes ou par renvoi à une disposition du traité de Rome; les deux premières catégories étant habituellement déclarées composantes de l'accord en question⁴⁵.

L'interprétation extratextuelle, constructive (prononcée par une autorité habilitée à l'interprétation) a lieu en cas de lacune de l'interprétation constructive.

En cas où l'Accord qui ne mentionne pas expressément la compétence d'interprétation, il est à conclure qu'une telle compétence appartient au Conseil d'association habilité (par l'article 103 dans le cas des accords européens) à „apprécier toute question importante découlant du cadre de l'accord”.

Une telle interprétation au sein du Conseil d'association peut parfois servir à effacer les divergences entre les opinions des parties contractantes dans le cas où – pour le champ d'application communautaire – la Cour, saisie par un recours préjudiciel, a donné aux notions utilisées dans cet accord (y compris antérieurement à la conclusion de cet accord) une signification précise, différente de celle soutenue par le pays associé.

En effet, dès que la Cour a attribué aux accords conclus avec des pays tiers et au droit d'association dérivé (établi par le comité mixte ou conseil d'association) la qualité des actes pris par une institution communautaire au sens de l'article 189 du traité C.E.E.⁴⁶, rayant ainsi la frontière entre les actes unilatéraux et ceux pris par le biais d'une négociation au niveau international, la question de compétence d'interprétation des accords extérieurs par la Cour ne se pose pas⁴⁷.

Par cet accès réaffirmé à plusieurs reprises dans sa jurisprudence, la Cour a créé le problème théorique suivant: pendant des négociations au sein du Conseil d'association, les représentants de la Communauté sont tenus par l'interprétation

⁴⁴ Par exemple l'article 44 de l'Accord.

⁴⁵ Par exemple protocole N° 4 ou l'article 63, paragraphe 4, alinéa (a) de l'Accord.

⁴⁶ Voir C.J.C.E. 24.11.1977, aff. 65/77, *Razanatsimba*, Rec. p. 2229 à propos de la Convention de Lomé I; 30.11.1977, aff. 52/77, *Cayrol*, Rec. p. 2261 concernant l'accord avec l'Espagne de 1970; 30.9.1987, aff. 12/86, *Demirel*, Rec. p. 3747 concernant l'accord avec la Turquie; 26.10.1982, aff. 104/81, *Kupferberg*, Rec. p. 3641; 31.1.1991, aff. 18/90, *Kziber*, Rec. p. 199 concernant l'accord avec le Maroc.

⁴⁷ Voir C.J.C.E. 30.4.1974, *Haegemann*, aff. 181/73, Rec. p. 449 concernant l'accord d'association avec la Grèce, complété par l'affaire 192/89 *Sevince*, Rec. 3461 (1990).

de la Cour en vigueur, tenu pour une composante du droit communautaire. Ainsi ces représentants n'ont aucune liberté de manoeuvre pour négocier. Bien que l'interprétation relève de la compétence du Conseil d'association, le résultat d'une négociation interprétative à son sein peut soit correspondre à l'interprétation de la Cour, soit laisser la question non tranchée, ce qui est inacceptable pour la mise en oeuvre d'un tel accord. Sous l'angle du pays associé il ne reste aucune liberté de négociation, le moyen principal d'atteindre des résultats au niveau international. En d'autres termes, si le caractère international d'un tel accord n'est pas ici gravement affaibli, tous les accords d'association conclus par la Communauté sont au moins quelque peu hypocrites en remplaçant silencieusement une disposition stipulant qu'un tel accord devait être interprété par la Cour.

Un aspect d'interprétation de la Cour reste à considérer: dès l'affaire *Demirel*, la Cour distingue son double rôle d'interprète des accords d'association qui ont le caractère mixte. Dans ce cas-là des gouvernements allemand et britannique ont fait valoir que lorsqu'il s'agit d'un accord mixte, la compétence d'interprétation de la Cour ne pourrait pas s'étendre aux dispositions par lesquelles les Etats membres ont pris les engagements envers l'Etat tiers dans le cadre de leurs compétences propres, car il s'agit des obligations qui n'appartenaient pas à l'ordre juridique communautaire. Cette argumentation fondée a mené la Cour à dissocier sa compétence d'interprétation en deux volets:

- (a) compétence non contestable d'interprétation des dispositions dont le contenu est matériellement appréhendé par l'ordre communautaire, e
- (b) pouvoir d'interprétation de l'accord aux seules fins de l'application uniforme des dispositions dont le contenu matériel est exécutable dans les différents ordres juridiques internes.

4.2. Effet direct

L'effet direct d'une norme communautaire signifie que celle-ci est susceptible d'être invoquée directement par les justiciables devant les juridictions d'un ordre juridique déterminé⁴⁸.

Dès lorsque les accords externes de la Communauté et les décisions prises par le conseil d'association institué par cet accord (ces dernières appelées aussi „droit d'association dérivé”) sont considérés normes du droit communautaire⁴⁹, il convient d'examiner – hors de leur primauté et l'applicabilité immédiate⁵⁰ – leur effet direct par rapport au droit national.

Selon la Cour, les traités communautaires conclus avec des pays tiers – y compris des accords d'association – ne sont pas en principe dépourvus de cet

⁴⁸ Voir C.J.C.E., aff.: 9/70, *Grad*, Rec., 1970, 825.

⁴⁹ Voir *supra* 4.1 „Interprétation”.

⁵⁰ Il en résulte que tout manquement d'un Etat membre au respect d'un accord de la Communauté avec un pays tiers est susceptible de donner lieu à un recours sur base de l'article 169, voir 170 du traité C.E.E.; voir Manin, *L'article 228(2) du Traité C.E.E.*, Mélanges Teitgen, 289 et 294 (1984).

effet.⁵¹ Mais sa mise en oeuvre en ce qui concerne certaines dispositions des accords d'association n'est pas inconditionnelle. La Cour exige que les critères pareillement valables pour les normes communautaires d'origine interne soient satisfaits: clarté, inconditionnalité et perfection juridique.⁵² En même temps, la Cour refuse d'écarter automatiquement l'effet direct de ces accords pour raison de leur nature ou économie de rédaction, en d'autres termes elle prend en considération le caractère différent des normes intracommunautaires.

Dès l'arrêt Demirel il est établi que l'effet direct soit applicable dans le seul cas des compétences communautaires couvertes par les traités de Rome et Paris avec les réserves y incorporées. L'état actuel de partage des compétences joue ainsi un rôle considérable.

L'effet direct ainsi délimité est susceptible de créer un déséquilibre juridique dans l'exercice du principe de réciprocité dans le cas de non-transposition ou transposition tardive des accords d'association par la législation nationale des pays tiers (associés) dualistes: leurs ressortissants bénéficieront dans la Communauté de certains droits dont les équivalents ne seraient pas temporairement accordés aux ressortissants communautaires.

Les conséquences juridico-financières d'effet direct résultant des arrêts de la Cour, multipliées parfois encore par l'effet rétroactif de ceux-ci, ont menés les Etats membres à se défendre contre de telles conséquences. Certains auteurs étendent – partiellement à juste titre – ce nouvel accès des Etats membres (reposant sur la volonté de priver notamment les dispositions concernant la libre circulation des travailleurs de tout effet utile) vers leurs engagements extracommunautaires aussi aux accords européens, notamment aux dispositions relatives au mouvement des travailleurs. *Partiellement*, bien que l'Accord reflète un certain effort des Etats membres d'ôter tout effet direct utile à ces dispositions en outre par des formules comme (par exemple) „conformément aux conditions et modalités applicables dans les Etats membres”. Compte tenu (1) de la tendance de la Cour de prendre en considération l'économie de la rédaction du texte de tels accords, (2) de la déclaration conjointe N° 2 annexée à l'accord européen, selon laquelle la notion „conditions et modalités en pratique dans les pays concernés” implique des règles communautaires, s'il y a lieu; et en plus (3) du fait que la Cour avait déjà l'occasion de constater qu'un renvoi d'un acte communautaire à une norme nationale ne crée pas de menace à la perfection juridique d'un tel acte, une nouvelle conciliation par la Cour sera nécessaire pour évaluer si l'effort sus-mentionné des Etats membres est suffisamment efficace.

La position de la Cour concernant sa compétence d'interprétation relative aux domaines extracommunautaires, où cette compétence a lieu seulement afin

⁵¹ Voir C.J.C.E. 24.4.1982, aff. 17/81, *Pabst*, Rec. p. 1371.

⁵² Une disposition d'un accord conclu par la Communauté avec des pays tiers doit être considérée comme étant d'application directe lorsque, eu égard à ses termes ainsi qu'à l'objet et à la nature de l'accord, elle comporte une obligation claire et précise qui n'est subordonnée, dans son exécution ou dans ses effets, à l'intervention d'aucun acte ultérieur – C.J.C.E. du 31.1.1991, aff. 18/90, *Kziber*, Rec. p. 199.

de soutenir l'uniformité et la cohérence de l'ordre juridique communautaire et son application, s'étend aussi à l'effet direct en privant les domaines en question de celui-ci⁵³.

5. Typologie des accords d'association

Il est nécessaire de dresser une typologie des accords d'association afin de définir en leur sein la place des accords européens. Deux angles d'étude sont possibles lorsque l'on considère les accords d'association: suivant le critère territorial⁵⁴ ou celui de la base juridique⁵⁵, utilisé ci-dessous. Ce plan pose une difficulté grave à surmonter: le manque de référence expresse à une base juridique, c'est à dire à un article du traité. Cette lacune se justifie en outre par le caractère de droit international des traités concernés. Cette même observation est valable pour les accords européens, bien que, pendant les cinq dernières années, la base juridique des accords conclus par la Communauté soit indiquée plus souvent qu'auparavant⁵⁶.

Ce dernier plan est certes un élément de référence plus solide que la qualification et l'appellation de l'accord, mais, en l'absence de jurisprudence de la Cour et compte tenu des considérations politiques inévitables qui président souvent au choix de la base juridique d'un accord, cette base juridique n'est pas non plus absolument concluante pour la doctrine⁵⁷. Ainsi des accords dits d'association peuvent-ils n'avoir en fait qu'un contenu commercial et des accords fondés sur l'article 113 du traité C.E. peuvent-ils s'apparenter à des accords d'association.

A la suite de cette observation plusieurs bases juridiques peuvent être trouvées dans la pratique communautaire:

- (a) l'article 238 du traité C.E.E. et l'article 206 du traité C.E.E.A.,
- (b) l'article 113 du traité C.E.E.⁵⁸ et
- (c) les articles 131 – 136 bis du traité C.E.E. prévoyant aussi la conclusion de certains accords d'un caractère juridique assez différent.

Sous l'angle de la compétence de la Communauté de conclure des accords extérieurs les indications susmentionnés présentent de telles compétences expressément prévues par les traités.

⁵³ Voir aff. *Dzodzi*, Rec. 1990, 376.

⁵⁴ Choisi par exemple par *Cartou*, p. 748.

⁵⁵ Cf. *Flaesch-Mouglin*, p.89 et suiv.

⁵⁶ Selon Mme *Flaesch-Mouglin*, p.92, les accords des cinq dernières années „ont finalement été conclus par référence expresse à une base précise du Traité, alors que cela n'avait pas été le cas antérieurement". Les accords européens et leurs accords intérimaires prouvent le contraire, n'ayant aucune référence à une base juridique du droit communautaire.

⁵⁷ *Loüis*, p. 86.

⁵⁸ La nouvelle rédaction de l'article 228 contenue dans le traité de Maastricht est consciente de la distinction entre des accords d'association au sens étroit, fondés sur l'article 238 du traité et des autres accords d'association (plutôt ceux de coopération) fondés sur l'article 113 du traité, en distinguant entre „les accords visés à l'article 238" et „les autres accords qui créent un cadre institutionnel spécifique en organisant des procédures de coopération".

5.1. Accords fondés sur l'article 238 du traité C.E.

L'article 238 du traité C.E. est „traditionnellement réservé aux partenaires privilégiés”⁵⁹ en habilitant la Communauté à „conclure avec un Etat tiers, une union d'Etats ou une organisation internationale, des accords créant une association caractérisée par des droits et obligations réciproques, des actions en commun et des procédures particulières”. En vertu de cette disposition ce type d'association est accessible non seulement aux Etats européens, mais à tous les sujets de droit international. Le contenu n'est pas matériellement limité aux questions réglées par les traités fondamentaux, mais touche des domaines non expressément prévus dans les traités⁶⁰, ce qui est appuyé par la théorie des compétences externes de la Communauté⁶¹.

Parmi les accords appartenant à ce groupe il convient de distinguer deux grandes catégories de traités: les accords conclus dans une perspective d'adhésion et ceux de coopération conclus en vue du développement économique et social.

5.1.1. Accords d'association conclus dans une perspective d'adhésion

Ce type d'association appelé „dynamique”⁶² ne peut prendre tout son sens qu'à la lumière de l'article 237 (aujourd'hui article O du Traité UE⁶³) du traité C.E.E. qui réserve l'adhésion d'un nouveau candidat (en comparaison à l'article 238) aux (1) Etats „limitation juridique” (2) d'Europe „limitation territoriale”⁶⁴.

Stade préliminaire à l'adhésion, „antichambre de l'adhésion”⁶⁵, l'association „dynamique” est soumise à des conditions non écrites dans l'article 238 du traité C.E.E., mais clairement lisible dans les textes de traités de Paris et de Rome, formulées de manière complexe par le Conseil Européen de Copenhague en juin 1993 qui les diffère en trois catégories: conditions

- (a) politiques: démocratie, l'Etat de droit, droits de l'homme, protection des minorités,⁶⁶

⁵⁹ Flaesch-Mougin, p. 89.

⁶⁰ Isaac, p. 93. Schweitzer-Hummer, p. 73.

⁶¹ Les opinions contraires qui veulent réduire l'objet de traités aux seules relations commerciales ne posent pas de grands problèmes à la pratique, qui résout cette situation par le régime des accords mixtes.

⁶² C. Plesow in: Österreichische Zeitschrift für Aussenpolitik 196 (1967).

⁶³ „Tout Etat européen peut demander à devenir membre de l'Union.”

⁶⁴ Le Royaume du Maroc en a consolidé le principe en déposant une demande d'adhésion le 8 juillet 1987 qui a été refusée en dépit d'une contiguïté géographique nouvelle fondée sur la participation de l'Espagne à la Communauté ainsi qu'en dépit de liens historiques et d'intérêts stratégiques (Bull. C.E. N° 9/1987, point 2.2.19).

⁶⁵ Louis, p. 89.

⁶⁶ Ce principe a été plusieurs fois réaffirmé:

- (a) positivement:
- (aa) les 7 et 8 avril 1978 les chefs d'Etats et de gouvernements des Neuf (à ce temps-là) ont déclaré solennellement à l'occasion du Conseil européen de Copenhague que „le respect et le maintien de la démocratie représentative et des droits de l'homme dans chacun des

- (b) économiques: l'économie du marché, aptitude de faire face à la pression de la concurrence et du marché de la Communauté,
- (c) autres: une poursuite des objectifs de l'Union politique, économique et monétaire.⁶⁷

Parmi les accords d'association „dynamique” trois catégories peuvent être distinguées:

- (a) les accords prévoyant expressément l'adhésion, ce qui est le cas des accords avec la Grèce⁶⁸, la Turquie⁶⁹ et des accords européens avec la

Etats membres constituent des éléments essentiels de l'appartenance aux Communautés européennes.” (RAUX, p. 4);

- (ab) La Communauté „aspire à une union sans cesse plus étroite entre les peuple de ses Etats membres, symbolisée par un parlement européen aujourd'hui élu au suffrage universel direct, prise de la Charte des droits de l'homme d'O.N.U., Charte sociale européenne etc. (RAUX, p. 4);
- (ac) par écrit:
 - alinéa 3 du préambule du Traité sur UE „confirmant leur attachement aux principes de la liberté, de la démocratie et du respect des droits de l'homme et des libertés fondamentales et de l'Etat de droit”,
 - art. 130u, al. 2 du Traité CE: „La politique dans ce domaine (i.e. dans la Coopération au développement) contribue à l'objectif général de développement et de consolidation de la démocratie et de l'Etat de droit, ainsi qu'à l'objectif du respect des droits de l'homme et des libertés fondamentales.”
- (b) négativement:
 - (ba) Le Parlement a incité le Conseil et la Commission (voir Rapport Birkelbach sur les aspects politiques et institutionnels de l'adhésion et de l'association à la C.E.E., Documents de séance N° 122 du 15 janvier 1962) à écarter toute demande d'association émanant de l'Espagne franquiste ou du Portugal de Salazar (voir Débats P.E., séances du 27 au 30 mars 1962, p. 81);
 - (bb) Faute de pouvoir dénoncer son accord d'association avec la Grèce des colonels (terminé en 1974), la Communauté en a gelé l'application dès que la mise en oeuvre de ses clauses exigeait une décision de sa part ou de la part des institutions mixtes;
 - (bc) les relations se sont dégradées avec la Turquie après son intervention militaire en Chypre, à la suite du coup d'Etat en 1980; un plus grand respect des principes démocratiques et des droits de l'homme a favorisé „la normalisation” sur la base de nouveaux protocoles (J.O.C.E. N° L 297 du 21 octobre 1987);
 - (bd) les négociations d'association avec les pays d'Europe centrale ne commençaient qu'après l'évolution vers des structures démocratiques en 1989/90.

⁶⁷ Conclusions de la présidence du Conseil européen, Copenhague les 21 – 22 juin 1993, point 7A/iii, SN 180/93, p. 13.

⁶⁸ Signé le 9 juillet 1961 (J.O.C.E. N° 26 du 18 février 1963, p. 293 et suiv., entrée en vigueur le 1er novembre 1962; le plus ambitieux accord d'association avant les accords européens. Quant à la formulation de la promesse de l'adhésion, l'alinéa 4 du préambule de cet accord stipule: „Reconnaissant que l'appui apporté par la Communauté économique européenne aux efforts du peuple hellénique pour améliorer son niveau de vie facilitera ultérieurement l'adhésion de la Grèce à la Communauté.”

Ensuite, l'article 72 du même accord stipule:

Lorsque le fonctionnement de l'accord d'association aura permis d'envisager l'acceptation intégrale de la part de la Grèce des obligations découlant du traité instituant la Communauté économique européenne, les Parties contractantes examineront la possibilité d'une adhésion de la Grèce à la Communauté.”.

⁶⁹ „Reconnaissant que l'appui apporté par la Communauté économique européenne aux efforts

- Hongrie, la Pologne, la République tchèque, la Slovaquie, la Roumanie et la Bulgarie;
- (b) les accords avec les pays européens ne prévoyant pas expressément l'adhésion mais donnant à celle-ci la possibilité d'intervenir; il s'agit des accords avec la Malte⁷⁰ et le Chypre⁷¹;
 - (c) l'accord avec l'A.E.L.E. créant l'Espace économique européen: il s'agit du premier accord d'association fondé sur l'article 238 du traité C.E.E. avec une organisation d'Etats; plusieurs Etats membres de l'A.E.L.E. ont déjà présenté leurs demandes d'adhésion à la Communauté⁷². Le Conseil „Affaires générales” a décidé de lui donner (comme aux accords européens) le *caractère mixte*⁷³ en raison du volet „dialogue politique”, politique extérieure C.E.C.A. et certains aspects de la propriété intellectuelle⁷⁴.

5.1.2. *Accords de coopération conclus en vue de développement économique et social*

A la différence des accords „dynamiques”, ces accords sont caractérisés par l'absence de perspective d'adhésion⁷⁵. Ils trouvent leur origine dans les relations particulières que les pays et territoires d'outre mer ont entretenues avec leur ancienne puissance coloniale⁷⁶.

Deux groupes de traités sont à distinguer: les accords de coopération conclus avec les pays du Bassin méditerranéen et ceux conclus avec les pays d'Afrique, des Caraïbes et du Pacifique.

du peuple turc pour améliorer son niveau de vie facilitera ultérieurement l'adhésion de la Turquie à la Communauté.”

– l'alinéa 4 du préambule de l'accord d'association signé le 12 septembre 1963 entre la Turquie et la Communauté, entré en vigueur le 1er décembre 1964 (J.O.C.E. N° L 217 du 29.12.1964, p. 3705)

⁷⁰ Signé le 5 décembre 1970, entré en vigueur le 1er avril 1972 (J.O.C.E. N° L 61 du 14 mars 1971); la politique de neutralité a jusqu'au présent écarté les perspectives d'adhésion.

⁷¹ Signé le 19 décembre 1972, entré en vigueur le 1er juin 1973 (J.O.C.E. N° L 133 du 21 mars 1973).

⁷² Sauf la Suisse les Etats membres de l'A.E.L.E. ont présenté leurs demandes d'adhésion.

⁷³ Après avoir rejeté une proposition de la Commission estimant que les matières n'entrant pas dans la compétence communautaire puissent faire l'objet de protocoles séparés; de cette manière l'Accord aurait un caractère „communautaire” – voir Agence Europe N° 5601 du 1.11.1991.

⁷⁴ Cf. les raisons générales de caractère mixtes, section 2, sous (D.) du présent chapitre.

⁷⁵ Ces accords ne peuvent conduire à des relations progressivement plus étroites avec la Communauté alors même qu'une évolution des domaines de coopération, ainsi que des instruments formels qui les accompagnent, est aisément décelable.

⁷⁶ En principe, la doctrine fournit une explication historique du régime juridique autonome de ces accords: en voyant l'association comme une adhésion politique de vue et une acceptation délibérée du système économique et social en vigueur dans la Communauté (voir section 1, § 2 „Définitions doctrinales”), certains Etats ont écarté par rapport aux anciennes puissances coloniales toute référence à la notion d'association (R a u x, p. 6).

A. Les accords de coopération avec les pays du Bassin méditerranéen prévus par déclarations annexées aux traités de Rome sous l'appellation „convention d'association économique” ont été signés avec

- (a) trois Etats du Maghreb: la Tunisie, l'Algérie, le Maroc, signés successivement les 25 au 27 avril 1976⁷⁷, et
- (b) les Etats du Machrek: Egypte, Syrie et Jordanie, signés le 18 janvier 1977⁷⁸.

B. Les accords de coopération conclus avec les pays d'Afrique, des Caraïbes et du Pacifique sont des actes établis avec les pays qui ont accédé à l'indépendance postérieurement à l'entrée en vigueur des traités de Rome, et dont les relations avec leurs anciennes puissances coloniales étaient réglées par la IV^e partie du traité C.E.E.. Ces pays ont conservé des relations privilégiées avec la C.E.E. dans le cadre de conventions d'association conclues respectivement:

- conventions de Yaoundé I. et II. avec les Etats africains et malgaches associés (les E.A.M.A. francophones)⁷⁹,
- convention d'Arusha avec la Tanzanie, l'Ouganda et le Kenya (Etats anglophones)⁸⁰, et
- conventions de Lomé I. – IV.⁸¹; après l'entrée de la Grande Bretagne dans la Communauté avec ses partenaires africains et après l'acceptation de coopération des pays des Caraïbes et du Pacifique, tous ces pays sont devenus les A.C.P. (69 pays d'Afrique, des Caraïbes et du Pacifique), parties à ces conventions, considérées comme le premier programme d'aide dans le monde.

5.2. Associations en vertu de l'article 113 du traité C.E.E.

Un certain nombre d'accords avec les Etats membres de l'A.E.L.E. (Association européenne de libre échange) dont le contenu correspond aux exigences de la notion d'association porte le nom d'association non pas pour des raisons politiques, mais ce sont des associations caractérisées par la doctrine comme „between Equals”⁸² ou „quasi-associations”⁸³. Pour éviter l'érection de nouvelles

⁷⁷ Les accords avec la Tunisie et le Maroc remplacent les accords du 28 mars 1963 (Tunisie) et du 31 mars 1969, dits – contrairement à leur contenu – „d'association”. Ce changement d'appellation n'est pas toujours parfaitement reflété par la doctrine – cf. par exemple Carrou, p. 758.

⁷⁸ Remplaçant les accords de libre échange de 1972.

⁷⁹ I. du 20 juillet 1963, J.O.C.E. N° 93 du 11 juin 1964, p. 1430; II. du 29 juillet 1969, J.O.C.E. N° L 282 du 28 décembre 1970, p. 51.

⁸⁰ Du 24 septembre 1969 avec Tanzanie, Ouganda, Kenya; J.O.C.E. N° L 282 du 28 décembre 1970, p. 54.

⁸¹ I. du 28 février 1975, J.O.C.E. N° L 25, p. 2; II. du 30 octobre 1979, Sartorius II, N° 161; III. du 8 décembre 1984, J.O.C.E. N° L 86, p. 3. du 31 mars 1986; IV. du 15 décembre 1989, J.O.C.E. N° L 170, p. 1.

⁸² Entre égaux – K. Lipstein: „The Legal Structure of Association Agreements with the EEC”, BYBIL 202 (1974 – 75).

⁸³ Louis, p. 160.

barrières entre les Etats d'Europe, l'article 113 du traité C.E.E. a servi à négocier des accords *sui generis* avec la Suisse⁸⁴, la Suède⁸⁵, l'Autriche⁸⁶, la Norvège⁸⁷ et l'Islande⁸⁸.

Un résumé succinct de ces accords est particulièrement intéressant en comparaison avec le contenu des accords européens: régime de libre échange réalisé en 5 étapes, l'exclusion de toute harmonisation contractuelle des politiques ou des législations⁸⁹, l'exclusion du domaine de l'agriculture en général, une clause évolutive prévoyant l'établissement de relations plus étroites par voie de révision du traité et l'institution d'un comité mixte dans chaque traité.

Ces accords viennent d'être remplacés par l'accord d'association conclu avec l'A.E.L.E.

5.3. Association en vertu de l'article 131 – 136 bis du traité C.E.

Les pays qui ont conservé des liens spécifiques (post-coloniaux) avec plusieurs Etats membres de la Communauté bénéficient de droits de coopération étroite avec la Communauté sur la base du Traité C.E.E. . Il ne s'agit donc pas d'une association contractuelle entre les souverains conformément au droit international. Par conséquent, la „convention d'application” selon l'article 136 du traité C.E.E. dont la conclusion est confiée à la Communauté, n'est pas un véritable accord d'association. C'est aussi pourquoi la doctrine peut constater – à juste titre – que „à cet égard le régime spécial d'association prévu par l'article 131 du traité C.E.E. au profit des pays et territoires entretenant des relations particulières avec des Etats membres (P.T.O.M.) ne constitue pas une véritable association, mais plutôt une modalité particulière de l'extension territoriale du traité”⁹⁰; conjointement avec l'élargissement du nombre de pays concernés par les articles 131 – 136 bis du traité C.E.E. (dont l'énumération figure à l'annexe IV du traité C.E.E.) et à l'occasion de l'adhésion de la Grande Bretagne, ces relations sont directement désignées comme „l'adhésion”⁹¹.

6. Appellation

Un des éléments relativement nouveaux qui soulève de nombreuses questions d'ordre et juridique et politique est sans aucun doute l'appellation des récents accords d'association. A défaut d'une explication officielle disponible, il est nécessaire de trouver des raisons probables qui avaient mené la Commission à ajouter aux nouveaux accords d'association l'adjectif „européens”.

⁸⁴ J.O.C.E. N° L 300 du 1972, p. 188.

⁸⁵ J.O.C.E. N° L 300 du 1972, p. 96.

⁸⁶ J.O.C.E. N° L 300 du 1972, p. 1.

⁸⁷ J.O.C.E. N° L 301 du 1972, p. 1.

⁸⁸ J.O.C.E. N° L 171 du 1973, p. 1.

⁸⁹ Sans interdictions d'alignements spontanés pris par les Etats; l'accord avec l'A.E.L.E. prévoit déjà une harmonisation.

⁹⁰ I s a a c, p. 26.

⁹¹ C a r t o u, p. 750.

6.1. Variabilité des appellations des accords d'association

La Communauté est dotée d'une habilitation découlant de l'article 238 du traité C.E. afin de conclure „des accords créant une association”, ce qui permet non seulement une grande souplesse quant au contenu de l'acte respectif, mais aussi à l'égard de l'appellation de celui-ci.

Dans sa réponse à une question parlementaire, la Commission soulignait que „le traité C.E.E. ... ne contient aucune définition précise des appellations des différentes catégories d'accords que la Communauté peut conclure dans le cadre de ses compétences. Tout comme leur contenu, la dénomination des accords de la Communauté ne relève d'ailleurs pas de la seule initiative de celle-ci⁹², mais est souvent le résultat d'une négociation avec ses partenaires”. „Il peut en résulter que des accords de contenu similaire reçoivent des appellations différentes et que des accords de contenu différent puissent avoir des appellations voisines⁹³.

En répondant à une question identique, le Conseil soulignait pour sa part que „les accords dits „de coopération” conclus par la Communauté peuvent avoir des contenus fort différents et c'est en fonction de ce contenu qu'est déterminée la base juridique à retenir⁹⁴.”

Ainsi les accords d'association au sens large peuvent être trouvés sous les appellations suivantes:

- accord d'association (conclu avec la Grèce, la Turquie, la Malte, le Chypre, la Tunisie en 1963 et le Maroc en 1969),
- accord européen d'association⁹⁵ (avec [la Tchécoslovaquie,] la Pologne, la Hongrie, la République tchèque, la Slovaquie, la Roumanie et la Bulgarie),
- convention d'association (Yaoundé I, II, Arusha),
- accord de coopération⁹⁶ (avec le Maroc de 1976, la Tunisie de 1976, l'Algérie, l'Egypte, la Syrie et la Jordanie),
- accord de libre-échange (avec la Suisse, l'Autriche, la Suède, la Finlande et la Norvège),
- accord commercial préférentiel (Israël, Liban),
- convention (Lomé I – IV).

⁹² Voir chapitre préliminaire, section 4 „Typologie”.

⁹³ Réponse de la Commission à la question écrite N° 731/77 de M. Gert Peterson, J.O.C.E. N° C 88 du 11 avril 1978, p. 2.

⁹⁴ Réponse du Conseil à la question écrite N° 732/77 de M. Gert Peterson, J.O.C.E. N° C 88 du 11 avril 1978, p. 3.

⁹⁵ Cette catégorie d'accords, ensemble avec la précédente, peut être considérée comme des accords d'association au sens étroit. Le traité de Maastricht prévoit une distinction entre des accords d'association par la nouvelle rédaction de l'article 228: son alinéa 3 distingue entre „les accords visés à l'article 238” et „les autres accords qui créent un cadre institutionnel spécifique en organisant des procédures de coopération” ce qui convient parfaitement aux accords d'association hors du sens étroit, surtout aux accords de coopération.

⁹⁶ Prévu par les annexes du traité de Rome sous l'appellation „conventions d'association”.

A l'heure actuelle il faut attendre le contenu des *accords de partenariat et de coopération* préparés pour la Russie, l'Ukraine et d'autres parties de l'ancienne URSS pour savoir s'il s'agit aussi d'accords d'association au sens large.

6.2. Motifs de l'appellation „accords européens”⁹⁷

Depuis le début des travaux préparatoires chacun des trois nouveaux accords d'associations a porté la dénomination „européen”. Celle-ci était officiellement présentée pour la première fois par la communication de la Commission du 27 août 1990. Cette appellation apparaît ensuite déjà régulièrement dans les textes suivants, bien qu'à cette époque-là, on ne pouvait pas encore constater avec certitude s'il ne s'agissait que d'une appellation auxiliaire. Toutefois de nombreux renvois ont signalé la nouveauté du contenu des accords en préparation.

Examinons ensuite la nouveauté de l'appellation „accord européen”: c'est pour la première fois qu'un accord d'une telle appellation apparaît dans le cadre communautaire. Elle est déjà présente dans le cadre européen: „l'accord européen relatif au travail des équipages des véhicules effectuant des transports internationaux par route (A.E.T.R.)” signé en 1962 dans le cadre de la Commission économique pour l'Europe des Nations-Unies⁹⁸, les „accords européens de distribution sélective dans la matière de droit des affaires, Accord européen sur l'échange de réactifs pour la détermination des groupes tissulaires et sanguins” (J.O.C.E. N° L 295 du 18.11.1977, p.8), „l'Accord européen sur la circulation des personnes” signé au sein du Conseil de l'Europe en 1957 en matière de droit social sont des exemples d'usage préalable de cet adjectif pour marquer certains accords conclus en Europe. Résumons par le constat que cette appellation n'est neuve que dans le cadre communautaire.

Mais si l'Accord, lui-même, porte la dénomination précitée, il est nécessaire de trouver pour cela une motivation correspondante, si l'on ne veut pas se heurter à la question: lequel des accords d'association dans le sens étroit n'est pas „européen”, notamment s'il s'agit „d'antichambre d'adhésion” dont la réglementation selon l'article O du traité sur UE commence par les mots „tout Etat européen...”?

La portée politique de l'accord européen d'association, bien qu'elle soit très large, n'est elle-même pas suffisante pour qu'une appellation soit traitée comme une notion juridique.

La reconnaissance d'une appellation comme une notion juridique est possible au moment où une distinction quant au contenu en comparaison avec des actes

⁹⁷ L'appellation complète des accords en question est „l'accord européen établissant l'association entre ...”. La pratique utilise soit l'acronyme „l'accord européen” (par ex. Bulletin C.E.), soit „l'accord européen d'association” (par ex. Agence Europe N° 5683 du 6 mars 1992).

⁹⁸ Cette convention n'est néanmoins pas entrée en vigueur, faute d'un nombre de ratifications suffisant. A partir de 1967 elle fait l'objet d'une négociation de révision.

précédents est à prouver. L'utilisation de l'appellation „accord européen” est assujettie aux observations suivantes:

- (a) le contenu politique fort a pris la forme de droit⁹⁹, ce qu'on ne peut pas trouver dans les accords d'association précédents;
- (b) la réglementation de la coopération culturelle présente aussi un aspect nouveau échappant manifestement à la compétence communautaire¹⁰⁰,
- (c) la comparaison formelle avec l'accord d'association le plus élaboré à ce jour, l'accord conclu avec la Grèce, attire notre attention:
 - l'Accord: 123 articles, Grèce: 77 articles¹⁰¹;
 - les domaines nouveaux des Accords: la pêche, l'environnement, la coopération culturelle et politique;
- (d) l'intention des auteurs de l'Accord d'introduire une nouvelle notion découle déjà de l'appellation du traité lui-même: „l'accord européen établissant l'association...”; sans une intention correspondante une telle prolixité est immotivable;
- (e) l'élargissement du cadre de l'Accord quant au contenu a pour conséquence que plusieurs définitions doctrinales d'association jusqu'ici valables ne sont plus applicables¹⁰²;
- (f) l'obligation de rapprochement de droit est une nouveauté de contenu considérable.

Certes, aucune des raisons sus-mentionnées ne suffit pas elle-même pour justifier une valeur juridique de l'adjectif „européen”. C'est peut-être la multitude des nouveautés de contenu qui a mené la Commission à l'introduction de cette nouvelle expression. On ne peut pas déduire de l'appellation en question que la Commission suive l'intention de considérer comme non-européens les autres accords d'association au sens étroit¹⁰³. Au contraire, l'introduction de la nouvelle appellation suit la loyauté constante de la Commission par rapport aux appellations des accords d'association: lorsque la Commission ne conteste pas le caractère associatif des accords conclus sous une autre dénomination, on ne peut pas la soupçonner de vouloir affaiblir le caractère européen des accords précédents de ce type.

7. Conclusion

Afin de caractériser succinctement les données étudiées, on peut détecter un certain nombre d'éléments juridiques importants qui permettent d'arriver aux conclusions suivantes:

⁹⁹ Cf. chapitre „Dialogue politique” de l'Accord européen.

¹⁰⁰ Cf. chapitre „Coopération culturelle” de l'Accord.

¹⁰¹ La volume des accords européens était plusieurs fois dépassé par l'accord d'association avec l'A.E.L.E. instaurant l'espace économique européen. Sous l'angle chronologique, cet accord est néanmoins postérieur aux accords européens.

¹⁰² Voir chapitre préliminaire, section „Définitions doctrinales”.

¹⁰³ Voir chapitre „Typologie” de cet article.

- (a) tout d'abord il s'agit d'un **accord international** entre les sujets juridiques souveraines conformément au droit international public¹⁰⁴.
- (b) même si l'appellation étroite d'un accord ne révèle rien elle-même du rapport de cet acte au droit communautaire, l'Accord est un véritable **accord d'association**,
- (c) l'**acte de la solidarité européenne** est caractérisé par l'asymétrie au profit du pays associé, résultant d'une décision politique, non économique, une décision stratégique pour la stabilité du Continent.

Les considérations politiques relatives au développement de l'Europe centrale et orientale préoccupent aujourd'hui les négociations des Douzes: „La paix et la sécurité en Europe dépendent de la réussite de ces efforts”,¹⁰⁵ constate le Conseil Européen de Copenhague. „Il y a une contradiction objective entre l'approfondissement et l'élargissement” a constaté M. Jaques Delors devant le Parlement européen le 8 avril 1992¹⁰⁶ en parlant de l'impossibilité de réconcilier l'adhésion des nouveaux candidats avec le développement des nouveaux domaines de l'Union. Cette évolution ne doit pas être simplement évaluée sous l'angle des accords européens, mais mérite d'être intégrée dans une vue générale de l'avenir de la Communauté. L'ambassadeur Renato Ruggiero a prononcé le 6 mars 1992 à Genève ses observations concernant les responsabilités de l'Europe communautaire face aux pays de l'Est. Sans invoquer les dettes historiques, il attire l'attention sur le fait qu'il y a, après les trois pays récemment associés, devant la porte communautaire une file de candidats demandant des liens plus étroits avec la Communauté. Il souligne le besoin de concilier la responsabilité de développement dans ces pays avec la sauvegarde des objectifs de la C.E. qui nécessite l'établissement d'une stratégie nouvelle (d'après cet auteur, par une construction européenne nouvelle, distincte de la C.E.). Ces observations sont soutenues par des faits découlant du diagramme suivant:

342 mil. 12 pays	373 mil. 19 pays	498 mil. 27 pays*	554 mil. 30 pays#	562 mil. 33 pays	693 mil. 44 pays	840 mil. 45 pays
1994	+ A.E.L.E (E.E.E.)	+ Europe centrale et orientale	+ Chypre Malte Turquie	+ 3 pays baltes	+ autres pays de l'Ex-URSS sans Russie	+ Russie

* la première fois qu'une région de religion musulmane serait incorporée au territoire de la Yougoslavie;

à ce moment la C.E. aurait déjà 16 langues et des différences économiques importantes: Suisse – 25.581 ECU par habitant par an, Turquie – 1.309 ECU par habitant par an.

¹⁰⁴ Ce caractère se traduit d'ailleurs par l'art. 105 § 2 de l'Accord selon lequel l'institution principale créée par celui-ci – le Conseil d'association – aboutit aux résultats de ses délibérations par un consentement des parties, c'est-à-dire sans un vote majoritaire etc. ce qui est typique au niveau international.

¹⁰⁵ Conclusions de la présidence du Conseil européen, Copenhague les 21 – 22 juin 1993, point 7/A/iii, SN 180/93, p. 13.

¹⁰⁶ Agence Europe N° 5710 du 13 et 14 avril 1992, p. 7.

Si l'Europe n'aboutit pas à une telle conciliation politique, M. Ruggiero prévoit que „l'horloge de l'histoire pourrait retourner en arrière, retourner aux nationalismes, aux conflits qui ont caractérisé notre passé.” Et il ajoute: „Dans le continent européen se joue peut-être encore une fois une grande partie de la sécurité de notre monde”. M. Ruggiero veut ainsi dire que si cette mission devait échouer, on risquerait une extension graduelle des forces de désagrégation de l'Est vers l'Ouest, les disputes territoriales et les affrontements nationalistes, accompagnés par la fermeture des frontières économiques.

Cette observation, peu juridique, mérite sa place à la fin du présent article, car elle concerne le destin de tous les accords européens: l'exemple yougoslave donne lieu aux réflexions peu optimistes en cas d'échec de la construction européenne.

Some Problems Regarding Ratification and Implementation of the European Economic Area Agreement in the EFTA Member States

BERTIL COTTIER
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1. Introduction

Despite several difficulties, the European Economic Area Agreement, concluded in Oporto on May 2, 1992, finally entered into force the 1st of January 1994, bringing together in a single market the twelve member states of the European Economic Community and five of the seven members of the European Free Trade Association (Austria, Finland, Iceland, Norway and Sweden; Liechtenstein will join in the very near future; Switzerland will stay outside for the time being.¹ The EEA will constitute the world's biggest trading area encompassing over 370 million people. Under the terms of this agreement, all restrictions on the free movement of goods, services, labour and finances are removed; in addition, the treaty provides for increased cooperation in the fields of social affairs, consumer protection, research and development, as well as education and tourism.

The purpose of the present contribution is not to comment upon the characteristics of the EEA Agreement – numerous juridical contributions have been devoted to that subject,² but to focus on the internal aspects of the EEA Agreement in the seven EFTA countries. In this respect, we will deal first with the outcome of the different ratification processes in the seven EFTA countries, bearing in mind that two rounds of ratification were necessary: one in 1992 for the EEA Agreement itself, a second one in 1993 for the Protocol adjusting the EEA Agreement following its rejection by the Swiss people. In the second part of this study, we will consider the general problem of ensuring some kind of direct applicability and primacy of EEA law; this problem concerns primarily the four Nordic member states and their dualistic commitment to international agreements. In the third part of this report, we will, as a matter of balance,

¹ Cf *infra* II.1.

² See: among others S. Norberg et alia: *EEA Law: A Commentary on the EEA Agreement* (1993).

switch to the two (three³) Alpine member states and discuss the issue of implementing EEA law in the light of the two distinctive features of those countries: on the one hand, their federalistic structure, on the other hand, the institution of the referendum.

2. The ratification process

2.1. Ratification of the EEA Agreement itself

All in all, six of the seven EFTA countries ratified the EEA Agreement itself: in chronological order Austria, Norway, Finland, Sweden, Liechtenstein and Iceland; more often than not, the members of parliament gave an overwhelming support to the Agreement.⁴ Only in Sweden and in Iceland was a simple majority vote sufficient;⁵ in Austria, in Finland and in Norway qualified majorities were required by way of the Constitution. This is because the creation of the EFTA Surveillance Authority and the EFTA Court needs, to a certain extent, a transfer of executive and judicial powers to those new international bodies responsible for the application of Community law in the EFTA States, particularly in the field of competition. Such an entrustment of powers requires a two-thirds majority of the parliamentarians in Austria and in Finland and a three-quarters majority in Norway.⁶ In none of those five countries was a referendum needed, although the Austrian, Icelandic and Norwegian opponents of the EEA Agreement – there were quite a lot of them among the population – wanted a popular vote to be held, at least a consultative one. They did not succeed: in Austria, the Parliament rejected a petition for a plebiscite launched by environmentalists and signed by more than 120.000 citizens. In Norway, the Government did not even put the question on the agenda, as many political leaders still have some mixed feelings about referendums; one may remember that in 1972 the Norwegian people chose with a tiny margin to stay outside the EEC.⁷ In what concerns Iceland, opponents

³ Despite the fact that the Swiss people finally rejected the EEA Agreement, we will take into account the planned Swiss solutions to the internal legal problems linked to the implementation of this treaty. The more so, as the Swiss *no* may not be a final one. A couple of weeks after the negative vote, different groups favoring European integration launched a campaign in order to collect the necessary 100.000 signatures to obtain a new plebiscite on the EEA Agreement (See: „Initiative populaire pour notre monde au coeur de l'Europe”, *Feuille Fédérale* 1993 I p.126). The needed support was rapidly found, which means that the EEA issue will be brought back to the Swiss people in a couple of years. In addition, article 128 of the EEA Agreement, as amended by the Protocol Adjusting the EEA Agreement, creates the possibility for Switzerland to become a party to the treaty.

⁴ Rather reluctant was only the Icelandic Parliament: 33 votes in favor with 23 against and 7 abstentions.

⁵ Sweden: article 2, chapter 10 of the Constitution; Iceland: article 21 of the Constitution.

⁶ Austria: article 50 section 3 of the Constitution in connection with article 44 section 1 and 2 of the Constitution; Finland: article 33 and article 69 sec. 1 of the Constitution in connection with article 67 of the Act of the Parliament; Norway: article 93 section 1 of the Constitution.

⁷ 53, 5% of the people voted against EEC membership.

turned to the President, urging her not to sign the EEA Act passed by the Parliament the 12th of January 1993, the consequence of which would have been to bring the matter automatically to the people;⁸ the President refused to stand against the will of the Parliament.

As a matter of fact, it is only in Liechtenstein and in Switzerland that the EEA Agreement has been submitted to the people; both constitutions give the people the possibility to vote on relatively important international treaties.⁹ Although Switzerland and Liechtenstein have very close political and economic links, the results of the two plebiscites turned out not to be the same. The 6th of December 1992, the Swiss citizens finally rejected the EEA Agreement, despite the fact that its Parliament, a couple of weeks before, had given its approval with a large majority (only 65 deputies out of 246 voted against). This referendum was a peculiar one, in that not only the majority of the people itself was needed, but, as for a constitutional change, it was in addition required that a majority of the federal states, the so called cantons, give their support. Neither the people nor the cantons approved the Agreement; all in all, 52 % of the citizens voted against, as well as 16 cantons.¹⁰ However, the EEA Agreement got huge support from the french speaking part of Switzerland where more than 70 % of the people gave their approval.

There was much concern that the Swiss *no* to the EEA Agreement would pave the way to a negative decision in Liechtenstein, where the people were due to go to the polls one week later.¹¹ But surprisingly the outcome was positive: more than 55 % of the citizens of this tiny alpine country backed the agreement, showing the same feeling of clear cut political independence towards Switzerland as had been the case two years before when Liechtenstein decided to join the United Nations despite a negative stand of the Swiss citizens.

⁸ Article 26 of the Icelandic Constitution states that if the President disapproves a bill it shall be submitted to a plebiscite by secret ballot and if rejected shall become invalid.

⁹ According to article 63bis of the Constitution of Liechtenstein (a provision adopted in March 1992 in the turmoil of the EEA debate), 1500 citizens or four communes can call for a plebiscite to be held on an international agreement; in the case of the EEA Agreement, the Parliament preempted this unavoidable issue by submitting the Agreement to the people without delay. The same hapened in Switzerland, but at an even earlier stage: the Government itself decided that a referendum was to be held, pointing out the exceptional importance of the matter (see: its explanatory report to the ratification of the EEA Agreement, *Feuille fédérale* 1992 IV 529); for more information regarding the subtilities of the Swiss referendum in the context of international treaties, see: M. H a y m a n n: „Approaching Europe: Swiss Prospectives and Dilemmas”, in: „Legal Issues of European Integration 68 ff (1992).

¹⁰ Exactly speaking: 1 786 708 *no*, 1 762 872 *yes*; 14 cantons and 4 half-cantons were against, 6 cantons and 2 half-cantons in favor.

¹¹ To choose the date of the referendum in Liechtenstein turned out to be a constitutional nightmare: the head of State, Prince Hans Adam II, who is one of the last European monarchs with real powers, favored a date prior to the Swiss referendum as a sign of independence towards Switzerland; the government of Liechtenstein was more sensitive to the broad economic ties the principality has with its neighbour and wanted to wait for the result of the Swiss referendum. After a fierce struggle – 2000 people took to the streets to protest against the prince's tough stand – Hans Adam accepted to postpone the plebiscite till one week after the Swiss one.

2.2. Ratification of the Adjusting Protocol

Following the negative decision of the Swiss people, the EEA Agreement needed to be adjusted in order to be brought into force between the eighteen remaining Contracting Parties. Though the amendments were not of a substantial nature, but merely technical (deletion of all references and provisions relating to Switzerland for instance), the Protocol adjusting the EEA Agreement¹² to the new situation had to be ratified by all Parties in accordance with their respective constitutional requirements.¹³

The prospect of a second round of ratification bolstered the mood of the numerous Norwegian opponents to European integration. One may remember that in Norway, due to the constitutional prerequisite of a qualified majority of three-quarters, the positive margin was extremely thin; if only half a dozen disappointed parliamentarians had swung from yes to no during the crucial vote on the Adjusting Protocol, Norway would have stepped out, bringing the whole EEA Agreement to the brink of collapse... But this was finally not the case. The Norwegian Parliament approved the Adjusting Protocol on 29 April 1993 with more than 3/4 of the MPs voting in favor. Indeed, a simple majority vote would have been sufficient since the Parliament decided, in a preliminary vote, that the adjustments were not on a scale requiring a whole new EEA debate, as they entailed no modification of the Agreement *per se*.¹⁴ The same reasoning led to swift and smooth ratifications of the Adjusting Protocol in two other countries where the approval of the EEA Agreement itself also needed qualified majorities (Austria and Finland¹⁵). Needless to say such a problem did not arise in Iceland and Sweden where only simple majorities were required for the EEA Agreement.¹⁶

Due to Switzerland's failure to ratify this agreement, Liechtenstein will have to face unexpected delays in joining the EEA, the cause of which is to be found in a customs union treaty between the two alpine countries;¹⁷ in accordance with this old treaty, numerous matters now pertaining to the EEA Agreement are presently governed by Swiss laws.¹⁸ As these two unharmonized legal regimes cannot co-exist without uncertainties and risks of fraud, Liechtenstein is prevented from entering the EEA before the customs union has been renegotiated in a way not "impairing the good functioning of the EEA Agreement".¹⁹ It is up

¹² Concluded in Brussels on 17 March, 1993.

¹³ Article 22 (2) of the Adjusting Protocol.

¹⁴ E. S m i t h: „EØS og grunnloven“, *Lov og Rett* 1993, p. 385f.

¹⁵ The Austrian Parliament gave its approval on May 6 and Finnish Parliament on 15 June 1993.

¹⁶ The Icelandic Parliament gave its approval on 5 May and the Swedish Parliament on 4 June 1993.

¹⁷ *Vertrag vom 29 März 1923 zwischen der Schweiz und Liechtenstein über der Anschluss des Fürstentums Liechtenstein an das schweizerische Zollgebiet.*

¹⁸ About 800 legislative acts, mostly executive orders.

¹⁹ Article 1 (2) of the Adjusting Protocol.

to the EEA Council to decide if this condition has been fulfilled by a new customs union treaty and if so, at what date the EEA Agreement shall enter into force as regards Liechtenstein. Of course, the green light will not be given before this country has ratified the Adjusting Protocol, which is still not the case. As a matter of fact, the Government of Liechtenstein plans to submit the Adjusting Protocol to the people at the same time as the modified customs union treaty, as the two agreements are substantially linked; this joint plebiscite is scheduled to take place in the summer of 1994, provided that the difficult negotiations currently in progress between Switzerland and Liechtenstein do not last longer than expected.

3. Primacy and direct applicability of EEA law

Turning to this specific problem, it is important to stress that the Preamble of the Agreement states that the goal of the Contracting Parties is to establish a *homogeneous* law area, based on a common legal order;²⁰ in more concrete wording, it means that in the different matters covered by the EEA Agreement a Norwegian judge, an Austrian civil servant or the Icelandic government are expected to apply the same rules. The problem of homogeneous law is rather easy to solve in the context of the EEC Treaty: on the one hand, article 189 of the Treaty provides for the self executing nature of EEC regulations;²¹ on the other hand, the EEC Court stated as early as 1970 that the directives have direct effect if they are sufficiently precise, unconditional and if the time-limit for their implementation has expired and no action has been taken by the member state.²² One could imagine that those clear solutions would also prevail regarding the implementation of EEA law, but this assumption seems to be far from true.

Despite the fact that all EEA regulations are identical – at least in substance – to their EEC counterparts, and all EEA directives are also identical to their EEC counterparts, a lot of problems arise regarding the implementation of EEA law in the different internal legal orders of the member states. Those problems are all more or less linked with the general problem that, except for Liechtenstein, Switzerland and – more or less – Austria, all the other EFTA countries are so called dualistic countries. From a practical point of view, it means that international law is not as such directly applicable, but needs further incorporation into domestic law. During the negotiation of the EEA Agreement, the Nordic countries were not at all willing to give up their dualistic approach and to amend their constitutions so as to guarantee direct applicability and primacy of EEA

²⁰ The precise wording is (...) „Considering the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate mean of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties”.

²¹ According to article 189 of the EEC Treaty, a EEC regulation is of „general application ... binding in its entirety and directly applicable in all member States”.

²² Case 9/70 *Grad v. Finanzamt Traunstein*, 1970 ECR, p. 825 ff.

law. To give direct effect to EEA law would have been a conclusive step towards the establishment of a classic supranational organisation, and to that especially Iceland and Norway were firmly opposed; therefore, the EEA Agreement does not contain a provision similar to article 189 of the EEC Treaty.

Nevertheless, in order to give the EEA regulations some kind of direct applicability, article 7 of the EEA Agreement states that:

"(a) an act corresponding to an EEC regulation shall *as such* be made part of the internal legal order of the Contracting Parties";

At least in what concerns the dualistic countries, the meaning of that provision is not that a EEA regulation is granted direct applicability, but that the Contracting Parties are committed to incorporate it without changing the wording (*as such*); consequently, it is absolutely forbidden for a member state to practice incorporation by transformation, a method which the Norwegians and the Swedes tend to favor and which consists in reshaping the international provisions into a domestic statute, the contents of which conform to the international requirements, in order to fit them into the particular legal framework of the implementing country. The EEA member states are bound to pass a law enacting a regulation as domestic law either by mere reference to its original title or by reproducing in its full extent, the regulation's official translation.

The EEA Agreement does not say anything regarding the direct effect of a directive where its time-limit has expired without action. Is the abovementioned jurisprudence of the Court of Luxembourg automatically valid or must the silence of the treaty be interpreted as meaning that no direct effect is to be granted at the expiration of the time-limit? In reading the wording of article 6 of the EEA Agreement, one can consider, as the Swiss or the Austrian scholars do,²³ that the first alternative is correct. This provision states that:

"Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community (...) shall in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement".

The problem is that the Nordic countries refuse to give a broad scope to this provision: their unanimous point of view is that the relevant case law is limited to the case law governing substantive provisions of EEC law; all case law regarding institutional or procedural provisions of EEC law, like the one about

²³ C. A l d e r: „Zum Vorrang von EG-und EWR Recht vor schweizerischem Recht“, in: *Europarecht* 357 and 363 (1992); O. J a c o t-G u i l l a r m o d: „Préambule, objectifs et principes" (article 1er-7 EEE), in: „EEA Agreement, Comments and Reflexions", 65 (1992). (Mr. Jacot-Guillarmod was one of the Swiss negotiators of the EEA Treaty); R. K r i s t, A. Z a h r a d n i k: „Verfassungsfragen der unmittelbaren Anwendbarkeit des EWR-Rechts", in: *Ecolex* 894 (1992).

direct effect of directives, is not due to be complied with.²⁴ Nevertheless, the law passed by the Finnish Parliament in order to enact the EEA Agreement into domestic law expressly states that, where the time-limit for transposition of unconditional directives has expired, they shall be applied as domestic law.²⁵ At a first glance this provision seems a gesture of great respect to the aim of the EEA Agreement, and in fact it surely is; but one must also be aware that this provision indirectly means that Article 6 of the EEA Agreement has a narrow scope: such a codification of the jurisprudence of the EEC Court would have been completely unnecessary if the case law pertaining to the direct effect of directives had been part of the relevant *acquis communautaire*....

Paying respect to their dualistic commitments, all the Nordic countries expressly incorporated the whole set of provisions of the EEA Agreement into domestic law. But there are differences regarding the scope of the incorporation. Finland incorporated at once the entire Treaty as such, that means the main agreement, as well as its 49 protocols and 22 annexes. Hence, the whole relevant *acquis communautaire*, more than 1200 pieces of community legislation (just about 1000 directives, 110 regulations and 110 decisions), which span over 10 000 pages, is automatically valid as internal law.²⁶ This is not true in Iceland, in Norway and in Sweden: during the ratification process, the Parliaments of those countries only incorporated the main Agreement and a couple of protocols;²⁷ each regulation and directive belonging to the *acquis communautaire* will be made part of the internal legal order separately, by specific enacting legislation. This is not a mere technical issue; the consequences of neglecting – if more or less intentionally does not matter²⁸ – to implement a directive or

²⁴ See: for instance the Finnish government's explanatory report to the EEA Treaty („Regeringens proposition till Riksdagen med förslag till godkännande av vissa bestämmelser i de avtal som gäller upprättandet av Europeiska ekonomiska samarbetsområdet”), p. 68 and the Swedish government's explanatory report to the EEA Treaty („Regeringens proposition 1991/92: 170 om Europeiska ekonomiska samarbetsområdet”), p. 152. See: also H. Bull: „EØS-avtalen – litt om avtalens struktur og om prinsippene for gjennomføring i norsk rett”, in: *Lovog Rett*, 595 (1992), as well as L. Se v ó n: „EES-avtalet, statsforfatningen och lagprövningsskyldigheten”, in: *Juridiska Föreningens Tidskrift*, 571 (1993) (Both Mr. Bull and Mr Se v ó n were negotiators of the EEA Treaty).

²⁵ Article 2 section 2 of the Finnish EEA Act (*lag om godkännande av vissa bestämmelser i avtalet om Europeiska ekonomiska samarbetsområdet och om tillämpningen av avtalet*, law 1504/1993).

²⁶ Article 1 of the Finnish EEA Act.

²⁷ Article 1 of the Norwegian EEA Act (*lov om gjennomføring i norsk rett av hoveddelen i Avtale om Det europeiske økonomiske samarbeidsområde, mv.*, law 109/1992) incorporates the main Agreement and only article 1 – 3 of protocol 25. Article 2 of the Swedish EEA Act (*lag om ett europeiskt ekonomiskt samarbetsområde*, law 1317/1992) incorporates in addition protocols 1, 2, 13, 14, 17, 21 – 25 and 39; finally, article 2 of the Icelandic EEA Act (*lög um Evrópska efnahagssvaedid*, law 2/1993) incorporates the main Agreement, as well as protocol 1, article 8 of the annex VIII and article 1, section g of the annex XII.

²⁸ It may be interesting to point out that in Norway and in Sweden such important international treaties as the Free Trade Agreement with the EEC and the European Human Rights Convention were only to a very small extent incorporated into domestic law.

a regulation are drastic: as the courts or the administrative agencies of those strict dualistic countries only apply domestic law, the relevant EEA rules are in danger of being totally ignored.²⁹ The doctrine of "friendly interpretation of treaties" is hardly able to change anything in case of failure to implement;³⁰ only in cases of improper or incomplete implementation is there a chance of rectification by invoking the basic EEA legislation.

Furthermore, to implement the EEA regulations and directives is one thing, to ensure that the internal rules implementing EEA law are superior to posterior conflicting domestic legislation is another thing. As was the case with the problem of direct applicability of EEA law, the Nordic countries successfully opposed all attempts to insert in the main Agreement a provision stating the primacy of EEA law. In order not to undermine the general goal of homogeneity, they nevertheless agreed to introduce in their internal legal orders a provision giving priority to the legal rules implementing EEA law over posterior conflicting national law. This commitment to a certain European uniformity is embodied in protocol 35 of the EEA Agreement which reads:

"For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases".

Complying with this obligation, all Nordic countries adopted, in their respective statutes incorporating the EEA Agreement, a so called *choice of law* provision aiming to accord priority to EEA rules over conflicting domestic law; the Swedish *choice of law provision* for example has the following content:

"The regulations in this law or in any other law which have been enacted to fulfill the Swedish obligations pertaining to the EEA Agreement should be applied without hinderance from what is prescribed in other law".³¹

The Nordic choice of law provisions only lay down a rule of construction, whereby domestic law must be interpreted so far as possible to conform to EEA

²⁹ See: the fears expressed by U. B e r n i t z: „The perspective of the EEA Agreement – its interpretation and implementation”, in: *Nordic Perspectives on European Financial Integration*, 197 (1992) and this comment from A. E v a n s, P. F o l k: "In practice however Swedish institutions might be less than efficient in embodying in national law EEA measures with which they disagreed" (*Law and Integration: Sweden and the European Community*, 224 (1991)).

³⁰ This doctrine, as well as its Norwegian counterpart, the so-called doctrine of assumption of conformity with international treaties, has been developped by the Swedish and Norwegian supreme courts in recent years in order to try to comply to a larger extent with the international commitments of both countries without granting any superiority to international law over domestic law (Norway: *Retstidende* 1984 p.1179; *Retstidende* 1990 p. 314, 322 and 602; Sweden: *Nytt Juridisk Arkiv* 1988 I p.572).

³¹ Article 5 of the Swedish EEA Act. Somewhat similar provisions are to be found in the Finnish EEA Act (art. 2 and 3), in the Icelandic EEA Act (art. 3) and in the Norwegian EEA Act (art. 2).

law.³² Given that no parliament can bind its successor, they are unable to guarantee that priority will always be given to EEA law. And the Norwegian explanatory report is very clear in that matter:

"(...) the choice of law rule does not at all impede the constitutional powers of the Storting (the Norwegian Parliament) to pass laws which conflict with Norway's obligations in the field of the EEA Agreement".³³

In deliberately passing a law violating EEA law, a Nordic parliament would of course engage the international responsibility of its country, but seen from an internal perspective, the conflicting domestic statute would be fully valid and as such enforced by the executive authorities as well as the courts.

It should be added that regarding Liechtenstein, similar problems concerning direct applicability and primacy of EEA law do not arise, as this country recognizes the superiority of international law (except over the constitution).³⁴ A joint declaration on the cited protocol 35 to the Agreement ensures that this monistic approach will continue to prevail and that Liechtenstein will give EEA law priority over domestic law:

"It is the understanding of the Contracting parties that Protocol 35 does not restrict the effects of those existing internal rules which provide for direct effect and primacy of international agreements".³⁵

As regards Austria, the situation is somewhat unclear. Theoretically this country is dualistic, but in fact its pragmatic approach to dualism has hitherto made it not very different from a monistic country.³⁶ Some problems may however arise concerning the primacy of EEA law over posterior domestic law: a report of the Austrian government points out that the EEA does not at all create a supranational legal order, and in particular that there has been no transfer of

³² A similar mechanism is to be found in the *British European Community Act of 1972*, more precisely in section 2 subsection 4 which gives Community law primacy over domestic law by way of interpretation; this is due to the fact that Great Britain is also a strict dualistic country.

³³ The Norwegian government's explanatory report to the EEA Treaty (Ot.prp.nr. 79, 1991 – 92, *om lov om gjennomføring i norsk rett av hoveddelen i Avtale om Det europeiske økonomiske samarbeidsområde (EØS)*, mv) p. 5.

³⁴ G. W i n k l e r: *Staatsverträge, Ihre Erzeugung und Geltung in der Rechtsordnung Liechtensteins*, Liechtensteinische Juristische Zeitung, 12 (1990).

³⁵ Originally this joint declaration concerned also Switzerland, where a monistic approach to international treaties prevails.

³⁶ In the forefield of the ratification debates, the Austrian government proposed to adopt a constitutional provision to ensure that the regulations pertaining to European law would be directly applicable in the country. But all political parties forced the government to withdraw this draft bill, arguing that this kind of provision not only was unnecessary in respect of EEA law but would go too far in direction of EEC membership, preempting a decision which finally belongs to the Austrian people by the way of a referendum (*EWR: Pläne zur Verfassungsänderung auch von Koalitionsparteien abgelehnt*, in: *Die Presse*, Vienna, 11.9.1992).

souvereign power and thus no corresponding limitation of the legislative power of the Austrian Parliament.³⁷ The implicit consequence of this reasoning is that the Parliament can legislate without any hindrance.

4. Implementation of EEA law

4.1. General remarks

Shifting to the third part of this report, we will now deal with the delicate problem of the implementation of EEA law. First of all, it is worth mentioning that all of the EFTA countries performed huge legislative work in order to comply with their obligation to introduce the *acquis communautaire* up to the cut-off date of July 31, 1991 (which amounts to 1200 pieces of Community legislation).³⁸ Several task forces of civil servants were set up well in advance, under the guidance either of the Ministry of Foreign Affairs or the Ministry of Justice, in order to analyse, for each area covered by the EEA Agreement, the needed legal changes and to propose the necessary amendments to the parliament in case of modification of statutes, or to the government in case of executive regulations; nowhere were modifications of constitutional rules needed to implement the *acquis*. The necessary legal amendments were adopted by way of numerous distinctive bills issued during the last months of the year 1992, and not, as was for instance the case with the British European Community Act, as part of the act incorporating the Treaty; those specific bills came into force at the same time as the EEA Agreement.³⁹ Not all legislative measures had to be taken before the end of 1992: amendments pertaining to areas in which an EFTA country was given the benefit of a one to five years stay will of course be delayed till the end of the postponed deadline; for instance, that is the case for Liechtenstein in the field of free movement of persons.⁴⁰

The task of implementing the *acquis communautaire* was carried out fairly quickly in Sweden and in Norway, as in both countries wide legislative powers have long ago been delegated to the Government in many of the fields pertaining to the relevant directives and regulations. This is especially so in

³⁷ *Beilage 741 zu den Stenographischen Protokollen des Nationalrates XVIII. GP, A 4.2., p. 6.*

³⁸ The next step will be to implement the so called *additional acquis*, in other words around 400 EEA relevant EC acts adopted between the cut-off date and the 1 January 1994, when the EEA Agreement entered into force. Those acts are going to be listed in a special EEA protocol which will need to be ratified by all Contracting Parties.

³⁹ Except for the 50 laws passed in the autumn of 1992 by the Swiss Parliament in order to implement the EEA Treaty (the so called Eurolex-project, discussed in depth by Haymann M., *op. cit.*, p. 67); following the rejection of the EEA Treaty by the Swiss people, those laws will never be enacted as such. In order to prevent Switzerland from being totally isolated, the Parliament adopted in the course of 1993 some of the most important pieces of legislation (in particular in the field of labor market and competition) contained in the Eurolex-project.

⁴⁰ See: Protocol 15, articles 5 – 7.

Sweden, where effective harmonisation started already before the EEA negotiations were launched: a 1988 executive order imposed upon the drafters of all legislation the obligation to take into account existing Community law, as well as proposals for future Community rules, and seek to harmonise Swedish law with them. A deviation from the Community line was possible only if clearly justified.⁴¹

It should be noted that it is up to the EFTA Surveillance Authority to monitor the fulfilment by the EFTA States of their implementation obligations under the EEA Agreement.⁴² The first measure taken in January 1994 by this newly established authority was to start a comprehensive examination of the compatibility of the alcohol monopolies in the Nordic states with the EEA provisions limiting state monopolies of commercial character (mainly art. 16 EEA Agreement). Referring to social and health concerns,⁴³ the Nordic countries try to keep an overall control over import, export, production and wholesale of alcoholic beverages; the European Commission holds such impediments to be discriminatory and finds that the protection of public health can be fulfilled by measures less restrictive on competition.⁴⁴ State aids and oil production are other matters where serious implementing problems will probably arise in a near future, as in those fields the policies of Sweden and Finland, respectively Norway are very different from those of the EEC.

4.2. Problems pertaining to the referendum

As Switzerland finally opted to stay outside the EEA, the problem of the referendum in respect of the implementation of the *acquis communautaire* as well as the subsequent EEA rules now solely concerns Liechtenstein. But first a few words about the referendum in general: all laws passed by the Parliament of Liechtenstein can be challenged by way of a referendum. If 1000 citizens sign a request for a referendum within 30 days of the Parliament's decision, a popular vote must be held;⁴⁵ if the outcome is negative, the challenged piece of legislation will not come into force. But it must be noticed that the Parliament

⁴¹ *Kommitédirektiv till kommittéer och särskilda utredare angående beaktande av EG-aspekter i utredningsverksamheten*. Dir 1988:43. Somewhat similar measures were taken in Austria one year later, see: *Richtlinie des Bundeskanzleramts-Verfassungsdienst zur Prüfung von Regierungsvorlagen auf ihre EG-Rechtskonformität*.

⁴² See: Article 6 of the ESA/EFTA Court Agreement which entitles the EFTA Surveillance Authority to request all the necessary informations from the authorities of the EFTA States. Failure to comply with such a request can be sanctioned by penalty payments. In this respect the EFTA Surveillance Authority has the same wide control powers as the European Commission on the EU side.

⁴³ See: the Declaration by the Governments of Finland, Iceland, Norway and Sweden on Alcohol Monopolies attached to the Final Act to the EEA Agreement.

⁴⁴ P. B i u r m a n: *Nordic Alcohol Policies with a View to EC Membership*, in: *World Competition*, 137 ff (1993).

⁴⁵ Article 66 of the constitution of Liechtenstein.

can, where needed, decide that a law is urgent with the important consequence that the law escapes the threat of a referendum forever. By the way, here lies the only substantive difference between the rules governing the referendum in Liechtenstein and those in Switzerland: in the latter country, an urgency clause would only put off a plebiscite for one year: at the end of this term, the law is opened to the facultative referendum or, if it is a constitutional amendment, lapses automatically unless it is sanctioned by the people.⁴⁶

All in all, one has to take into account that the exercise of those democratic rights is time consuming (during the period allowed for collecting the signatures as well as for organizing the plebiscite, the challenged piece of legislation cannot enter into force); furthermore, a negative outcome would hinder the country in fulfilling its international obligations. In order to speed up the implementation of the *acquis communautaire*, as well as in order to avoid all measures that would jeopardize Switzerland's commitment to its international obligations, the Swiss Government proposed to the Parliament that all 50 laws adopted or modified in connection with joining the EEA should escape the referendum.⁴⁷ The Parliament did not agree: for the majority of its members, the referendum is a cornerstone institution of the Swiss legal order that should be safeguarded at all costs: had the EEA Agreement been approved, it would have been possible to call for a referendum against each of the 50 laws implementing EEA law. Nevertheless a compromise was adopted in order to avoid international criticism for delaying the implementation of the relevant *acquis communautaire*: all 50 laws would have entered into force at the same time as the Agreement (which at that time was scheduled to enter into force in the beginning of 1992). Needless to say, a negative outcome of any referendum would have caused the rejected piece of legislation to become suddenly inoperative.⁴⁸

In Liechtenstein, the Government was also tempted to evade the referendum in order to gain time: in its explanatory report to the Parliament, it mentioned the possibility of adding an urgency clause to all laws implementing the *acquis communautaire*.⁴⁹ But there also the Parliament refused to give priority to efficiency over the democratic rights of the people: none of the laws introducing the *acquis* was accompanied with an urgency clause; nevertheless, it turned out that nobody called for a referendum against any of those pieces of legislation.

The referendum problem is not only of importance in the field of laws implementing the *acquis communautaire*, but also, and even more, in the field of the so called "newly adopted *acquis*"; this curious anglo-french expression refers to the EEA regulations and directives adopted after the Agreement enters into force. In this respect, it has to be stressed that in order to maintain the homo-

⁴⁶ Article 89bis of the Swiss constitution.

⁴⁷ IV Feuille fédérale 89 (1992).

⁴⁸ See: the proposed article 20, section I of the transitory provisions of the constitution (VI Feuille fédérale, 54 (1992)).

⁴⁹ *Bericht und Antrag der Regierung an den Landtag* 46/1992, p. 237.

gency of EEC law and EEA law, the EEA must introduce new rules of Community legislation within the shortest possible delay. In addition the EFTA States have to speak with one voice: if only one EFTA State does not agree to the new Community legislation, this has the effect of a veto for all EFTA States; it is the so-called "collective opting out".⁵⁰

Now it is important to note that in Liechtenstein not only the Parliament will be able to exercise this veto right, but, in addition, the people themselves will have the opportunity to originate a "collective opting-out". This is how it could work: let us assume that the EEA Joint Committee adopts a new regulation on free movement of persons. These rules are then ratified by the Parliament in conformity with the procedure laid down by article 8 of the constitution.⁵¹ However, conservative groups find the new regulation too permissive and collect signatures for a referendum. According to article 63bis of the constitution, the citizens can call for a referendum not only against statutory laws, but also against international treaties approved by the Parliament,⁵² and technically speaking, this is what the regulation of the Joint Committee is. In this case, the government of Liechtenstein will probably have to ask the Joint Committee to prolong the six month deadline for the fulfilment of the ratification requirements in order to organize the vote.⁵³ If the outcome is negative (or if it is positive, but the Prince refuses to give his sanction⁵⁴, Liechtenstein will have to notify its veto, which may provoke the suspension of the affected parts of the EEA Agreement.

Our example dealt with a regulation; but what would happen in case of a directive? In this case, one can doubt whether this kind of legislation of the Joint Committee needs to be approved by the Parliament and subsequently is open to be challenged by referendum, because the directive requires national implementation measures. Though the government of Liechtenstein did not discuss the matter in its explanatory report to the EEA Agreement, a solution can be found by turning to the explanatory report of the Swiss government – as mentioned, there is really no substantive difference between Switzerland and

⁵⁰ See: articles 102 and 103 of the EEA Agreement and for further informations S. N o r b e r g e t a l i a: op. cit., pp. 142 – 147.

⁵¹ According to article 8 par. 2 of the constitution, not all treaties are to be approved by the Parliament, but only those which „cede national territory, alienate national property, dispose of rights of sovereignty or State prerogatives, assume any new burden for the Principality or its citizens, or contract any obligation to the detriment of the rights of the people of the Principality“.

⁵² There is only a slight difference regarding the number of citizens' signatures required to call for a referendum: 1000 (or three communes) in case of a statute, 1500 (or four communes) in case of an international treaty.

⁵³ See: The Final Act of the EEA Agreement, Agreed Minutes, ad article 111 and A. L o m b a r d i: *Die Gestaltung des künftigen EWR-Recht: Grundzüge des Verfahrens im EWR und im schweizerischen Recht*, in: Aktuelle Juristische Praxis, 1339 (1992).

⁵⁴ According to article 9 of the constitution of Liechtenstein, every law (also those adopted by way of a referendum) shall require the sanction of the Prince in order to acquire validity. This prerequisite is not at all a merely formal one: in Liechtenstein, both the Prince and the people exercise the power of the State.

Liechtenstein regarding the rules governing the referendum. The report stresses the fact that only treaties that are directly applicable are susceptible to be challenged by way of the referendum,⁵⁵ which means, in effect, that the people may only opt-out of new Community legislation in the case of regulations, not in the case of directives. For some Swiss scholars, this distinction is not legally sound; referring to the fact that detailed directives are of a self-executing nature, they assert that, at least in the case of directives, the people must be granted the benefit of a double referendum: first against the directive as adopted by the Joint Council and then against the implementing legislation,⁵⁶ which might be too much of a good thing...

If the possibility of a referendum against the directive as such is questionable, the right of 1500 citizens of Liechtenstein to challenge the domestic law of implementation is beyond all doubt. If the plebiscite is negative, the Parliament would have to draft a new law, conforming to Liechtenstein's EEA obligations, but mustering greater popular support; nevertheless, one has to bear in mind that to draft a different bill will not be an easy task as nowadays most of the directives are very detailed and leave little room for the national legislator. If the Parliament wanted to meet the implementation-deadline set by the directive (1 to 3 years in general), it could always prevent a second referendum by resorting to the "urgency clause". This would of course hinder the referendum forever.

In Austria on the other hand those implementation problems will simply not occur; in that country referendums are only possible in case of modifications of the core of the Austrian constitution⁵⁷ or if the Parliament so decides.⁵⁸

3. Problems pertaining to federalism

As mentioned, the last part of this report will deal with problems related to federalism. Only two of the seven EFTA States are federal States: Austria, with its 9 *Länder* and Switzerland with its 23 Cantons. The general rule, admitted in both countries, is that the EEA Agreement does not alter the respective competences of the federation and the federated States (but it must be underlined that power over most of the matters covered by the EEA Agreement is in both countries vested in the federal legislator).

Thus, in matters in which the *Länder* (or the Cantons) are competent, they will implement and apply the relevant EEA-rules on their own. The federation however, exercises a certain control in order to ensure that the country's international obligations are fulfilled. For instance the Austrian constitution expressly provides that if a *Land* does not take the measures required for the

⁵⁵ See: The Swiss government's explanatory report on the EEA Agreement, p. 89.

⁵⁶ See: for instance, Aubert J.-F., *L'EEE et la démocratie suisse*, in: EEA Agreement, Comments and Reflexions, 801, note 24 (1992).

⁵⁷ Article 44 par. 3 of the Austrian constitution.

⁵⁸ See: The federal law on plebiscites (*Bundesgesetz über Volksabstimmungen*, 1973) in connection with article 43 of the constitution.

implementation of an international treaty, the federation can take these measures in its stead. However, such federal measures are only provisional, until the *Land* has taken the necessary measures itself.⁵⁹

The Austrian *Länder* were afraid that this rule could lead to massive federal interference through the back door of the EEA. Therefore a new paragraph was added to the Constitution, which provides that, within the context of European integration, the federation can take substitute measures only after a *Land's* failure to implement has been confirmed by an international court, i.e. the EFTA court (or the Court of Justice of the EC, when Austria becomes member of the EEC).⁶⁰ Needless to say, this solution will seriously delay the implementation of the relevant EEA law.

However, the central theme of the debate between the federation and the *Länder* was not the implementation of EEA law, but as to the measure in which the federal states could participate in the decision-shaping process of the newly adopted acquis. Traditionally, foreign policy has always been the *domaine réservé* of the federal executive. Given the great impact of EEA law on the legislation and administration of the Austrian *Länder*, this traditional rule was no longer accepted. The *Länder* demanded the right to be informed of and consulted in European matters which affect their particular interests, as are the German *Länder* or the Spanish regions in respect of the EEC decision-shaping process.

The result of this debate in Austria consists not only of a new constitutional article,⁶¹ but also of a treaty between the federation⁶² and the *Länder* as well as an agreement between the Austrian *Länder*.⁶³ In substance, the Austrian federal government is obliged to inform the *Länder* of European projects and drafts, whenever the competences or the interests of the *Länder* are concerned. In addition, the government fixes a certain period of time, within which the *Länder* must take position. The same rights to be informed are accorded to the Austrian units of local governments. In all matters in which the *Länder* are competent, the Austrian government is, in principle, bound by a common position of the *Länder*. It may only deviate from this position for compelling reasons of foreign policy or of European integration. Finally, the Austrian *Länder* also have the right to participate in the Austrian delegation to European institutions.⁶⁴

A last remark: the Swiss model of cooperation between the federal government and the federated states in matters pertaining to EEA law was not

⁵⁹ Article 16 par.4 of the Austrian constitution.

⁶⁰ Article 16 par.6 of the Austrian constitution.

⁶¹ Article 16 par. 4 – 6 of the Austrian constitution.

⁶² *Vereinbarung zwischen dem Bund und der Länder gemäß Art. 15a B-VG über die Mitwirkungsrechte der Länder und Gemeinden in Angelegenheiten der europäischen Integration.*

⁶³ *Länder-Vereinbarung über die gemeinsame Willensbildung in Angelegenheiten der europäischen Integration.*

⁶⁴ For more informations, see: J. A z i z i: „EWR-Abkommen und Auswirkungen auf die Länder“, in: *Der Europäische Wirtschaftsraum und Oesterreich*, 96 – 113 (1994).

nearly so elaborate; it simply provided for a new constitutional provision obliging the Confederation to „attempt to preserve the competences of the cantons and to safeguard their interests in the implementation and the development of the EEA Agreement as well as in questions of European integration. The Confederation informs the cantons fully and forthwith, consults with them and involves them in the preparation of decisions”.⁶⁵ In other words the cantons were given an opportunity to be heard, but nothing was said about the scope of this right; more importantly, the Confederation remained free to ignore the demands of the Cantons.

⁶⁵ See: article 21 of the transitory provisions of the constitution (VI Feuille fédérale 55 (1992)).

The EC Competition Policy – Trade Policy Tension in Light of the ECJ Case-Law

STANISŁAW KNAFLEWSKI

I. Introduction

The question whether and to what extent trade protection measures interfere with the freedom of competition has long been a vividly debated issue in American economic and legal literature.¹ It became also increasingly important in Europe in the late 1980's.² Far from calling for a complete repeal of trade laws on the basis of their anti-competitive effects, European authors suggested the possibility of "a peaceful co-existence" between the two policies.³ This necessarily implied giving more weight to competition arguments in decisions about trade protection measures. Nevertheless, not only did the institutions responsible for EC trade policy largely ignore these admonitions, but also the Court of Justice of the European Communities proved rather slow to review the correctness of those Institutions' decisions.⁴

This attitude seems to have been part of the Court's more general policy of extensive deference to the Commission's and the Council's decisions in the field of trade measures.⁵ Recently, it has become possible to argue that this trend has been altered by a number of judgments rendered in 1991 and 1992, which appear to enlarge procedural rights of affected parties,⁶ as well as to broaden the scope

¹ Cf. e.g. J.J. Barcelo: „The Anti-Dumping Law: Repeal It or Revise It?“, 1*Michigan YB Int'l Legal Studies* 53 (1979).

² See: in particular: P. Vandoren: „The Interface between Anti-Dumping and Competition law and policy in the European Community“, *Legal Issues of European Integration* 1986, 2, 1 – 16; J. Temple Lang: „Reconciling European Community Antitrust and Antidumping, Transport and Trade Safeguard Policies“, in: B. Hawk (ed.): 1988 *Fordham Corporate Law Institute* 7 – 1; J.H.J. Bourgeois: „Antitrust and Trade Policy: A Peaceful Coexistence? European Community Perspective“, 17 *Int'l Bus.L.* 59 (1989).

³ Cf. J.H.J. Bourgeois, *supra* n. 2 and, similarly, other articles referred to in note 2.

⁴ F. Jacobs: „Review by the Court of Justice of Commercial Policy Measures“, in: M. Maresceau (ed.): *The European Community's Commercial Policy after 1992: The Legal Dimension*, 65 – 78 at 67 (1993).

⁵ Cf. J.H.J. Bourgeois: „Competition Policy and Commercial Policy“, in: M. Maresceau (ed.) – see: n. 4, *supra*, pp. 114 – 135, at 122.

⁶ See: Judgment of 27 June 1991 (*Al-Jubail Fertilizer Company and Others v. Council*, case C-9/88) 3 *CMLR* 377; Judgment of 28 November 1991 case C-170/89 (*BEUC v. Commission*) not yet reported in *ECR*.

of judicial review.⁷ One case, namely *Extramet Industrie S.A. v. Council*,⁸ was particularly concerned with the antitrust – trade protection interface and resulted in a judgment by and large more sympathetic to free competition than the prior case-law. It is, however, dubious whether *Extramet* constitutes a breakthrough case since its real scope and eventual aftermath remain rather obscure.

Given the significance of recent developments and the possibility of a considerable evolution, it is interesting to attempt a reassessment of the relationship between antitrust and trade policy. The purpose of this article is to carry out part of such an inquiry, mainly with respect to the EC Institutions's discretion in defining priorities between the sometimes divergent objectives of the two policies.

As economists' viewpoints differ considerably on the nature of this divergence, it seems worthwhile to start by attempting to identify the most coherent and convincing economic perspective. This is the one that implies the necessity of eliminating clashes in certain areas of potential conflict. Resolving these difficulties in the case of the European Community has to be considered in the light of its institutional law. After examining the general confines stemming from the EC Treaty and the case-law of the Court of Justice, attention can be turned to specific kinds of trade protection measures. The investigation is limited to measures available under the EC legislation; the ECSC anti-dumping and anti-subsidy law⁹ is of lesser importance and need not be considered on its own.

The EC trade protection measures comprise:

- anti-dumping and countervailing (anti-subsidy) measures; both governed by Regulation 2423/88¹⁰
- measures against unfairly low prices in maritime transport; under Regulation 4057/86¹¹
- measures against illicit commercial practices of non-EC states under Regulation 2641/84¹², the so-called "New Instrument"
- safeguard measures under the EC rules on imports, Regulation 288/82¹³
- voluntary restraint agreements (VRAs) and voluntary export restraints (VERs) devoid of specific legal framework.

⁷ See: Judgment of 7 May 1991, case C-69/89 (*Nakajima All Precision Co. Ltd. v. Council*), not yet reported in *ECR*; Judgment of 22 October 1991, case C-16/90 (*Detlef Nölle v. Hauptzollamt Bremen-Freihafen*), not yet reported in *ECR*.

⁸ Judgment of 11 June 1992 (on the merits), case C-358/89, not yet reported in *ECR*.

⁹ Decision (ECSC) of 29 July 1988, No 2424/88, OJ 1988 L 209/18.

¹⁰ Council Regulation (EEC) of 11 July 1988 on protection against dumped or subsidized products from countries not members of the European Economic Community, OJ 1988 L 209/1.

¹¹ Council Regulation (EEC) of 22 December 1986 relative to unfair pricing practices in maritime transport, OJ 1987 L 378/14.

¹² Council Regulation (EEC) on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices, OJ 1984 L 252/1.

¹³ Council Regulation (EEC) on common rules for imports, OJ 1982 L 35/1 as amended by Council Regulation (EEC) No. 1243/86, OJ 1986 L 113.

It is natural to give most weight to the consideration of *anti-dumping action* as being the most important¹⁴ and most widely discussed of all trade protection measures. *Anti-subsidy* actions are governed essentially by the same rules and therefore most observations made about anti-dumping will apply *mutatis mutandis* to countervailing measures.¹⁵ *Measures against unfair freight pricing*, though covered by a separate regulation, rely on the same logic and given their rare application they can be left aside.

Measures against illicit commercial practices fall clearly into two distinct categories: the first concerned with third countries's interference with EC exports, and the second covering cases of illicit handling of foreign exports to the Common Market. The first category is outside the scope of our interest because a collision with the EC competition policy is rather unlikely, whereas the second gives rise to problems similar to those in anti-dumping cases.¹⁶

Safeguard measures need sometimes a separate analysis since they are governed by different substantive and procedural rules, for instance those measures can be adopted whether exports are unfairly traded or not.

VER's and VRA's also constitute a specific case; they are in principle instruments of conventional trade policy implemented under Art. 113 of the EC Treaty, but their legality may often raise doubts.¹⁷ Industry-to-industry VRA's or restraints obtained by the EC Member States will not be dealt with as they are clearly incompatible with the Community law.¹⁸ As VER's and VRA's arranged by the EC Commission or Council neither have any basis in the implementing legislation, nor rely on concrete provisions of the EC Treaty, the only solutions that can apply to them are extrapolations from other fields and general rules of the Community law.

II. Antitrust and trade protection: an inherent, potential or illusory conflict?

1. An overview of the relationship between trade protection and competition law

Competition related arguments are advanced in virtually any discussion about the desirability of trade protection. I believe it fair to say that they stand for a broader proposition that free trade is better than protection of national industry. Certainly, competition arguments are of a considerably narrower scope than the claim about global free trade, at least as long as antitrust law does not aim at

¹⁴ Cf. R. K u l m s: „Competition, Trade Policy and Competition Policy: The Example of Antidumping”, 27 *CMLR* 285 at 290 (1990).

¹⁵ Cf. J. T e m p l e L a n g, *supra* n. 2, at 64.

¹⁶ *Ibidem*, at 63.

¹⁷ Cf. R. K u l m s, *supra* n. 14, at 305 – 306.

¹⁸ J. T e m p l e L a n g, *supra* n. 2, at 82.

granting equal status to domestic and foreign industries.¹⁹ On the other hand, it is often more practical to invoke competition arguments in a legal debate, because commitment to free trade is merely a matter of political declarations while free competition constitutes a principle of high rank in a number of legal systems. Yet the object of free-trade pleas and pro-competition arguments is essentially the same: the lessening of protectionism.

The possibility of anti-competitive effects of trade protection measures is widely recognized²⁰ despite a common assumption that both antitrust and trade laws are designed to remedy some shortcomings of trade occurring when market forces come into play in the absence of state control.²¹ It is often suggested that it is due to the abuse of trade measures that competition is adversely affected.²² Some differences can, however, be probably detected also at the level of pure objectives.

Antitrust, or competition law aims at safeguarding the freedom of competition through preventing markets from being dominated by a limited number of operators or combatting abuses in concentrated markets.²³ The underlying principle is that a competitive structure enhances efficiency, thus contributing to the general welfare. Whether this premise proves true in practice is to a certain extent still an open question, there is no denying though that antitrust is supposed to work not to the benefit of competitors, but of the competition as such, safeguarding ultimately the interests of end users and of the society as a whole.²⁴

Already at first sight trade protection measures appear to conflict with these objectives.²⁵ Markets do not seem more competitive when trade protection instruments are applied; indeed some products find their access to the market impeded or practically denied: the range of buyer's choice is therefore restricted and competition limited.²⁶ If trade relief measures hindering foreign competition are requested by a national industry, it might well be the sign of its inefficiency

¹⁹ Cf. J.H.J. B o u r g e o i s, *supra* n. 5, at 122. See also: P. H o l m e s: „The Regulation of Competition in Globalised Markets”, unpublished paper (forthcoming Frances Pinter).

²⁰ See e.g.: M. M a r q u e s M e n d e s: „Antitrust in a World of Interrelated Economies”, at 143 (1991).

²¹ P. V a n d o r e n, *supra* n. 2, at 1.

²² See e.g.: W. J. D a v e y: „Antidumping Laws: A Time for Restriction”, 1988 *Fordham Corp. L. Inst.* 8 – 1 (1989 B. Ilaw ed.) at 24 – 25.

²³ See: M. M a r q u e s M e n d e s, *supra* n. 20 at 73 – 78 for a brief overview of the goals of the EEC competition policy. For a US perspective e.g. C.W. S c h w a r t z: „Trade Measures, Competition Policy and the Consumer”, in: P. D e m a r e t, J.H.J. B o u r g e o i s, I. V a n B a e l (eds.): *Trade Laws of the European Community and the United States in a Comparative Perspective*, at 213 (1992).

²⁴ J.H.J. B o u r g e o i s: „Trade Measures, Competition Policy and the Consumer”, in: P. D e m a r e t et al. (eds.), *supra* n. 23, pp. 227 – 259, at 236.

²⁵ C.W. S c h w a r t z, *supra* n. 23, at 216.

²⁶ Cf. R. D e G r e y: „Trade Policy and the System of Contingent Protection in the Perspective of Competition Policy”, (Report prepared for the OECD Committee on Restrictive Business Practices: DAFE/RBP/WP1/85.4, 21 October 1985).

coupled in some cases with the existence of restrictive practices such as cartels or abusive exploitation of the dominant position.²⁷

a) An equivalence of antitrust and trade protection law?

Nevertheless, some supporters of trade protection laws defend the view that they play in the external field the same role as antitrust does in the internal field.²⁸ They would be thus devices of safeguarding competition on the global arena whenever distortions might occur. This idea relies on the assumption that trade protection laws combat practices which only apparently enhance competition and benefit consumers, being finally designed to replace more efficient undertakings by less efficient ones by reason of national origin. In such case it would be fair to say that *both antitrust and trade remedy laws have similar goals as they seek to establish rules for free competition in the marketplace*.²⁹

The major drawback of this hypothesis lies in its overlooking a widespread use of protection measures against imports incapable of having any anti-competitive effects or objectives.³⁰ It may sound odd, but the difference between the most eager partisans of trade protection and its most harsh critics lies in the fact that what the former regard as reality, the latter view as an almost unattainable ideal. More specifically, the opponents of trade protection and of anti-dumping law in particular, believe that it should be superseded by transnational enforcement of antitrust rules, to which currently applied measures are in their opinion by no means equivalent.³¹

b) Affinities of trade protection and unfair competition law

One should perhaps correct the idea of the equivalence between trade protection and antitrust law by indicating that it is rather unfair competition law to which trade protection bears resemblance.³² Unlike in antitrust, it is not a restriction of competition, but the unfairness of methods used to compete that is the immediate target of trade protection measures.³³ Certainly, it is not always easy to draw the line between antitrust and unfair competition law, some infringements of antitrust law being defined by reference to a transgression of the

²⁷ Compare D a v e y's conclusion that most anti-dumping actions are brought by concentrated industries and the evidence on the situation in the US in W.J. D a v e y, *supra* n. at 33.

²⁸ In the US doctrine for instance Epstein: „The Illusory Conflict between Anti-dumping and Anti-trust”, 18 *Antitrust Bulletin* (1974).

²⁹ A. E c k e s: „The Interface of Antitrust and Trade Laws – Conflict or Harmony? An ITC Commissioner's Perspective”, 56 *Antitrust L.J.* 417, 419 (1987).

³⁰ For the case of anti-dumping see e.g.: R. D a l e: *Anti-dumping Law in a Liberal Trade Order*, at 40 (1980).

³¹ See: R.M. B i e r w a g e n: *GATT Art. VI and the Protectionist Bias in Anti-dumping Laws*, at 168 (1990); W.J. D a v e y, *supra* n. 22, at 39 – 41.

³² J.F. B e s e l e r, A.N. W i l l i a m s: *Anti-Dumping and Anti-Subsidy Law – The European Communities*, at 50 – 51 (1986).

³³ J. T e m p l e L a n g, *supra* n. 2, at 2.

boundaries of fair competition.³⁴ Nevertheless, the distinction seems crucial to me since a considerable number of justifications for trade protection measures rely on the concepts of fairness and not freedom of trade. The question that arises is whether there exists a conflict between the objectives of antitrust law and unfair competition rules. Some believe that fairness should in certain cases be safeguarded at the expense of competition, just like patent law eliminates competition by reason of deserved reward and incentive for inventive activities.³⁵ An argument which can be advanced in favour of unfair competition law is that once all sorts of competition are allowed, the market will be less competitive since the winners would be not the most efficient but the most aggressive undertakings. The problem is therefore not that of an irremediable conflict between antitrust and unfair competition law.

The problem is rather that trade law adopts a by far more extensive notion of unfair practices than that applied to any domestic situations.³⁶ Since it is a question of competition between national economies and not just undertakings, the unfairness of certain practices is easily found by state authorities when it is suitable for the conduct of a national policy.³⁷ Given the absence and, moreover, virtual impossibility of a workable definition of fair trade,³⁸ it is necessary to conclude that trade protection based on the idea of fairness risks to be protection-biased and quite often actually is.³⁹

c) Protectionist justifications

Eventually, it is possible to approach the question of the relationship between antitrust and trade protection laws from a more or less openly protectionist point of view. Although both protectionist and non-protectionist standpoints regard a country's own welfare as the goal, they differ in selecting the appropriate means. While free trade supporters consider the market as a whole, giving no less weight to its demand than to its supply side, protectionists favour the manufacturers' interests even at the expense of the consumers.

Since econometric calculations indicate that in principle protection does not contribute to increasing the aggregate economic welfare,⁴⁰ current protec-

³⁴ See: the *Vitamins* case: Judgment of 13 February 1979 case 85/76 (*Hoffmann-La Roche & Co. v. Commission*) 1979 ECR 461, in particular ground 91 with a definition of an abuse of dominant position.

³⁵ M.C.E.J. Bronckers: „Anti-Dumping Law and Consumer Interest”, in: P. Demaret, J.H.J. Bourgeois, I. Van Bael (eds.), *supra* n. 23, pp. 261 – 165, at 264.

³⁶ J.M. Finger: „Subsidies and Countervailing Duties”, in: P.K.M. Tharakan (ed.): *Policy Implications of Anti-Dumping Measures*, 175 – 189, at 181 (1991).

³⁷ An interesting review of specific instances of protectionist bias in US anti-dumping proceedings is presented by W.J. Davey, *supra* n.22, at 24 – 33.

³⁸ For a critique of the notion of „fairness” as used in international trade see e.g.: R. Dale, *supra* n. 30, at 195.

³⁹ R.M. Bierwag, *supra* n. 31, at 169.

⁴⁰ B. Hindle: „The Economics of Dumping and Anti-Dumping Action: Is There a Baby in the Bathwater?”, in: P.K.M. Tharakan (ed.), *supra* n. 36, pp. 25 – 43, at 26.

tionist arguments become more sophisticated. They are mostly related to the idea of strategic trade policy, according to which it is advantageous for a state to induce its producers to gaining a larger market share in sectors giving best returns on investment.⁴¹ It is then perfectly sensible to use strong protectionist measures, even if they have a clearly anti-competitive edge. Temporary losses for the buyers have to be allowed as long as a domestic strategic industry is less efficient than foreign producers, and competition is safeguarded only insofar as its absence could affect the rate of development. Another argument which may advocate for granting protection is the social cost of giving in to foreign competition. This is true especially for labour-intensive industries, where employment is to be preserved even despite a sometimes negative economic outcome.

Obviously, overt protectionist arguments are phased out by international trade law, yet they clearly underlie many of the measures taken, being sometimes disguised as action against unfair or restrictive practices. Some economists indicate that only strategic behaviour can explain state action in certain cases and also the uneven intensity of protection in different sectors shows that many states adhere to the idea of industrial targeting.⁴²

It is interesting to notice that even when "innocent" justifications are provided, some protectionist bias can be often revealed, since for instance predatory intent is by far more easily presumed in case of foreign enterprises.⁴³ Some economic analyses also assume that while artificially cheap supplies from abroad are unreliable and cause distortion in forecasting, the same does not apply to practices of the same kind by domestic industries.⁴⁴

The foregoing analysis mentioned three types of justifications in an increasing order of divergence with antitrust law. The first one (extension of antitrust enforcement) stands for the proposition of almost perfect compatibility, the second one (combatting unfairness) – for a possibility of convergence, whereas the third one (selective protection) entails a clear conflict. In the real world all the three types of justifications enter into a complex interplay, it may occasionally be impossible to identify the actual rationale. Still, it is possible to steer the system of trade protection more toward compliance with free competition, or, alternatively, toward outright protectionism. This will, naturally, bring about minimization or maximization of the potential conflict. A closer look at the rationales of the specific trade protection measures may give further indication about the current tendencies.

⁴¹ See: P.R. Krugman: „New Thinking about Trade Policy”, in: P.R. Krugman (ed.): *Strategic Trade Policy and the New International Economics*, (1987).

⁴² P. Holmes, *supra* n. 19.

⁴³ C.W. Schwartz, *supra* n. 23, at 223.

⁴⁴ B.S. Fisher: „The Anti-Dumping Law of the United States. A Legal and Economic Analysis”, 5 *Law and Policy in International Business*, 85 – 154, at 89 (1973).

2. The main types of trade protection measures: economic rationales and compatibility with competition policy

a) Anti-dumping action

There is no disputing that the most controversial issue is that of anti-dumping law. Despite its crucial role in most systems of trade protection including that of the European Community, its economic rationales remain very obscure. In order to identify the economic justification of anti-dumping, it is necessary to consider what kind of conduct it is supposed to combat. On the basis of Art. VI of the GATT followed by national laws, dumping can be defined as selling products on a foreign market at below their domestic price or below their normal value.

Although this kind of pricing strategy is not a usual one, economists suggest at least 4 types of situations where it may occur, namely: promotional sales, hidden export subsidies, price discrimination and predatory pricing.⁴⁵

Promotional sales occur when a new product is put on the market and the seller aiming first at maximizing the number of units sold fixes very low prices. This is rather a common marketing strategy and even though it often entails sales at a loss, it is not objectionable under national competition laws. In an international setting it can be relatively easily distinguished from other cases of dumping owing to the special features of promotional sales such as their temporary character and the novelty of the product.

Hidden export subsidies are those which are not directly observable and cannot be attacked under countervailing duties law. Such hidden incentives as e.g. lowered transportation costs, may, however, result in a difference between home market and foreign market prices. These practices raise problems particular to the field of anti-subsidy law.

Price discrimination takes place when export prices are set below those in the home market since the seller estimates that the foreign market cannot bear as much as the national one. It is plausible in cases when the seller exercises considerable market power in the home market and prefers keeping the prices high to increasing the volume of his sales to domestic buyers.⁴⁶ This can possibly be a monopoly which established its profit maximization at some point combining a high unit price with a low supply quantity. A variant of this situation is a pricing agreement in an oligopolistic industry which restricts the quantity of products at the domestic market and recommends disposing of the surpluses abroad.⁴⁷ Welfare implications of price discrimination for the importing country remain a

⁴⁵ I am following a list given by R. B o l t e c k: „Assessing the Effects on Domestic Industry of Price Dumping” in P.K.M. T h a r a k a n (ed.), *supra* n. 36, at 101 – 103. Some others explanations are suggested among others by B. H i n d l e y, *supra* n. 40.

⁴⁶ R.M. B i e r w a g e n, *supra* n. 31, at 9

⁴⁷ Cf. B. H i n d l e y, *supra* n. 40, at 30 – 33

debatable issue in international economics, though many authors stress that they do not justify a *per se* prohibition of dumping.⁴⁸

Predatory pricing has been a favoured argument of the anti-dumping law supporters and, simultaneously, the claim about its implausibility has been a major weapon of its opponents.⁴⁹ Similarly as in the discussion about the possibility of predation in a national market, the currently prevailing view is that such a possibility is very restricted.⁵⁰ Predatory pricing presupposes not only the possibility of getting rid of competition, but also that of loss recoupement due to the monopoly rent subsequently gained.⁵¹ The first requires a very high concentration of the market, whereas the second assumes very high entry barriers which would prevent potential competitors from entering the market at the moment when the monopolist starts overcharging.⁵² This possibility is found quasi-inexistent in a situation of a relatively closed national market, all the more it is unlikely to occur in cases of dumping when the competition from foreign countries has to be taken into account.⁵³ An undertaking would need a considerable power over the global or regional market to engage reasonably in predatory dumping.

The crucial point to be decided about anti-dumping action is how often it is directed at objectionable kinds of conduct, including especially predatory pricing and detrimental price discrimination.⁵⁴ Although economists' views vary on this point, it is commonly assumed that the use of anti-dumping goes far beyond any acceptable rationale.⁵⁵ It can be agreed that *there is an economic rationale for antidumping action, but its scope is tiny compared with the current range of antidumping cases*.⁵⁶ Particularly, with respect to the predation argument, it has been noted that *most current anti-dumping action occurs in industries in which predatory pricing is inconceivable*.⁵⁷ Since, however, a possibility of predation cannot be totally excluded, it is sometimes suggested that a counter-action should remain permissible, but under more restrictive conditions. First, the market has to be very highly concentrated to make an allegation of dumping viable, second only sales below costs should be considered, since other kinds of differential pricing are unlikely to have the effect of eliminating competitors.⁵⁸

⁴⁸ R.M. Bierwagen, *supra* n. 31, at 10.

⁴⁹ See e.g.: J.J. Barcelo, *supra* n. 1, W.J. Davey, *supra* n. 22.

⁵⁰ An up-to-date analysis is given by B. Hindley, *supra* n. 40, at 28 ending by a conclusion that *though examples of predatory pricing are few, they are not zero*.

⁵¹ W.J. Davey, *supra* n. 22, at 10.

⁵² B. Hindley, *supra* n. 40, at 27.

⁵³ J.J. Barcelo, *supra* n. 1.

⁵⁴ Some economists believe that international price discrimination is in principle beneficial to the importing country. Cf. R. Dale, *supra* n. 30, at 40.

⁵⁵ See: in particular D.N. Palfeter: „The Capture of the Antidumping Law”, 14 *Yale Law Journal of International Law*, 182 – 198 (1989).

⁵⁶ B. Hindley, *supra* n. 40, at 39.

⁵⁷ *Ibidem*, at 30.

⁵⁸ *Ibidem* at 40. Other suggestions for a revision of anti-dumping law were made among others by W.J. Davey, *supra* n. 22, at 40 – 41.

In the light of these arguments the idea of antidumping as an instrument restricted to counteracting antitrust infringements is clearly untenable. The question whether all dumping is unfair remains open,⁵⁹ it is nonetheless obvious that anti-dumping law is capable of being abused for the purpose of selective protection, and having thus clearly anti-competitive effects.⁶⁰

b) Anti-subsidy action

Unlike in the case of anti-dumping law, the discussion about anti-subsidy measures does not focus on explaining the origin of the counteracted practice. Subsidies are granted for a variety of reasons and the central question is rather to know whether it is reasonable to combat a practice that causes a shift of resources from the exporting to the importing country. Some economists argue that the aggregate welfare of the importing country would increase if subsidized products were allowed to flow in.⁶¹

There are, however, also some cogent arguments for taking protective measures: first it is the injury that can be caused to the national industry, secondly it is the distortion in the rational allocation of resources.⁶² Although both justifications, and in particular the first one, are compatible with the free trade theory, the same phenomenon as in the case of anti-dumping can be observed – a practice that goes beyond its rationales.⁶³ Nevertheless, it is fair to say that the abuse in this field is imputable to the European Community to a much lesser degree than to the United States. This is obviously linked to the fact that generally anti-subsidy action plays a minor role in the EC trade protection and constitutes a tiny proportion of all measures taken.⁶⁴

c) Protection against illicit commercial practices

Protection against illicit commercial practices of other countries is of relevance to the topic insofar as it concerns imports to the EC. The New Instrument does not enumerate specific types of practices to be counteracted and even the ECJ case-law offers little help for the identification of their nature.⁶⁵ As long as one can assume that only truly illicit practices are the target, no serious conflict with competition policy should occur. Since the Regulation provides that illi-

⁵⁹ Cf. C.M.E.J. Bronckers, *supra* n. 35, at 265.

⁶⁰ M. Marques Mendes, *supra* n. 20, at 146.

⁶¹ Cf. J.M. Finger, *supra* n. 36, at 182 – 183.

⁶² J.H.J. Bourgeois: „The GATT Rules for Industrial Subsidies and Countervailing Duties and the New GATT Round – The Weather and the Seeds”, in: E.U. Petersmann, M. Hilt (eds.): *The New GATT Round of Multilateral Trade Negotiations*, 226 – 233, at 232 (1988).

⁶³ J.M. Finger, *supra* n. 36, at 182.

⁶⁴ According to J.M. Finger (op. cit. at 177) in the seven years 1980 – 1986 there were only 7 EC countervailing duty cases compared to 282 cases in the US.

⁶⁵ A review of ECJ case-law under the New Instrument is presented in H. Lesguillon: *CEE dumping/subventions et autres mesures de défense commerciale*, vol. II, paras 2266 – 2270 (1989).

citiness is to be judged by international law and other commonly accepted rules, the only concern should be about their proper understanding by the EC administration. The problem, although in a more technical form, resembles that with the proper definition of unfair trade.

d) Safeguard measures

Safeguard measures adopted under the common import regime and pursuant to Art. XIX of the GATT are characterised by several features which make it the most blunt instrument of the EC commercial policy.⁶⁶ First of all, safeguard measures can be applied equally against fairly as unfairly traded goods. Secondly, they take the form of quantitative restrictions being the most outright limitation of competition. Although tariff increases are possibly also allowed under Art. 15 and 16 of Reg. 288/82, import quotas have been the only practically applied measure.⁶⁷ Certainly, their unreasonable application could lead to a complete elimination of foreign competition with respect to all similar and directly competing products.⁶⁸

Fortunately, both Art. XIX GATT and Art. 15 of Reg. 288/82 restrict the use of these measures to exceptional situations and provide for significant procedural and substantive requirements such as consultations with the exporting states, a duty to compensate etc. The possibility of employing safeguard measures as an instrument of trade protection is further restricted by the obligation to apply them on a non-discriminatory basis. This requirement prohibiting the use of safeguard measures only against the most competitive producers, has, unfortunately, been so frequently circumvented in international practice that its removal is suggested.⁶⁹

Additionally, in the case of the EC, the nature of the safeguard measures which consists in restricting imports to average quantities in preceding years has been found to be a proper means of avoiding blatant conflicts with competition policy.⁷⁰

e) VERs and VRAs

The application of these restrictions does not necessarily refer to the need of offsetting improper conduct of other countries. Neither are VERs and VRAs destined to be used in some clearly defined situations, nor governed by specific rules. One feature that helps to identify them as a group is that they generally consist in quantitative restrictions or minimum price fixing.⁷¹ Actually, they are

⁶⁶ Cf. J.F. Beseler, N.A. Williams, *supra* n. 32, at 51.

⁶⁷ I. Van Bael, J.F. Bellis: *International Trade and Practice of the European Communities – EEC Anti-Dumping and Other Trade Protection Laws*, at 181 (1985).

⁶⁸ J.H.J. Bourgeois, n. 24, *supra*, at 243.

⁶⁹ J.F. Beseler, N.A. Williams, *supra* n. 32, at 51.

⁷⁰ J.H.J. Bourgeois, *supra* n. 24, at 243.

⁷¹ Cf. M. Matsushita: „Coordinating International Trade with Competition Policy”, in: E.V. Petersmann, M. Hilf: *The New GATT Round of Multilateral Trade Negotiations. Legal and Economic Problems*, pp. 395 – 435.

used as a parallel track of trade protection, complementing more formal types of action. Exports restraints have been often negotiated by the European Community simultaneously with or subsequently to proceedings under its trade law.⁷²

Measures of a nature similar to VRAs are allowed in Regulations 2423/88 and 2641/84 under the name of undertakings. Such agreements also impose minimum prices or quantitative restrictions⁷³ and they have even been labelled "Voluntary Restraint Agreements administered".⁷⁴ Both undertakings and voluntary export restraints have been criticised for being essentially kind of legalized cartels, granted immunity from Art. 85(1) EC only by reason of the EC Institutions' participation.⁷⁵

Even though undertakings have a solid legal basis and their collision with competition policy has rarely been an issue,⁷⁶ it has been recognized by the EC Institutions that their interference with competition can be more severe than in case of imposition of a duty. For instance in the *Glycine from Japan* case⁷⁷ imposition of duties was found permissible, but acceptance of undertakings had to be excluded for competition reasons.

Obviously, problems arising with respect to VRAs and VERs are by far more serious: their flexibility is outweighed by the lack of transparency and the severity of the restrictions imposed. They are deprived of an adequate system of constraints and procedural requirements and they might be blatantly protectionist.⁷⁸ In many cases it could turn out unnecessary to scrutinize their compatibility with competition policy; the first step would be to examine their validity on more elementary grounds.

III. Competition and trade policy under the scheme of the EC Treaty

The foregoing consideration of the relationship between competition policy and trade protection has led to the conclusion that to a certain point their reconciliation is feasible. Nonetheless, in practice most states go far beyond this point. From that moment it is possible to have either more protection and some less competition or the reverse. Both solutions are economically justifiable, provided that a loss in competition is minimized when protection is sought and vice versa. The next point to be analysed is whether the EC institutions are legally

⁷² See: for instance: I. Van Bael, J.F. Bellis, *supra* n. 67, at 185 – 186 on VRAs negotiated subsequently to proceedings under Reg. 288/82.

⁷³ See: J. Cunnane, C. Stanbrook: *Dumping and Subsidies. The Law and Procedures Governing the Imposition of Anti-dumping and Countervailing Duties in the European Community*, at 86 – 88 (1983).

⁷⁴ R. Kułms, *supra* n. 14 at 303.

⁷⁵ M. Clough: „Conflicts between EEC Anti-dumping and Competition Law”, 13 *ECLR* 222 at 223 (1992).

⁷⁶ I. Van Bael, J.F. Bellis, *supra* n. 67, at 103.

⁷⁷ Commission Reg. (EEC) No. 997/85 of 18 April 1985, OJ 1985, L 107/8 and Council Reg. (EEC) No. 2322/85 of 12 August 1985, OJ 1985, L 218/1.

⁷⁸ Cf. M. Marques Mendes, *supra* n. 20, at 182 and 196.

bound to pursue a policy that clearly opts for a specific solution and sets a hierarchy between competition and trade protection considerations.⁷⁹

Three solutions can be envisaged: a clear priority of the freedom of competition, a precedence of trade protection and a balance between the two policies. One should note that the three solutions constitute kind of continuum with a wide span between the two extremes. This span contains a whole range of various kinds of balance struck with more preference to one or the other side. In such case, quite intuitively, one is tempted to say that a balance must be the appropriate solution. This is not, however, a satisfactory answer. Even if it proves true, it is still necessary to know what kind of balance is proper: a clearly defined one or one that is freely struck.

An answer can only be given after a careful analysis of legal provisions binding on the EC Institutions. This is first of all the European Community Treaty and the other two founding treaties: The European Coal and Steel Community Treaty of 1951 and the European Atomic Energy Community Treaty of 1957. Since the EC competition and trade policies are carried out mainly under the EC Treaty, a reference to the provisions of the other two treaties should only be made when they can shed new light.

Looking for the answer will entail an exploration of three issues of the EC law: first the character and scope of provisions relating to competition and trade policies, secondly the possibility of hierarchy between the two policies, thirdly the EC Institutions' discretion in implementing the Community policies.

1. The content and scope of the relevant provisions

A glimpse at the EC Treaty shows that both competition and trade policy are governed by provisions of various rank and specificity. For competition policy the detailed rules are laid down in Art. 85 – 90 EC (for undertakings) and Art. 92 – 94 EC (for state aids). More general is the provision of Art. 3(f) EC, stating among the Community activities *the institution of a system ensuring that competition in the common market is not distorted*. Finally, a broad declaration can be found in the fourth recital of the preamble to the Treaty: *Recognizing that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition*.

Similarly, for trade policy, specific provisions are contained in Art. 110 – 116 EC, its pursuit is recognized as a Community activity by Art. 3(b) EC (*the establishment of a common customs tariff and of a common commercial policy towards third countries*), and a declaration is made in the sixth recital: *Desiring to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade*.

⁷⁹ With reference to the analogue problem under US law it is sometimes stated that regulatory policies deviating from freedom of competition have to be strictly construed as exceptions to the general principle. (Cf C.W. S c h w a r t z, *supra* n. 23) In the US, however, antitrust enjoys an exceptional, quasi-constitutional status.

One could think that there exists no important difference between the ways in which the two policies are phrased by the Treaty. One such difference can, however, be found – it is the degree of precision with which the substance of competition rules is defined compared to the striking vagueness of the provisions on common commercial policy. It is clear, in light of Art. 85 – 86 EC that a policy of fair competition entails an obligation to combat collusive practices and abusive exploitation of dominant position. On the other hand provisions on trade policy are mostly of a procedural character except Art. 110 and Art. 113 EC.

Art. 110, enumerating the objectives of the CCP, quite strikingly repeats the content of the sixth recital, adding only a mention of the lowering of customs barriers and an explanation of the effects of free movement between the EC Member States. The issue whether this article lays down substantive legal obligations for the EC Institutions is debatable in the doctrine.⁸⁰

Art. 113 EC, on its part, recognizes that after the end of the transitional period *the CCP shall be based on uniform principles, particularly in regard to (...) measures to protect trade such as those to be taken in case of dumping or subsidies*. The obligation as such relates to the use of uniform principles, it is though followed by a list of measures to which it applies. This list including anti-dumping and anti-subsidy measures can be construed as a mandate for the EC Institutions to use such means. Although an empowerment is not an obligation in itself, it is helpful to identify the substance of the duty laid down in Art. 3(b) EC. Yet, this provision remains very open-ended compared to Art. 3(f) backed by competition rules.

2. The relationship between Art. 3(b) and Art. 3(f) EC

Some discussion in the EC legal doctrine has been devoted to a comparison of the status of Art. 3(b) and 3(f).⁸¹ Since systematic interpretation gives them an equal rank, it would be difficult to argue that either of them should take precedence as being more fundamental to the scheme of the Treaty. Although some methods of interpretation could lead to inferring an order of priority even between provisions of a formally equal rank, no such attempts have been made by the European Court of Justice with regard to Art. 3(f) and 3(b).

Although it is widely recognized that the objectives enumerated in Art. 3 EC can easily collide, the task of their reconciliation has been undertaken by the Court in an extremely limited number of cases.⁸² Moreover, the two most important ones: the *International Fruit Company* case of 1971⁸³ and the *Maizena*

⁸⁰ J.H.J. Bourgeois, *supra* n. 24, at 231.

⁸¹ Cf. J.H.J. Bourgeois, *supra* n. 5, at 121.

⁸² V. Constantinesco, J.P. Jacqu  , R. Kovar, D. Simon (eds.): *Traite instituant la CEE. Commentaire article par article.*, at 41 (1992).

⁸³ Judgment of 31 May 1971 Joined cases 41 to 44/70 *International Fruit Company and Others v. Commission*, 1970 ECR 411.

case of 1980⁸⁴ both concerned the incompatibility between the objectives of competition policy under Art. 3(f) and those of agricultural policy under Art. 3(d) EC. This is not a case of genuine conflict, because the EC Treaty expressly states in Art. 42 that competition rules are applicable in the agricultural sector only to the extent determined by the EC Council. In both cases an invocation of this argument allowed the Court to dispose very easily of the problem without even entering the unexplored field of policy-balancing decisions.⁸⁵

Although in some cases involving the application of Art.3(f) EC the Court emphasized the importance of competition policy, this has little relevance to the hierarchy problem as long as competition was not confronted with other objectives of Art. 3 EC. In the *Continental Can* case, for instance, the Court ruled in respect to Art. 3(f) that *This requirement is so essential that without it numerous provisions of the Treaty would be pointless*.⁸⁶ It is clear from the wording that although Art. 3(f) EC is a prerequisite to a number of other provisions, this does not effect the standing of other subparagraphs of Art. 3 EC.

Furthermore, the Court recognized explicitly that the freedom of competition principle can be restricted not only under the provision of Art. 42 EC, but also when it is required by the general interest. In the *Waste Oils* case⁸⁷ the Court was asked about the applicability of the principles of freedom of trade, free movement of goods and freedom of competition to measures motivated by environment protection. The Court ruled that these principles are *subject to certain limits justified by the objectives of general interest pursued by the Community* adding only that such departures "*must nevertheless neither be discriminatory nor go beyond the necessary restrictions*".⁸⁸ This naturally makes inadmissible any claims about the absolute character of the freedom of competition principle and implies that this freedom may be legitimately restricted in general interest also in case of trade protection.⁸⁹

Since the ECJ case law as a whole provides no satisfactory answer to the question about the hierarchy between various objectives of Art. 3 EC, it might be interesting to inquire whether such answer is available on the basis of any recognized techniques of legal interpretation. A technique that could be particularly suitable is that of distinguishing between ultimate (fundamental) and instrumental (immediate) objectives. The former can be defined as ends in themselves, whereas the latter are means to other ends.

⁸⁴ Judgment of 29 October 1980 case 139/79 (*Maizena GmbH v. Council*) 1980 ECR 3393.

⁸⁵ Despite the fact that in the *International Fruit* case the parties' submissions contained also their views on a possible hierarchy or equality of the objectives mentioned in Art.3 EEC.

⁸⁶ Judgment of 21 February 1973 case 6/72 *Europemballage Corporation and Continental Can Company v. Commission*, 1973 ECR 215.

⁸⁷ Judgment of 7 February 1985, case 240/83 *Procureur de la Republique v. ADBHU* 1985 ECR 538.

⁸⁸ *Ibidem*.

⁸⁹ Cf. J.H.J. B o u r g e o i s, *supra* n. 24, at 232.

If it were to appear that either freedom of competition or trade protection constitute an ultimate end, it would mean that its pursuit need not be reconciled with other objectives. This does not, however, seem to be the case, especially in the light of the content of Art. 2 EC. An enumeration of the EC tasks in Art. 3 is preceded by words *For the purposes set out in Art. 2, the activities of the Community shall include . . .* While competition and trade protection appear in Art. 3, Art. 2 does not make any mention of them and only includes such aims as *raising of the standard of living* to which objectives of Art. 3(b) and 3(f) can serve as tools.

Moreover, the only objective which the preamble labels as "essential" is *the constant improvement of the living and working conditions* of the Member States' peoples. A *concerted action in order to guarantee steady expansion, balanced trade and fair competition* is called for in the fourth recital only insofar as it is necessitated by the removal of barriers existing between countries. This removal has for its aim, as stated in the second recital, *social and economic progress*. This construction seems to be supported by a common sense observation of the necessity of competition and trade protection for the development of general welfare.

Since both competition and trade protection are instrumental objectives, it follows that they can be weighed against each other and that the preference should be decided on the basis of a more direct contribution to the attainment of the fundamental ends.

3. The EC Institutions' discretion in policy-balancing decisions

Insofar as the interpretation of the EC Treaty proves that obligations deriving from Art. 3(b) and Art. 3(f) are of the same status and since in the light of economic analysis they may diverge, the question which consequently begs answer is that of EC Institutions' competence to set out priorities.

One of the cornerstones of the European Community constitutional law is the principle of limited powers conferred on the Institutions, expressed in Art. 4 of the EC Treaty. The Institutions are empowered and obliged to implement policies enumerated in Art. 3 EC without being allowed to alter their content or scope.⁹⁰ It has been decided by the Court of Justice that Art. 3 EC does not merely contain a general programme, but has a real binding force.⁹¹ To the extent, though, that some objectives set out in this article are inevitably compromised while others are carried out, the EC Institutions need to be granted a certain margin of discretion.

It is rather unfortunate that the Court has not yet specified with respect to Art. 3 EC under what conditions this discretionary power can be exercised. It is

⁹⁰ P. Pescatore: „Les objectifs de la Communauté comme principes d'interprétation dans la jurisprudence de la Cour de Justice”, in: *Miscellanea W.J. Ganshof van der Meersch*, Bruylant at 327 (1972).

⁹¹ *Continental Can*, see: note 86, *supra*, at 244.

suggested in the legal doctrine that the applicable criteria are those which the Court established for policy-balancing decisions under Art. 3 ECSC and Art. 39 EC.⁹² This view is founded on a strong similarity of the structure of these provisions and of the problems which arise in their application. Art. 3 ECSC, very much like Art. 3 EC, enumerates in broad terms general policies for the coal and steel sector, Art. 39 EC does the same for agriculture, differing thus from Art. 3 EC mainly by a narrower scope.

The basic principles concerning policy-balancing decision were laid down by the Court under Art. 3 ECSC in the *Meroni* case.⁹³ The Court ruled that *Reconciling the various objectives laid down in Article 3 implies a real discretion involving difficult choices, based on a consideration of the economic facts and circumstances in the light of which those choices are made.* Refraining from establishing any firm priorities, the Court deemed it proper to apply a case-by-case approach when stating that: *The High Authority must permanently reconcile any possible conflict which may be implied by these objectives when considered individually, and when such conflict arises must grant such priority to one or other of the objectives laid down in Article 3 as appears necessary having regard to facts or circumstances in the light of which it adopts its decisions.* This standpoint was more recently confirmed in the *Valsabbia* case⁹⁴ and adopted also with respect to Art. 39 EC in the *Balkan-Import-Export* case.⁹⁵

An important limitation of the discretionary power in question consists in the obligation to consider all other objectives and to minimize the effect of compromising their attainment. This obligation was most clearly described by the Court in the *S.A. Biovilac* case⁹⁶ under Art. 39 EC. The Court ruled that: *the institutions must reconcile the various objectives laid down in Art. 39, which does not allow any of those aims to be pursued in isolation in such a way as to make the attainment of other aims impossible.*

There seems to be no reason why the principles applicable to various policy-balancing decisions should not be followed in the case of conflicts between competition and trade policies.⁹⁷ Nonetheless, one specific feature of this tension is the relative precision of the obligation imposed by Art. 3(f) in conjunction with competition rules, which can give a certain advantage to the competition policy objective. Namely, it would be technically more difficult to accommodate

⁹² V. Constantinesco et al. (eds), *supra* n. 82, at 46.

⁹³ Judgment of 13 June 1958 cases 9 and 10/56 *Meroni v. High Authority* 1958 ECR 133. See also: Judgment of 21 June 1958, case 8/57 *Groupement des Hauts Fourneaux et Acières Belges v. High Authority* 1957 – 58 ECR 245.

⁹⁴ Judgment of 18 March 1980 Joined. cases 154, 205, 206, 226 to 228, 263 and 264/78, 29, 31, 83 and 85/79 *Valsabbia e.a. v. Commission* 1980 ECR 907.

⁹⁵ Judgment of 24 October 1973, case 5/73 *Balkan-Import-Export v. Commission* 1973 ECR 1091.

⁹⁶ Judgment of 6 December 1984 case 59/83 *S.A. Biovilac v. Council* 1984 ECR 4072.

⁹⁷ A teleological analysis leads R. K o v a r to the same conclusion that competition policy must take account of other EC policies and vice versa. See: R. K o v a r: „Marché intérieur et politique de concurrence“, 14 *DPCI* 230 (1989).

competition than trade policy considerations at the stage where their reconciliation is sought. The obligation of Art. 3(b) in conjuncture with Art. 110 and 113 EC, being considerably more flexible, it might be easier for the EC Institutions to shape its trade policy so as not to affect competition within the Common Market than to make a concession on the side of competition policy. This argument, however, is of only technical nature, and as long as Art. 3(b) and 3(f) are of equal rank, the Institutions' discretion is only limited by the discussed caveats.

4. The antitrust – trade policy interface and the role of the EC Institutions

It has been pointed out on numerous occasions that, compared to other systems, the EC trade protection, and in particular anti-dumping law is more suitable for coordination with competition policy due to the fact that both fields are administered by the same authorities. Comparisons have been made with the US where antitrust and anti-dumping enforcement is carried out by separate bodies.⁹⁸ In the case of the EC it is the Commission that plays a key role in both types of proceedings. This is evident in the area of the EC competition law, but also in the field of commercial policy the Commission has a decisive impact due to its power to take provisional measures, as well as its exclusive authority to make proposals to the Council. As a result it can be assumed that the decision making processes in one of the fields can always include an analysis of possible consequences for the other area based on reliable and consistent information. Therefore the risk of neglecting trade policy aspects in taking competition measures and *vice versa* should in principle be minimal.⁹⁹

There exist, however, serious obstacles to the flow of information within the Commission itself. On the one hand they are of organizational nature since commercial policy and competition policy are administered by different Directorates General: DG I and DG IV respectively. More serious, though, are procedural constraints: the use of information collected in one type of proceedings for proceedings of another type is prohibited both in trade¹⁰⁰ and in competition law.¹⁰¹

This certainly precludes the two departments from an exchange of information and of their files in particular.¹⁰² Nevertheless, they are not prevented from consultations in which the opinions of respective services can be expressed and taken into consideration with a view to reconciling the two policies. Such consultations actually take place and, according to some authors, their development should be enhanced.¹⁰³

⁹⁸ Cf. P. V a n d o r e n, *supra* n. 2, at 3.

⁹⁹ Ibidem, at 2.

¹⁰⁰ Regulation 2324/88, Art. 8(1) and Regulation 2641/84, Art. 7(1).

¹⁰¹ Council Regulation (EEC) No 17/1962 of 6 February 1962; First regulation implementing Articles 85 and 86 of the Treaty, JO 1962/204, OJ Spec. Ed. 1959 – 1962/87; Art. 11.

¹⁰² Cf. J.H.J. B o u r g e o i s, *supra* n. 24, at 240.

¹⁰³ P. V a n d o r e n, *supra* n.2, at 3.

5. The scope of review by the Court of Justice

It has been observed that in the field of judicial review of commercial policy measures the Court has displayed much more self-restraint than in considering other cases.¹⁰⁴ Not only is a full retrial never admitted, but also the scope of scrutiny is very limited. As Advocate General Jacobs explains in his recent paper, this review includes: 1) the observation of the procedural rules, 2) the accuracy of the statement of the facts, 3) the adequacy of the reasoning of the regulation, 4) the occurrence of a manifest error or misuse of powers, or 5) a violation of the Treaty, of the enabling legislation or of fundamental principles of Community law.¹⁰⁵

Since decisions which balance competition policy against trade policy arguments are discretion-based choices subject to general confines under Community law, they are also amenable to judicial review,¹⁰⁶ although only in its limited form. The Court made it clear in extra-contractual liability actions that in legislative fields involving wide discretion applicants might be required to prove that the Institutions manifestly and gravely disregarded the limits on the exercise of their powers.¹⁰⁷ The Court is certainly prevented from undertaking an assessment of the economic correctness of the Institutions' decisions, but even the existing possibility of limited review exerts by itself a protective influence.¹⁰⁸

IV. Competition policy considerations in trade protection: the way the balance can be struck

1. An overview of the problems

The interface between antitrust and trade protection is usually analysed in two complementary aspects: first – that of undertakings' actions related to trade protection and possibly infringing competition law, second – that of competition considerations in the process of decision-making by the authorities responsible for trade measures. The latter aspect is obviously of primary interest to our subject, though also a brief overview of the former one can be of some relevance.

Considering the institutional aspect alone, one should first ask what "competition considerations" stand for, do they comprise only antitrust infringements or also possible impact of trade measures on competition? It is rightly suggested

¹⁰⁴ Cf. Temple Lang: „Judicial Review of Trade Safeguard Measures in the European Community“, *Fordham Corp. L. Inst.* 643 (1985).

¹⁰⁵ F. Jacobs, *supra* n. 4, at 72.

¹⁰⁶ Cf. J. Temple Lang, *supra* n. 2, at 85.

¹⁰⁷ Cf. Judgment of 25 May 1978, case 83/76 *HNL v. Council and Commission*, 1978 ECR 1209.

¹⁰⁸ Cf. J. Temple Lang, *supra* n. 2, at 85.

that in order to make the reconciliation of the policies feasible, the EC Institutions must be also allowed to consider competition implications of trade measures merely on the basis of economic analysis and thus e.g. refuse to reinforce or create a dominant position even without any prior abuse.¹⁰⁹ This attitude was recently supported by Advocate General Van Gerven in the *Nölle* case who noted that: *On the one hand it may not be the objective of antidumping proceedings to endorse or provoke practices contrary to competition rules, on the other, it should be avoided, to the highest possible extent, that antidumping proceedings bring about such effects.*¹¹⁰

The foregoing standpoint could be challenged for its incompatibility with the rule that undertakings can only be penalised for an anti-competitive behaviour when an infringement of antitrust rules is found by competent authorities.¹¹¹ The answer is, however, that a refusal to grant protection does not deprive private parties of any rights: under the EC law they have a right to a complaint,¹¹² but not to relief.

It should, therefore, be repeated that competition considerations are of a two-fold nature: the first group can be classified as "implication arguments", the second – as "infringement arguments". These two categories remain relatively distinct: on the one hand an impact on competition without infringements can easily be envisaged, on the other in some situations only an existent antitrust abuse could justify a refusal of relief.¹¹³ It would therefore be clearly wrong in case of a dispute concerning possible infringements to base a decision on mere allegations. Thus the Institutions are sometimes right to claim that trade proceedings are no substitute for competition policy investigations. They point out that for instance under Regulation 2423/88 proceedings are in principle circumscribed by a one-year time limit,¹¹⁴ and they would sometimes have to prejudge the results of antitrust investigations. Therefore, the most appropriate manner of taking competition law infringements into consideration would be a review action under Art. 14(1) of the basic regulation as soon as the existence of infringements is confirmed by an antitrust decision.¹¹⁵

Another highly debatable issue is when the EC Institutions are under a duty to take account of competition arguments. Quite naturally, they consider such

¹⁰⁹ J. Temple Lang, *supra* n. 2, at 30.

¹¹⁰ See: *supra* n. 7, para. 11 of the Opinion at 5177, my translation from the French language version published in: *Recueil de la Cour de Justice* reading as follows: *d'une part, l'objet des procédures antidumping ne saurait être d'entériner ou de sousciter des pratiques qui sont contraires aux règles de concurrence et d'autre part, il convient d'éviter, dans la mesure du possible, que des mesures et des procédures antidumping produisent un tel effet.*

¹¹¹ An argument of this sort was advanced with respect to the *Glycine from Japan* case by J.H.J. Bourgeois: „EC Antidumping Enforcement – Selected Second Generation Issues”, 1985 *Fordham Corp. L. Inst.* 563 at 575 (1985).

¹¹² See: the discussion below.

¹¹³ See: the *Nölle* case discussed below.

¹¹⁴ Art. 7(9) a).

¹¹⁵ See: for instance the Regulation in the *Mercury from the USSR* case, *infra* n. 138.

arguments raised by the parties to the proceedings, but they have refrained from undertaking an analysis on their own initiative.¹¹⁶ Given the restricted access of private parties to administrative and judicial proceedings, as well as broad social implications of import relief measures, it is doubtful whether this policy is always proper. It is difficult and unreasonable to argue for a systematical case-by-case analysis,¹¹⁷ yet I believe that a duty for the Institutions to act on their own motion should be established in some situations such as complaints from highly concentrated industries. Cooperation between DG I and DG IV should be increased within permissible limits and DG I should especially refrain from invoking the lack of decision by competition authorities in cases when implications rather than infringements should be decisive. An alternative solution would be to allow a wider participation of private parties and then leave it to them to raise competition concerns. This could be even the most natural solution, necessitating, however, additional efforts and resources.

As far as legal bases for allowing competition arguments in trade proceedings are concerned, two of them are of general importance. In the first place all pieces of the EC trade legislation subject the adoption of measures to the finding of their compatibility with the interests of the Community.¹¹⁸ This is a specific feature of the EC trade law making it more flexible than other systems. The other basis for voicing competition concerns is present at the stage of the determination of injury to the Community industry.

A finding of injury (suffered or threatened) is an essential requirement for the relief to be granted¹¹⁹ and competition issues are relevant to its assessment. This is particularly due to the fact that the injury resulting from an ordinary commercial conduct is to be disregarded. It is stated in Reg. 2423/88 that *Injuries caused by other factors, such as volume and prices of imports which are not dumped or subsidized, or contraction in demand (...) must not be attributed to the dumped or subsidized products.* (Art. 4(1)) The same principle is expressed in Art. 8(3) of the New Instrument. This makes it possible to argue, even in case where findings of unfair trade practices have been made, that there was no link between them and the injury.

Both grounds permit similar results: on the basis of competition considerations the Institutions may either refuse to intervene or to shape measures taken so as to minimize their impact on competition. Both also allow arguments based on antitrust infringements as well as on possible future impact. Before the particularities of both tracks are examined, a short glimpse at the problem of private restrictions can be worthwhile.

¹¹⁶ J.H.J. B o u r g e o i s, *supra* n. 24, at 241.

¹¹⁷ Ibidem.

¹¹⁸ Regulation 2423/88, Art. 11(1) for provisional duties and Art. 12(1) for definitive duties; Regulation 288/82, Art. 15(1) and 16(1). A specific situation is that of Regulation 2641/84, where not only the adoption of measures (Art. 10(1)), but also the initiation of proceedings (Art. 6(1)) depends on the Community interest.

¹¹⁹ Regulation 2423/88, Art. 4(1); Regulation 2641/84, Art. 1(a) and 2(3), Regulation 288/82, Art. 15(1).

2. The problem of private restrictions on competition in trade protection cases

Antitrust-based confines for private action are interesting to the extent they indicate what aspects of trade protection are objectionable from the standpoint of competition policy. Since the EC Institutions are not bound by competition rules, it is not always easy to draw the line between their compliance with those rules and their discretionary departure justified by trade protection objectives. This line can be drawn on the basis of the scope of antitrust prohibitions for private restrictions of trade. In this way it becomes possible to judge whether an EC Institutions' decision remains within the confines of antitrust objectives or constitutes an example of policy-balancing choice.

The scope of departures from competition rules permissible for undertakings differs very sharply from that existing in case of the Institutions. This is a logical consequence of the division between the private and public spheres and of the exclusive competence of public authorities to coordinate the policies of the EC. Private parties are therefore precluded, on grounds of competition law and policy, even from taking measures identical in their effect to institutionalized trade protection. The rule was established in the *French-Japanese Ball-Bearings Agreement* decision¹²⁰ and further developed in the case concerning *Aluminium from Eastern Europe*.¹²¹ In the latter case the Commission stated in its decision (not challenged before the Court) that: *A public authority must take into account the rights and interests of third parties as well as a general public interest. A cartel is habitually for the benefit of the participants and takes no account of the other two concerns.* The Commission dismissed also the argument that private restrictions were necessary because of the inadequacy of the existing legislation. In the Commission's view such inadequacy was merely a matter of legislative correction and could not justify restrictive agreements.¹²²

The principle that private parties are not granted any immunity from competition rules on trade protection grounds is subject to an exception in cases where such departures are clearly required by trade legislation. The most obvious example is that of anti-dumping or anti-subsidy complaint for which *acting on behalf of a Community industry* is required by Art. 5(1) of Regulation 2423/88. The same requirement is contained in Art. 3(1) of Regulation 2641/84 on protection against illicit commercial practices. It is well understood that certain exchange of information between interested undertakings might be necessary in preparation of a complaint and this might involve disclosure of confidential data among competitors, being a collusive practice in the meaning of Art. 85 EC. The prohibition of this article cannot, however, apply to the situation in question, since it would deprive Community industries of any pro-

¹²⁰ Commission Decision (EEC) of 29 November 1974, OJ 1974 L 343/19.

¹²¹ Commission Decision of 19 December 1984, No 85/206/EEC, OJ 1985, L 92/1.

¹²² Cf. P. V and o r e n, *supra* n. 2, at 12 – 13; and J. T e m p l e L a n g, *supra* n. 2, at 49 – 53.

tection provided by Regulation 2423/88 and the Regulation itself of any utility.¹²³ In principle this is a legitimate means of protection even for dominant companies, which cannot be deprived of their rights by reason of their position.¹²⁴

Nevertheless, undertakings' conduct in preparing and lodging complaints is circumscribed by competition rules.¹²⁵ Any unnecessary large-scale exchange of information would amount to an infringement of Art. 85 EC.¹²⁶ Also the use of a complaint as a threat to foreign competitors can be deemed to infringe the EC competition law.¹²⁷ An interesting situation arises under Art. 86 EC regarding its application to the lodging of a complaint by a dominant undertaking. It was suggested in the doctrine that an infringement of Art. 86 EC can be found whenever a complaint is lodged with an intention to eliminate any competition from outside the EC.¹²⁸ This would naturally entail the difficulties proper to findings based on parties' intentions and until now it has not been clear what attitude the Court would adopt towards such over-extensive complaints by dominant companies.

3. Competition arguments under the Community interest clause

a) *The practice of the EC Institutions*

The consideration of the Community interest is the point at which the discretionary powers of the EC Institutions in trade policy find their full expression. The introduction of this clause to the trade legislation allows the making of balancing decisions on the basis of this legislation alone without necessary recourse to more general provisions of the EC law.¹²⁹

It is crucial to define the content of the Community interest concept, but this has not been done in the existing legislation. The Commission's interpretation of the clause was given in its "Guide to European Communities Anti-Dumping and Countervailing Legislation",¹³⁰ where it stated that this concept *may cover a wide range of factors, but the most important are the interests of consumers and processors of the imported product and the need to have regard to the competitive situation within the Community market.*

Such an interpretation could entail the use of the clause in question to oppose excessive trade protection, but the Institutions have not shown much willingness to follow this path. A widespread criticism has emerged in the doctrine to the Institutions' interpretation of this clause.¹³¹ It has been maintained that *the Commu-*

¹²³ Cf. J.H.J. B o u r g e o i s, *supra* n. 24, at 248.

¹²⁴ P. V a n d o r e n, *supra* n. 2, at 4; J. T e m p l e L a n g, *supra* n. 2 at 46 – 47.

¹²⁵ Cf. the motivation of regulations on *Ferro-silicate-calcium from Brazil*, *infra* n. 135.

¹²⁶ P. V a n d o r e n, *supra* n. 2, at 4.

¹²⁷ See: the *Ball Bearings* decision, *supra* n. 120.

¹²⁸ J. T e m p l e L a n g, *supra* n. 2, at 44.

¹²⁹ J.F. B e s e l e r, A.N. W i l l i a m s, *supra* n. 32, at 169.

¹³⁰ Reproduced in: I. V a n B a e l, J.F. B e l l i s, *supra* n. 67, Annex 6, at 345.

¹³¹ Cf. e.g. I. V a n B a e l, J.F. B e l l i s, *supra* n. 67, at 88 – 89.

nity interest concept, and in particular the interests of the users and consumers, have consistently been reduced by EC authorities to the interest of the complainant industry applying for protection.¹³²

A different understanding of the "Community interest" clause was sometimes defended by parties to trade law proceedings. Their argument that the notion should not be restricted to the interests of particular groups, has, however, been generally unsuccessful. This is partly due to the fact that representatives of the Community consumers intervened rather rarely,¹³³ whereas the permissibility of voicing their interests by foreign producers was found questionable.¹³⁴

The Institutions devised two major arguments against competition-based challenges to their measures made under the "Community interest" provision. In some cases they referred to the separation of trade law and antitrust proceedings, in many others they applied the idea of a long-term consumer interest in preserving a Community industry as opposed to a short-term interest in cheap products.

Both arguments were applied in the *Ferro-silicate-calcium from Brazil* case¹³⁵, where serious allegations about anti-competitive practices were made. The argument that protection measures would make Community user industries dependent on a cartel of Community producers was dismissed by the Commission on the ground that dependence on the Community first product manufacturers should not be replaced by dependence on foreign supplies. It was made explicit that the Community's strategic interest in retaining its important industry is capable of overriding the end users' or consumers' interest in a competitive supply.¹³⁶ An allegation was also made that the conduct of the Community undertakings was a prohibited restrictive practice which should not be reinforced by granting any relief. This, however, was refuted on the ground that antitrust infringement is exclusively subject to competition law proceedings and only if such proceedings lead to an affirmative finding, an anti-dumping measure can be reviewed.¹³⁷

The separation of antitrust and anti-dumping proceedings became an important argument allowing to disregard or dismiss competition considerations in a number of cases including e.g. the *Mercury from the USSR* case,¹³⁸ in which the Council merely promised that *if an infringement of Articles 85 and 86 is discovered and a proceeding is initiated, the Commission may review the present proceeding*.¹³⁹

¹³² M. Marques Mendes, *supra* n. 20, at 176.

¹³³ J.H.J. Bourgeois, *supra* n. 24, at 257.

¹³⁴ R. Kuls, *supra* n. 14, at 303.

¹³⁵ Comm. Reg. (EEC) No. 1361/87 of 18 May 1987, OJ 1987 L 129/5 and Council Reg. (EEC) No. 3365/87 of 9 November 1987, O.J. 1987 L 322/1.

¹³⁶ *Ibidem*, Comm. Reg. at paras 14 and 15, Council Reg. at para. 9.

¹³⁷ *Ibidem*, Comm. Reg. at para. 12.

¹³⁸ Council Reg. (EEC) No. 3687/87 of 8 December 1987 OJ 1987 L 346/87.

¹³⁹ *Ibidem*, at para. 15.

There exists a very long list of examples where pro-competitive pleas under the heading of the Community interest were disregarded since the interest in unrestricted trade was found outweighed by other considerations. The most notable cases include: *Barium Chloride from China and GDR*,¹⁴⁰ *Photocopiers from Japan*,¹⁴¹ and *Video Cassette Recorders from Japan and South Korea*.¹⁴² Interestingly enough, none of these or other regulations exemplified a true balancing act. Most explanations were very elusive, without a modest attempt at a cost-benefit analysis.¹⁴³

Even in the rare cases where the EC Institutions displayed more sympathy for pro-competition arguments under the "Community interest" clause, the insufficiency of their reasoning was strongly criticised.¹⁴⁴ The undoubtedly most significant example is that of *Glycine from Japan*.¹⁴⁵ In that case the Community market for glycine consisted of only three competitors: one producer and two exporting companies. At the stage when the findings of dumping and injury were made, the exporter for whom the higher dumping margin was found, argued that imposing duties corresponding to the margins would make it impossible for it to compete with the other exporter. Finding it undesirable to eliminate one of only three competitors, the Commission and the Council followed the argument and imposed equal duties on both companies.¹⁴⁶

This solution can be viewed as a departure from the mainstream way of thinking about anti-dumping: it allows the injury not to be fully eliminated and refuses to follow the idea of fairness. It can be viewed as a genuine concession for competition policy made solely on grounds of the uncompetitive structure of the market. No antitrust infringement was found, the conditions to impose duties were fulfilled and only the Community interest clause prevented the industry from obtaining the normal relief.

In addition to that the Commission refused also price undertakings offered by both exporters as unacceptable in an oligopolistic market. The *Glycine* case can therefore be regarded as an important indication that even at the point where the adoption of protection measures is decided, competition aspects can influence their actual form.

¹⁴⁰ Comm. Reg. (EEC) No. 985/83 of 26 April 1983, OJ 1983 L 110/11 and Council Reg. (EEC) No. 2370/83 of 20 August 1983, OJ 1983 L 228.

¹⁴¹ Council Reg. (EEC) No. 535/87 of 23 February 1987 OJ 1987 L 54/12, at paras 89 and 93.

¹⁴² Comm. Reg. (EEC) No. 2648/88 of 26 August 1988, OJ L 240/5 (para 65) and Council Reg. (EEC) No. 501/89 of 27 February 1989, OJ L 57/55 (para 30).

¹⁴³ M. Marques Mendes: „Trade Measures, Competition Policy and the Consumer – Comments on the papers presented by J.H.J. Bourgeois and C.W. Schwartz”, in: P. Demaret et al. (eds), *supra* n. 23, at 280.

¹⁴⁴ M. Marques Mendes, *supra* n. 20, at 171.

¹⁴⁵ Commission Reg. (EEC) No. 997/85 of 18 April 1985, OJ 1985, L 107/8 and Council Reg. (EEC) No. 322/85 of 12 August 1985, OJ 1985, L 218/1.

¹⁴⁶ *Ibidem*, Comm. Reg. at para. 31, Council Reg. at para. 18.

b) Review by the Court of Justice

Given the widespread criticism of the way in which the Institutions have made use of the clause in question, the basic question is whether this inadequacy can be corrected by the Court of Justice. The consideration of the Community interest is clearly an obligation legally binding on the Commission and the Council when they take any measures under discussion. The motivation of such measures should explain how this duty was complied with, and the absence of such justification can result in an annulment for procedural invalidity according to Art. 190 EC.

The situation is less clear when a justification is laconic and elusive since there arises a question which elements are to be deemed indispensable. In this particular case it would be crucial to know whether an omission or insufficiency of considering competition concerns under the heading of the Community interest can lead to invalidity. A positive solution of the problem would constitute a major step in the discussion about the competition-trade protection interface, but, unfortunately, it is not to be found in the ECJ case-law despite some interesting discussions of the problem.

The first major occasion on which the Institutions' understanding of the Community interest was challenged in trade law proceedings was *the second Allied Corporation case*.¹⁴⁷ The imposition of a definitive anti-dumping duty which gave rise to the proceedings was claimed by the applicant companies to be devoid of sufficient consideration of the Community interest.¹⁴⁸ Although the challenged Council Regulation mentioned in the thirty-second recital that: *it is not in the long-term interest of the consumers in the Community to allow a Community industry to be weakened or have its activities reduced by persistent dumping*, the applicant deemed this general observation to be insufficient since it was not substantiated by any evidence pertinent to the case. Indeed, this is the general motive of anti-dumping measures and by no means an explanation how this need was weighed against other requirements. The applicants quite rightly submitted that the interest of the Community should not be equated with the interest of some of its producers and indicated whose interests could be compromised by trade measures (importers, ports, etc.).

Advocate General Verloren van Themaat in his opinion affirmed the applicant's submissions stating that they are *well-founded as and in so far as they contend or imply that the interests of the Community do not justify the definitive duties imposed, or at any rate in so far as it has not been demonstrated that that requirement, considered in the light of the last phrase of Art. 13 (3), has been observed*.¹⁴⁹ The Advocate suggested this ground together with

¹⁴⁷ Judgment of 23 May 1985, case 53/83 *Allied Corporation and Others v. Council* 1985 ECR 1621.

¹⁴⁸ Compare a discussion of the case in G.J. P e t c h i n: „Allied II: Limits on the Injury under the EEC Anti-Dumping Rules” in 1985 Fordham Corp. L. Inst. 605, (B. Hawk ed., 1986).

¹⁴⁹ At para. 4.4. of the Opinion, see: *supra* n. at 1636.

a few others as necessitating the annulment of the contested regulation. The Court, however, found it proper to deal exclusively with the problem of the adequacy of the imposed duty to repair the prejudice, and annulled the regulation without revealing its opinion on the problem of the Community interest.

The importance of the case for the discussed problem lies therefore primarily in the Advocate's opinion, although his attempt to extend the reach of the "Community interest" to deciding about the level of the duty was rejected by the Court.¹⁵⁰ What is particularly significant in the passage quoted above is that it clearly shows two tracks for the use of the clause: first a challenge strictly on the merits, second a challenge on the burden of proof grounds. The second possibility appears more promising — it is not necessary to establish an error in the Institutions' decision, but an omission of an element indispensable for the making and motivation of decisions. Though, for this argument to succeed, the indispensability of considering competition issues would have to be recognized, at least in some situations.

After the *Allied* case challenges to the Institutions' understanding of the "Community interest" clause have been both rare and unsuccessful. The Court dismissed them either by upholding the arguments given in the contested regulations or pointing out to the Institutions' wide discretion and its own lack of competence to review the substance.¹⁵¹

One should, however, notice the arguments advanced under this heading in the *Nölle* case.¹⁵² They consisted in the existence of a cartel between exporters and Community producers aiming at the exclusion of independent importers such as the applicant. Advocate General Van Gerven affirmed the importance of competition issues in trade measures proceedings,¹⁵³ but he could not uphold the applicant's argument in a situation where proceedings against the alleged restrictive practices had not even been initiated.¹⁵⁴ In this specific case the structure of the market could not in itself support the competition argument and the Court did not even consider the question. It seems probable, however, that the allegations might have had some impact on the Court's decision to annul the contested regulation on other grounds.

The issue of Community interest in preserving foreign competition played hitherto the greatest role in the recent *Extramet* case.¹⁵⁵ For a number of reasons the applicant had an unusually privileged position to challenge the measures under the heading of Community interest. The case concerned an anti-dumping

¹⁵⁰ Cf. C. S t a n b r o o k: „The Impact of Community Interest and Injury Determination on Anti-dumping Measures in the EEC", *Fordham Corp. L. Inst.* 623 at 631 (1985).

¹⁵¹ Cf. e.g. the recent cases on *Plain Paper Photocopiers from Japan* and especially Judgment of 10 March 1992 case C-174/87 *Ricoh Company Ltd. v. Council* not yet reported in *ECR*, para. 68.

¹⁵² See: *supra* n. 7.

¹⁵³ See: the quotation accompanied by note 110, *supra*.

¹⁵⁴ *Ibidem*, para. 12 of the Opinion, at 5178.

¹⁵⁵ See: *supra* n. 8, cf. also M. C l o u g h, *supra* n. 75.

duty on calcium-metal from China and the USSR, which was for the most part imported by an independent French company Extramet. In the EC this first product was manufactured by a single undertaking – the French company Péchiney, which competed with Extramet on the market of the down-stream product – pure calcium. As Extramet relied heavily on its importations of calcium metal, the Regulation was clearly putting it at a competitive disadvantage. Extramet seemed to have a strong case to argue that the Community interest required preventing Péchiney from extending its dominant position to the market of the final product.

For this argument to be made, however, there was a serious hurdle to be cleared: the problem of admissibility. Until the judgment on admissibility in the present case delivered by the full Court on 16 May 1991,¹⁵⁶ no single independent importer had been granted standing to challenge an anti-dumping regulation. As it was concluded by Advocate General Francis Jacobs,¹⁵⁷ the Court's prior case-law needed to be overruled in order to recognize the admissibility of Extramet's application. The Court did not decide to go this way and although it granted standing, it is doubtful how the judgment will affect future case-law on admissibility in anti-dumping cases.¹⁵⁸

After the admissibility judgment the position of Extramet was in a sense enviable. It was for the first time that in anti-dumping proceedings two directly competing Community companies confronted each other as applicant and complainant. Although earlier, in the *Japanese Photocopiers* cases¹⁵⁹ the Court admitted challenges by European companies acting as original equipment manufacturers, those were not on the same footing with the complainants, since their goods were of foreign origin. In the case of Extramet the opposition against trade measures was aired not by a foreign company and not even by consumers, but indeed by the Community industry.

Apart from the argument concerning the impact of protection on future competition Extramet submitted also the argument based on the existence of anti-competitive abuses in connection with the measures taken. It stated that the imports resulted from Péchiney's illicit refusal to supply it with calcium metal and explained that it had lodged a complaint with the Conseil Français de la Concurrence.¹⁶⁰ (Although a decision of a competent national authority under the EC competition rules can obviously be relied upon by the Court of Justice, it should be noted that at the time when the *Extramet* judgment was rendered, the Conseil had not arrived at a decision.)

¹⁵⁶ Case C-358/89 *Extramet Industrie SA v. Council*, not yet reported in *ECR*.

¹⁵⁷ In his Opinion delivered on 21 March 1991, paras 71 – 74.

¹⁵⁸ Cf. A. A r n u l l: „Challenging EC Anti-Dumping Regulations: the Problem of Admissibility”, (1992) *ECLR* 73.

¹⁵⁹ Joined cases 133/87 and 150/87 *Nashua Corp. v. Commission and Council* 1990 *ECR* I-719; case 156/87, *Gestetner Holding PLC v. Council and Commission* 1990 *ECR* I-781.

¹⁶⁰ See the *rapport d'audience* in: 1992 *Rec.* I-3813 at 3823.

Since competition arguments for Extramet and protection arguments for P  chiney appeared to be of similar importance, it was clear that the Institutions had faced a pure example of a balancing decision to be made. Such decision, as we note above, is subject to limited review by the Court of Justice, but the question of the specificity of the Institutions' obligations remains unresolved. Facing antitrust law and policy arguments submitted by Extramet in the course of proceedings which led to the adoption of a provisional duty, the Commission felt obliged to explain the reasons why it disregarded such concerns when granting relief to the Community manufacturer.¹⁶¹ The Council essentially used the same arguments in the motivation of its regulation imposing a definitive duty.¹⁶² The core of those arguments was the separation of competition and trade law proceedings and the prohibition to prejudge the result of the former.

These explanations were insufficient in the Opinion of Advocate General Francis Jacobs,¹⁶³ who clearly pointed out that there exists an obligation for the Institutions to consider the implications of trade measures on competition policy. After finding that: *The Community Institutions are under a duty to balance the necessity of protecting the Community manufacturers against any prejudice and that of ensuring that competition in the Common Market is not distorted*,¹⁶⁴ he remarked that the inadequacy of the explanation how such balance was struck may amount to a breach of Art. 190 EC. The construing of balance striking as a duty of the Institutions is a crucial and firm point in the Advocate's General conclusions. He does not make it clear, though, when this obligation emerges, implying that it appears in the first place where competition arguments are put forward by participants to proceedings,¹⁶⁵ but leaving unresolved the problem whether the Institutions should in some cases act on their own motion. Francis Jacobs also openly pointed out the general character of consideration under the discussed heading, which is largely independent from findings of antitrust infringements. He stated that even a negative finding by national competition authorities or by the Commission itself could not prejudge the result of reasoning under the Community interest clause.¹⁶⁶

The Advocate General finally suggested two grounds on which the Council Regulation should be annulled: one concerning the determination of the injury, the other the insufficiency of considerations under the Community interest clause. With respect to the latter he clearly opted for the second of the tracks indicated by Advocate General Verloren van Themaat in the second *Allied* case – a challenge not on substantive, but on burden of proof grounds.

¹⁶¹ Commission Regulation (EEC) No. 707/89 OJ 1989 L 78/10.

¹⁶² Recital 15 of the Council Regulation (EEC) No. 2808/89, OJ 1989 L 271/1.

¹⁶³ Delivered on 8 April 1992 and published in 1992 Rec. I-3828.

¹⁶⁴ Ibidem, para 45 at 3841, my translation from the French language version reading: *les institutions communautaires ont le devoir de mettre en balance la n  cessit   de prot  ger la production de la Communaut   contre tout pr  judice et celle de veiller    ce que la concurrence ne soit pas fauss  e au sein du march   commun.*

¹⁶⁵ Ibidem, para. 48 at 3841.

¹⁶⁶ Ibidem, para. 49 at 3842.

Therefore, the Court's acceptance of this solution would have essentially broadened the possibility of contesting trade measures in judicial proceedings. Unfortunately, the Court did not devote any space to the consideration of the argument based on the Community interest clause. This leaves uncertainty as to the scope of validity of the Advocate's General conclusions on this point, which were a most elaborate and coherent elucidation of the problem.

4. Competition arguments in the determination of injury to the Community industry

a) *The practice of the EC Institutions*

Some authors have expressed their preference for considering antitrust issues in the determination of injury to the Community industry rather than at the advanced stage of analysing the Community interest.¹⁶⁷ As we have noted earlier, such a possibility is greatly facilitated in the Community trade legislation by the requirement of distinguishing between the injury caused by unfairly and fairly traded products.

Unfortunately, this requirement is rather difficult to fulfill since the nature of injury is identical in both cases.¹⁶⁸ It would require a fairly sophisticated economic analysis to identify the relevant part of injury. It is regrettable that the competent EC authorities use an oversimplified analysis, which effectively boils down to a finding of price undercutting with respect to the Community producers.¹⁶⁹ Although both of the discussed regulations contain a long list of factors to be considered in injury determination, the EC practice in this respect clearly lags behind that of the US, where similar factors are employed in an economic analysis, which is by and large more complex and precise.¹⁷⁰

Nonetheless, in certain situations the concern about economic issues led the Institutions to determine injury in the light of competition policy arguments. An important example is *Certain Sodium Carbonate from the USSR*¹⁷¹, in which the Commission and the Council took account of the allegedly restrictive practices by the Community industry. They finally decided not to impose a duty on dense sodium carbonate as they considered that: *The supply of dense sodium carbonate is subject to strong contractual links between the Community producers and their main customers (...); these ties are presently the subject of an investigation by the Commission as possibly restraining competition on the dense sodium carbonate market.*

Occasionally, economic considerations which played a role in injury determinations were closely intertwined with the notion of the Community interest as

¹⁶⁷ Cf. R. K u l m s, n. 14 *supra*, at 312.

¹⁶⁸ J. T e m p l e L a n g, n. 2 *supra* at 32.

¹⁶⁹ G. J. P e v t c h i n, *supra* n. 148, at 619.

¹⁷⁰ Cf. R. B o l t e c k, *supra* n. 45, at 114 – 115.

¹⁷¹ Comm. Reg. (EEC) No. 2559/79 of 22 January 1979, OJ 1979, L297/12 and Council Reg. (EEC) No. 407/80 of 18 February 1980, OJ 1980, L 48/1.

in the case of *Polyester Fibres from the GDR, Romania, Turkey and Yugoslavia*.¹⁷² An injury caused by dumped imports was alleged by a cartel of Community producers, which had previously been exempted under Art. 85(3) EC. Since the existence of imports and other competing products accounting for 30% of the market was one of the reasons to grant an exemption, the Commission decided to make a finding of no injury. Even though the undesirability of protection for a concentrated industry found its expression at the stage of injury determination, that analysis was strongly influenced by a simultaneous consideration of the Community interest.¹⁷³

Similar pro-competition arguments were voiced also in cases when some Community producers, though not engaging in restrictive practices, were merely inefficient and their losses resulting from dumped products were more serious than they would have been in case of a competitive industry. The issue was considered in the cases of *Electric Motors from Yugoslavia*¹⁷⁴ and *Electric Motors from Bulgaria*.¹⁷⁵ It was found that the determination of injury should only be based on the costs of the most efficient manufacturers, since otherwise it would be clearly protecting an uncompetitive industry.

b) Review by the Court of Justice

The most important cases concerning the review of injury determinations by the Court of Justice include the second *Allied Corporation* case, concerning an anti-dumping duty on fertilizers imposed in a period of a global recession in the fertilizers market.

Already in the first *Allied*¹⁷⁶ case the applicants alleged the existence of price-maintenance practices on the importing market, and Advocate General Verloren Van Themaat said: *I doubt whether it is compatible with the purpose of the GATT Code and the basic regulation to establish a link between the extent of injury and a level of prices in the importing country, which is artificially high as a result of restrictive agreements*.¹⁷⁷ He concluded, however, that a possible error in the reasoning of the Institutions was not of a nature as to affect the validity of the regulation and following his conclusions the Court dismissed the application.

The issue was examined again in the second *Allied Corporation* case,¹⁷⁸ but the argument was different to that of the previous case: no reference was made to the existence of restrictive practices, but the applicants requested that injury resulting from normal commercial conduct be disregarded. In that case

¹⁷² Comm. Decision (EEC) No. 88/236 of 10 April 1987, OJ 1987 L 103.

¹⁷³ Cf. J.H.J. Bourgeois, n. 24 *supra*, at 238.

¹⁷⁴ Council Reg. (EEC) No. 2382/87 of 5 August 1987, OJ 1987 L 218/2.

¹⁷⁵ Council Reg. (EEC) No. 864/87 of 23 March 1987, OJ 1987 L 83/1.

¹⁷⁶ Judgment of 21 February 1984 joined, cases 239/82 and 275/82 *Allied Corporation and Others v. Commission* 1984 ECR 1005.

¹⁷⁷ *Ibidem*, at 1047.

¹⁷⁸ See: n. 147, *supra*.

Advocate General Verloren Van Themaat argued that selling at a loss was justified by two factors relating to the freedom of competition and the market-economy background of anti-dumping law.¹⁷⁹

Firstly, in a period of recession it is a normal practice to sell at a price that covers variable costs and only a proportion of fixed costs not allowing a full allocation of costs not to mention any profit margin. In conditions of crisis this is the only way to ensure an undertaking's survival and minimize losses, and it is therefore not objectionable from the competition law standpoint. Secondly, it might be necessary in order to retain a market share to sell, at least temporarily, at a price below normal value in the presence of active price competition. This price-alignment argument, called also "meeting-competition defence" is recognized in some antitrust laws and proposals are made to introduce it into dumping injury analyses.¹⁸⁰

The question is only whether these defenses are valid against allegations of dumping; the answer essentially depends on the resolution of the problem whether foreign competition should be protected in the same way as the domestic one. This is a debatable issue and it may be maintained that insulating national market in time of crisis is permissible¹⁸¹ when it remains within the limits of international trade law. At any rate the problem was not resolved by the Court in that case, since it decided to annul the regulation on the ground that the amount of duties was not proven to be adequate for removing the injury.

As far as the ECJ decisions are concerned, the main case since the *Allied* judgment is again that of *Extramet*. As it was noted earlier, an inadequate assessment of the injury was one of two grounds for annulment suggested in the Advocate's General opinion and eventually the decisive motive for the Court. The regulation was annulled for not having considered the argument that the injury was not caused by dumping but self-inflicted by the prejudiced company. This self-infliction was to consist in P  chiney's illicit refusal to supply Extramet with calcium metal, which compelled the latter to turn to imports.

The Court's conclusion seems to me flawed by certain inconsistency. At the time when the case was decided, it was not clear whether the disruption of co-operation really took form of a refusal to supply or, as stated by P  chiney, was due to a dispute concerning the quality of supplied products.¹⁸² The injury was in any event caused by dumped products; the alleged self-infliction being not a concurrent factor but a possible cause for it. The problem was not that of disentangling dumping from other factors susceptible of causing prejudice,¹⁸³ but that of deciding whether the fault is imputable to the harmed company.

¹⁷⁹ In paras 3.4. and 3.5. of the Opinion, *ibidem* at 1625 – 1626.

¹⁸⁰ Cf. R.A. Lipstein: „Some Comments on Using Competition Policy to Protect the Consumer from the Anti-Dumping Law”, in: P. Demaret, J.H.J. Bourgeois, I. Van Bael (eds.) n. 23 *supra*, pp. 269 – 272, at 270.

¹⁸¹ Cf. P. Vandroren, n. 2 *supra* at 7.

¹⁸² See: para. 36 of the Opinion of the Advocate General, 1992 *Rec.* I-3813 at 3838.

¹⁸³ As the Court suggested that the Institutions should have done under Art. 4(1) of Regulation 2423/88 (ground 15 of the judgment).

It is inherent to the notion of self-infliction that the conduct which leads to a prejudice has to be illicit or at least objectively improper: no one can be deprived of his right to a reparation of injury because of his contribution by an unobjectionable conduct. Were the Institutions able to ascertain the conduct of the harmed company when adopting the regulations? The Court says at ground 19 that they were under such duty, but it does not refute the Institutions' customary argument that it was not permissible for them to prejudge the result of competition law proceedings. The Commission would, naturally, take self-infliction into account if an antitrust infringement were to be found and the regulation then reviewed according to Art. 14(1) of the basic regulation.

This argument, referred to at ground 18 of the judgment, seems to be perfectly valid in the present case and remains uncontradicted in the Court's judgment. Grounds 18 and 19 of the judgment are therefore in an outright contradiction – if the occurrence of an anti-competitive practice can only be established in anti-trust proceedings, how can the Court require from the Institutions to have decided whether the injury was not self-inflicted?

I have therefore serious doubts whether the inadequacy of the injury determination was the proper ground for the annulment of the regulation. Although I recognize that the assessment of injury, like that of the Community interest, can take into account not only the existence of infringements, but also the competitiveness of a given market, I do not deem it proper in the *Extramet* case. Such possibility was used in the *Dense Sodium Carbonate from the USSR* case¹⁸⁴, where findings of no injury were based on collusion between Community producers and customers still under the Commission's investigation. In that case, however, the undisputed existence of ties between producers and customers, whether contrary to Art. 85 EC or not, was of a nature as to affect the findings of injury. Such ties can be presumed to be responsible for maintaining a level a prices different from that in fully competitive markets and price undercutting could be found artificially easily.

The *Extramet* case was different in my view. The existence of injury was not denied by the Court, it only upheld the applicant's argument concerning self-infliction. I should reiterate that it would not be proper to establish self-infliction without knowing whether any elements of *Péchiney's* conduct were objectionable from the antitrust law perspective. Thus I believe that it would have been decidedly more correct to base the annulment on the Community interest clause and not the provisions concerning injury determination. Such solution, perfectly consistent with the content and role of the Community interest clause, would have had, however, the aforementioned far-reaching consequences, which the Court might have wanted to avoid.

¹⁸⁴ See: n. 171, *supra*.

V. Concluding remarks

In the present state of the problems making any far-reaching conjectures about the future developments of the EC trade protection law would be an exceedingly bold enterprise. It is uncertain whether the *Extramet* case marks, as some authors believe *an enormous step in the direction of the Court's recognition of the need to resolve conflicts between anti-dumping and competition law relating to injury issues*.¹⁸⁵ The case has not been followed by any new anti-dumping judgments and whether it will have significant value as a precedent remains an open question. One clear thing about this judgment is that it regrettably did not deal with the issue of the Community interest.

The discussion of the possibility of judicial review under the Community interest clause is a discussion of the very nature of this provision. It is obvious that the clause gives to the Institutions a faculty to tailor measures taken to the particulars of each case. It is the major source of the flexibility of which the EC protection system boasts, especially in comparison with the automatic functioning of the US anti-dumping law. If, however, the interpretation given by the Institutions is not to be open to scrutiny in judicial proceedings, the role of the clause is ambiguous. It may be preferable to have a rigid system than an elastic, but uncontrollable and untransparent one. As long as the clause in question is viewed as providing for discretion without corollary obligations, it can degenerate to a device of selective, politically inspired protection.

The situation would be radically different if the reasoning under the Community interest clause were subject to judicial review both for its substantive correctness and on burden of proof grounds: therefore an omission of competition arguments in decision-making or motivation should be clearly recognized as a breach of obligations binding on the Institutions and as a ground for annulment of measures taken.

For a few years now, many hopes have been voiced for a revision of the Court's attitude in connection with the proposal to confer jurisdiction on anti-dumping and countervailing cases to the Court of First Instance.¹⁸⁶ It was argued that the new Court would be better equipped to undertake a substantive analysis and in particular to integrate the methods of investigation in trade law and antitrust cases.¹⁸⁷ The hopes have so far shared the fate of other premature expectations since the transmission of the jurisdiction has been blocked by the Member States. Recently, such possibility has been revived by a Commission proposal¹⁸⁸ and if it succeeds some of the awaited changes might occur. Even if

¹⁸⁵ M. C l o u g h, *supra* n. 75, at 224.

¹⁸⁶ Council Decision 88/591 (ECSC, EEC, Euratom) of 24 October 1988, OJ 1988 L 319/1, Art. 3(3).

¹⁸⁷ See e.g.: M. M a r q u e s M e n d e s, *supra* n. 20, at 178.

¹⁸⁸ Commission Proposal for a Council Regulation (EEC) on the harmonisation and streamlining of decision-making procedures for Community instruments of commercial defence and modification of the relevant Council Regulations, OJ 1992 C 181/9, Recital 5 and Art. 1(6).

the Court of First Instance were not to alter materially the judicial policy in trade law cases, a mere possibility of a closer scrutiny could exert a beneficial influence. It would be of utmost importance if the Institutions themselves felt compelled to better substantiate their positions, particularly with respect to competition law and policy problems.

Arguably, an ideal solution for the problem of the discussed interface would be the replacement of trade laws by an international antitrust enforcement.¹⁸⁹ That this is not only a theoretical proposal was proved by the European Economic Area Agreement signed on 2 June 1992. Art. 26 of the Agreement provides that anti-dumping measures will not be applied in relations between the EC and the EFTA Contracting States in those fields covered by the EEA in which the "acquis communautaire", including competition law, was fully integrated. The application of this provision may constitute an important indication whether such solution is viable, as well as have an impact on the theory of international antitrust enforcement. Some proposals hitherto made for such a system under the control of the GATT are nevertheless an eminently political issue and their future is at least as unpredictable as that of national antitrust and trade policies.

¹⁸⁹ EC Competition Commissioner Sir Leon Brittan expressed his views on the topic in an Address to World Economic Forum, on 3 February 1992, Davos, Switzerland.

Recent Trends in European Private International Law

KURT SIEHR*

1. New horizons?

You may be surprised about the title of my lecture: Is there a **European** private international law? Isn't it true any longer that private international law is basically **national** law, once in a while substituted by international treaties and conventions? Shouldn't we leave this lecture right at the beginning because there is somebody going to tell fairy-tales about conflict of laws? When I kindly ask you not to leave, I can do so, because I can assure you that no fairy-tales will be told, that I shall present facts some of which may be familiar to you and others perhaps may be new.

1.1. Private international law of continental Europe

Private international law, although being basically national law, can only be studied seriously on a comparative basis. How and why such comparative research in conflict of laws is necessary, shall be left aside for a moment. What I want to stress now, is the experience that there are some families or groups of countries which share the same history, tradition, technique and methodology in law. Two of these families are the so-called common law-countries and the civil law-countries. The civil law countries are mainly those of continental Europe from Portugal to Russia, from Greece to Norway. Also Poland forms part of this law family. This need not be demonstrated to you. You know it better than I do. I rather like to point out some common features of private international law in civil law-countries in order to give you some idea of the traditional aspect of European conflicts law.

In most of the continental European countries private international law is codified law, codified in separate statutes as in Poland¹ or as part of a civil code as in Germany.² Such a system of codified conflicts law has an important impact

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¹ Prawo prywatne międzynarodowe of 12 November 1965, reproduced in: A. M a k a r o v (ed.): „Quellen des Internationalen Privatrechts. Nationale Kodifikationen” 184 – 195 (1978) (with German translation); and in: T.M.C. Asser Instituut (ed.): *Les Législations de Droit International Privé* 295 – 301 (1971) (French translation).

² Einführungsgesetz zum Bürgerlichen Gesetzbuch, version of 25 July 1986, German Bundesgesetzblatt 1986, part. II, p. 1142. Polish translation in: J. P o c z o b u t: „Kodyfikacje prawa prywatnego międzynarodowego” (1991) 75 – 87.

on the style of reasoning and on the method to deal with problems of conflict of laws. Whereas the basically uncoded system of the common law is used to argue from case to case and to find solutions in line with former precedents, the civil law countries apply their statutory law on conflict of laws according to the same or almost the same method with which they apply their civil codes: statutory rules, systematic arguments, institutional prerequisite and limitations and general principles of law are used to uncover the spirit of a codification and to create judge-made law „modo legislatoris“. Without going into detail of the differences between continental-European private international law and especially American conflicts law, the continental-European style is said to be more traditional (as the American say) and less chaotic (as the Europeans say).

1.2. Private international law in the European Communities

The other reason why there can be spoken of „European“ private international law is due to the fact that within the European Communities also the field of private international law (including the law of international civil procedure) has been subject to unifying legislation. You all know that with respect to jurisdiction and enforcement of judgments in civil and commercial matters the Brussels Convention of 1968³ is in force since twenty years (since 1973) already and has been expanded in the meantime to younger Member States of the E.C.⁴ and also to EFTA countries.⁵ This Convention has unified to a large extent the law of international civil procedure in Western Europe and will finally do so also in those countries of Central Europe which have already stipulated association treaties with the E.C. More than that: A huge bulk of case law has emerged from national courts and the European Court of Justice in Luxemburg.⁶ This case law forms a sort of „acquis communautaire“ in the field of international civil procedure.

The other European treaty on conflict of laws is the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.⁷ This Convention is already in force in all Member States of the EC except Portugal and Spain and even Finland has enacted a statute very similar to this Convention.⁸ The Eu-

³ Convention of 27 September 1968 on Jurisdiction and Enforcement of Foreign Judgments in Civil and Commercial Matters, *Official Journal of the EC* 1972, L 299 p. 32.

⁴ Cp. Expansion of 9 October 1978 to Denmark, Ireland and the U.K., *Official Journal of the EC* 1978, L 304 p. 1; expansion of 25 October 1982 to Greece, *Official Journal of the EC* 1982, L 388, p. 1.; expansion of 26 May 1989 to Portugal and Spain, *Official Journal of the EC* 1989, L 285 p. 1.

⁵ Lugano Convention of 16 September 1988 on Jurisdiction and Enforcement of Foreign Judgments in Civil and Commercial Matters, *Official Journal of the EC* 1988, L 319 p. 9.

⁶ Gerichtshof der Europäischen Gemeinschaften (ed.), *Nachschlagewerk der Rechtsprechung zum Gemeinschaftsrecht, Serie D: Übereinkommen vom 27. September 1968* (looseleaf 1990).

⁷ *Official Journal of the EC* 1980, L 266 p. 1. Polish translation in: P o c z o b u t (*supra* n.2) 161 – 168.

⁸ Cp. the English translation of this statute of 27 May 1988 in *IPRax*, 407 – 409 (1989).

European Court of Justice has not yet been empowered to interpret this Convention by preliminary ruling.

Apart from these European Conventions there are several other influences of European law on transnational matters and activities.⁹ What they have in common is this: The more a Single Market will be achieved the less conflicts will be permitted to hamper inter-community commerce.

2. National private international law

2.1. Codifications

Poland has been one of the first European States which almost 30 years ago enacted a new statute on private international law.¹⁰ Since then twelve other codifications of conflict of laws have been promulgated¹¹ and two drafts for new codes of the same subject matter have been published.¹² Except France, Belgium, Luxemburg, Scandinavia, U.K., Ireland and Bulgaria all European countries have opted for more or less comprehensively codified conflict rules.

During the last years there is also a decline of some codifications because of political reasons. The East German „Rechtsanwendungsgesetz“ was abolished when the East German states introduced the Introductory Act to the BGB in 1991,¹³ and the Yugoslav statute is apparently not longer in force in Slovenia and Croatia which are going to enact new codifications.¹⁴ I do not know whether the Czechoslovakian Code is still valid in the Czech Republic and in Slovakia.¹⁵

2.1.1. Main features of codifications

If the modern codifications of private international law can be summarized at all, some salient features should be mentioned.

⁹ Cp. W.-H. Roth: „Der Einfluss des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht“, 55 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 624 – 673 (1991).

¹⁰ *Supra* n. 1.

¹¹ In historical sequence: Czechoslovakia (1963), Albania (1964), Portugal (1966), Spain (1974), East Germany (1975), Austria (1978), Hungary (1979), Turkey (1982), Yugoslavia (1982), West Germany (1986), Switzerland (1987), Roumania (1992). All these statutes, except that of Roumania, are reproduced in Polish translations in: *P o c z o b u t* (*supra* n. 2).

¹² Cp. the Italian Schema di articolato redatto dalla Commissione per la riforma del sistema italiano di diritto internazionale privato, istituita dal Ministero di grazia e giustizia, 73 *Riv. dir. int.* 741 (1990); Dutch Schets van een Algemene Wet betreffende het Internationaal Privaatrecht, *Nederlands Internationaal Privaatrecht* (abbr. NIPR) 454 – 476 (1992); Aanpassing van het Wetboek van Burgerlijke Rechtsvordering in verband met de herziening van de Rechterlijke Organisatie, *NIPR* 319 – 322 (1993).

¹³ Cp. Art. 9 of the Vertrag vom 18. September 1990 zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands (Einigungsvertrag), *Bundesgesetzblatt* 1990, part II, p. 889 et seq.

¹⁴ As to Croatia cp. K. S a j k o: „On International Arbitration in Croatia: Solutions and Open Issues“, 22/23 *Prinosi za poredbeno proučavanje prava i međunarodno pravo* 24 (1991/92).

¹⁵ The Statute of 1963 (*supra* n. 11) seems to be still in force in both states.

2.1.1.1. Contents of codifications

Most codifications are much longer than any former statute on private international law. This may be explained by two reasons. Some codifications have also included matters of procedure (jurisdiction, recognition and enforcement of judgments, bankruptcy, arbitration).¹⁶ The main explanation, however, is the fact that most legislators learnt from the past. On the threshold of a new century we have gathered the experience of hundred years of intensive legislation, adjudication and writing about matters of private international law. During this time everybody has become aware that problems are more complicated than thought of by Pasquale Stanislao Mancini, Friedrich Carl von Savigny, Tobias Michael Carel Asser, François Laurent or by Franciszek Kasperek. The Italian Codice civile of 1865 contained nine articles about private international law.¹⁷ The Italian draft of 1990 has 75 articles,¹⁸ almost ten times more than a century ago! The same can more or less be said of all modern codification of private international law in comparison with their predecessors.

2.1.1.2. Ideas of substantive law in conflicts law

We are used to distinguish carefully between conflicts law and substantive law to be applied according to references by conflicts rules. These rules are, according to Continental-European tradition, more or less formal, they designate the law applicable by rather formalistic distinctions. It is almost a „law on laws” and cannot be understood easily. It has been called a kind of „Glasperlenspiel” only to be understood by eccentric law professors.

This characterization is true of any branch of law which does not qualify as an „Entscheidungsrecht” but rather as a „Verweisungsrecht”, not as a set of rules for deciding cases, but as a bunch of rules to designate the rules according to which a case should be adjudicated.

Since some time, however, there has been an infiltration of ideas of substantive law into conflicts law. I should like to give three examples.

(1) In order to achieve the equality of sexes also in private international law it is no longer possible to choose the father or the husband as the dominating member of the family and to designate the law of his nationality or his domicile as law applicable to family matters. In order to be neutral a connecting factor common to both parents or both spouses has to be fixed. This is familiar to you and the Polish statute on private international law lives up to this standard.

(2) Another example for the influence of ideas of substantive law is the protection of the weaker party. Whether this goal can be achieved at all in private international law by special conflict rules is open to question. Despite this, several conflict of laws codifications provide special rules for consumers¹⁹ and

¹⁶ This is especially true of the codifications of Hungary, Turkey, Switzerland, Roumania and of the Italian draft (*supra* n. 12).

¹⁷ Cp. Art. 6 – 12, 100, 102 Codice civile del 25 giugno 1865.

¹⁸ *Supra* n. 12.

¹⁹ Cp. Art. 5 Rome Convention of 1980 (*supra* n. 7); § 41 Austrian Statute of 1978; or

employees.²⁰ In most of these cases the law at the habitual residence of the „weaker person” governs instead of the law normally chosen for contracts or torts in general.

(3) Finally you can legislate in favour of a certain result which is held to be achieved and the opposite to be avoided. By choosing alternative connecting factors you may favour the formal validity of wills²¹ and contracts in general,²² you may favour the validity of acknowledgments of children,²³ the compensation of certain victims,²⁴ the contracting of marriages²⁵ and the dissolution of marriages.²⁶ In all of these cases you have to determine the contents of several legal systems until you get a favourable answer by one of them.

2.1.1.3. Exception clauses

Since the early times of private international law the main question, the „*quaestio prima*”, has been: Which law should govern a case? As you may have seen by the influx of ideas of substantive law and by the alternative designation of the law applicable, today we are not so sure any more that there can be fixed the legal system which should apply to all cases of a certain kind of law suits. This sort of uneasiness can also be shown by the advanced differentiation of various kinds of contracts, torts and other transactions. In order to have a safety valve for unforeseen or hard cases some codifications provide so called exception clauses (clauses d'exception, Ausnahme-, Ausweichklauseln) for specific situations in certain fields of law²⁷ or for all cases in general. The general exception clause of the Swiss statute on private international law reads as follows:

Article 15

1. The law designated by the present law shall not be applied when in exceptional cases, the subject matter is, in view of all the circumstances, only slightly connected with this law and it shows a much stronger connection with another law.

2. This provision does not apply if parties have agreed on a choice of law.

Art. 120 of the Swiss Statute on P.I.L. of 1987. The Swiss statute can be found in Polish translations in: J. P o c z o b u t: „Źródła prawa prywatnego międzynarodowego”, Vol. I, 43 – 96 (1992), and in P o c z o b u t (*supra* n. 2) 89 – 129.

²⁰ Art. 6 Rome Convention of 1980 (*supra* n. 7); § 44 Austrian Statute of 1978; or Art. 121 of the Swiss Statute on P.I.L. of 1987.

²¹ Art. 1 Hague Convention of 5 October 1961 on the Conflict of Laws relating to the Form of Testamentary Dispositions, Conférence de La Haye de droit international privé (ed.), *Recueil des Conventions* (1951 – 1988) 49.

²² Art. 9 Rome Convention of 1980 (*supra* n. 7); § 8 Austrian Statute of 1978; Art. 124 Swiss Statute on P.I.L. of 1987.

²³ Art. 20 (1) German EGBGB; Art. 72 of the Swiss Statute on P.I.L. of 1987.

²⁴ Arts. 4 and 5 of the Hague Convention of 2 October 1973 on the Law of Product Liability, *Recueil des Conventions* (*supra* n. 21) 193; Arts. 135, 138 and 139 of the Swiss Statute on P.I.L. of 1987.

²⁵ Cp. Arts. 43 – 45 Swiss Statute on P.I.L. of 1987.

²⁶ Arts. 1 and 2 Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, *Recueil des Conventions* (*supra* n. 21) 128 et seq.

²⁷ Art. 4 (5) Rome Convention of 1980 (*supra* n. 7).

From this example you can easily gather that such a provision is exceptional in a double meaning: it provides a relief of uncertain outcome for exceptional cases and it is in itself exceptional by structure, method and result.

2.1.1.4. Choice of law

More than a superficial connection has the exception clause with a very well known phenomenon of conflicts of laws: the choice of law by the parties or by a single person. You all know that in matters of contractual obligations the parties may choose the law to be applied (art. 25 § 1 Polish statute). Such a rule is familiar to all modern statutes of private international law. New, however, is that many statutes give unrestricted freedom of choice to the parties even if the law chosen has no connection whatsoever with the contract.²⁸ Also an innovation to many legal systems is that restricted party autonomy is granted in matters of matrimonial property law,²⁹ in the law of personal names,³⁰ the law of successions³¹ and even in the law of property.³²

In all of these situations the legislator thought that in many cases the party themselves may designate the law to be applied because they should know what suits them best. Problems remain: Are they allowed to choose a law only to some parts of their transaction? May they also choose a foreign conflicts rule? May a choice be invalid because of „fraude à la loi”?

2.1.1.5. General part of conflicts law

This limitation of „fraude à la loi” brings me to another problem of all new codifications. How do they cope with the general matters of private international law, with qualification, renvoi, incidental question, ordre public, vested rights, fraude à la loi, foreign public law?

Generally spoken, the modern codes generally do not deal with qualification, incidental question and fraude à la loi as problems to be applied in all circumstances.³³ These matters are too complicated as to be simplified by statutory rules. Some problems connected with these „gimmicks” can be avoided by careful legislation, but the main issues will still be open for discussion.

²⁸ Art. 116 Swiss Statute on P.I.L. of 1987; similar Art. 3 (1) Rome Convention of 1980 (*supra* n. 7) with some restriction in Art. 3 (3).

²⁹ Art. 3 Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, *Recueil des Conventions* (*supra* n. 21) 229; § 19 Austrian Statute of 1978; Art. 15 German EGBGB; Art. 52 Swiss Statute on P.I.L. of 1987.

³⁰ Art. 10 (2) German EGBGB; Art. 37 Swiss Statute on P.I.L. of 1987.

³¹ Arts. 5, 6 Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estate of Deceased Persons, *Recueil des Conventions* (*supra* n. 21) 341; Arts. 90, 91 Swiss Statute on P.I.L. of 1987.

³² Art. 104 Swiss Statute on P.I.L. of 1987.

³³ An exception is the Portuguese Civil Code of 1966 with Art. 15 (qualification) and Art. 21 (fraude à la loi), in: M a k a r o v (*supra* n. 1) 197 and 199.

This is different with respect to renvoi and to public policy (*ordre public*). Renvoi is, except in Austria and Germany, handled carefully,³⁴ the *ordre public* exception is still to be applied cautiously, but can be extended also to foreign rules d'*ordre public*,³⁵ and foreign public law may be applied when foreign private law governs.³⁶

2.1.1.6. Favor recognitionis

As a last modern feature of the law of international civil procedure the favor recognitionis should be mentioned. More than in former times, foreign judgments will be recognized and enforced abroad. Such a result can be achieved by different methods. National provisions of international civil procedure have liberalized their prerequisites of recognition of foreign judgments and international conventions do the same (*infra* 3.1.3.).

2.1.2. Special problems of codifications

2.1.2.1. International conventions

As international conventions mushroom and to a large extent supersede national conflicts rules, the coordination of international and national sources of private international law becomes a matter of serious concern. Several codifications did the same what Poland has done in Art. 1 § 2 of the Polish Statute in Private International Law: A saving clause in favour of international conventions makes sure that these instruments prevail irrespective of the fact that they entered into force before or after the national statute. They simply prevail as international source or as special provisions (*leges speciales*).³⁷

This, however, does not solve all problems. There are many conventions which apply *erga omnes* and leave no field of application for national conflicts rules. The easiest way to solve the entailing problems is to refer to these conventions in the national codification. This has first been done by the Swiss Statute on Private International Law of 1987. To give an example, Art. 93 of this Statute reads:

„1. For the form of wills the Hague Convention of October 5, 1961 on the Law Applicable to the Form of Wills applies.

2. This Convention applies by analogy to the form of other dispositions for cause of death.”

³⁴ Cp., e.g., Art. 14 Swiss Statute on P.I.L. of 1987.

³⁵ Art. 7 (1) Rome Convention of 1980 (*supra* n. 7); Art. 16 Hague Convention of 14 March 1978 on the Law Applicable to Agency, *Recueil des Conventions* (*supra* n. 21) 253, 257; Art. 16 (2) Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, *Recueil des Conventions* (*supra* n. 21) 315, 321; Art. 19 Swiss Statute on P.I.L. of 1987.

³⁶ Art. 13 Swiss Statute on P.I.L. of 1987.

³⁷ As to this cp. K. S i e h r. „Günstigkeits- und Garantieprinzip“, in: „Recht und Rechtsdurchsetzung. Festschrift für Hans Ulrich Walder“ 409 – 423 (1994).

Paragraph 1 of art. 93 is a simple declaration because the Hague Convention would prevail anyway. Only the second paragraph works as a national conflicts rule. Because the Hague Convention applies only to testamentary dispositions and not to inheritance contracts the Swiss legislator, instead of formulating a separate rule for these contractual dispositions, extended unilaterally the field of application of the Hague Wills Convention and ordered Swiss courts to apply the international instruments „by analogy“.

Not all legislators followed the Swiss example. Germany incorporated verbatim the Rome Convention of 1980 in arts. 27 – 37 EGBGB. Italy seems to plan the same for the Rome Convention,³⁸ but to refer to Hague *erga omnes* – conventions as the Swiss legislator did.³⁹ The Dutch legislator seems to prefer the Swiss method.⁴⁰

Besides these technical problems of coordination the new codifications tried to a large extent to use international conventions as models for the national conflicts rules and to avoid severe discrepancies between evaluations of cases governed by international conventions or by national rules.

2.1.2.2. Law of procedure

As it has already been mentioned, many new codifications also include the law of procedure. In Switzerland the federal legislator took the chance to unify the cantonally divided law of international civil procedure. But not only this has been decisive. It is generally recognized now that the law of international civil procedure is too important as to be left to some scattered rules in codes of civil procedure.

For these reasons also very special problems of international civil procedure as bankruptcy and arbitration have been codified in Switzerland and elsewhere.

2.1.2.3. Foreign law

The treatment of foreign law by national courts can be called the matter of conscience in private international law. Only if it is applied ex officio the same way as domestic law the equivalence of both sources can be taken for granted.

In many countries such an equal treatment has been practiced since many years. Also some new codifications deal with this matter. In most cases they want to apply foreign law ex officio and prescribe some exceptions for pecuniary claims.⁴¹ Even the French legislator has changed the French practice and gave up the approach of the Cour de cassation started with the arrêt *Bisbal*.⁴²

³⁸ Arts. 55 et seq. Italian Schèma (*supra* n. 12).

³⁹ Art. 40 (1) (Hague Convention on the Protection of Minors), 43 (Hague Convention on the Law Applicable to Maintenance) Italian Schema (*supra* n. 12).

⁴⁰ Cp., e.g., Art. 62 (Hague Convention on the Protection of Minors), 64 (Hague Conventions of 1973 and 1956 on the Law Applicable to Maintenance), 65 (Hague Convention on Succession) Dutch Schets (*supra* n. 12).

⁴¹ Cp., e.g. Art. 16 Swiss Statute on P.I.L. of 1987; Art. 2 Turkish Statute of 1982; § 5 Hungarian P.I.L. Decree of 1979; Art. 12 Italian Schema (*supra* n. 12).

⁴² Cass. 11/18 October 1988, 78 *RCDIP* 368 (1989) = 116 *Clunet* 349 (1989).

2.2. Case law

It is impossible to give a survey of European case law on private international law. Two remarks should, however, be made. The first remark has to draw the attention to a European phenomenon which sometimes is not really perceived and evaluated: Europe is a paradise for conflicts lawyers because there seems to be hardly any place in the world with so many decisions on private international law. These cases are published or at least digested in several national publications,⁴³ and many specialized law reviews continually report new court decisions. The wealth of international case law is concentrated in Europe and hardly in the United States.

The other remark pertains to the influence of case law. The new codifications drew on the experience gathered by court decisions and abstained from simple generalizations of complex problems. The codifications even leave considerable scope for future developments and new evaluations. General and special clauses of exception are only one example for such statutorily recognized openings for judge-made law.⁴⁴

2.3. Legal theory and literature

What has been said about European case law in matters of conflict of laws, can be repeated with respect to legal theory and literature. As new codifications and new conventions flourish, literature on these matters has been as rich as never before. This literature is, like European case law, more pragmatic than many American theories. Authors do not venture to change the whole system because the *Babcocks* and *Jacksons*⁴⁵ happen to have an accident abroad. Authors rather try to formulate certain exceptions to a general rule and thereby maintain a certain system for legal reasoning along the lines of European codifications and their legislative systematizations.

⁴³ For Austria, see: M. Schwimann (ed.), IPRE, *Österreichische Entscheidungen zum internationalen Privat- und Verfahrensrecht* (1984 and 1991); for Germany, *Die deutsche Rechtsprechung auf dem Gebiet des internationalen Privatrechts [IPRspr.]*, ed. by J. Kropholler, Tübingen, J.C.B. Mohr (Siebeck); for the Netherlands, *Nederlands Internationaal Privaatrecht [N.I.P.R.]*, Den Haag, T.M.C. Asser Instituut (since 1983); for Italy F. Capotorti, V. Starace, U. Villani, R. Adam, G. Carella, M. Spagnoletti Zeuli and P. Mori: *La giurisprudenza italiana di diritto internazionale privato e processuale, Repertorio 1967 – 1990* (1991); F. Capotorti, B. Conforti, L. Ferrari Bravo, V. Starace: *La giurisprudenza italiana di diritto internazionale privato e processuale, Repertorio 1942 – 1966* (1967).

⁴⁴ *Supra* 2.1.1.3.

⁴⁵ Cp. *Babcock v. Jackson*, 19 N.E.2d 279 (1963), and the entailing American conflicts revolution.

3. European private international law

3.1. Brussels Convention

The Brussels Convention of 1968 on jurisdiction and enforcement of foreign judgments in civil and commercial matters⁴⁶ is in force in ten Western European countries and in the version of Lugano also in Switzerland.⁴⁷ This Convention has become a European Code of International Civil Procedure of which I should like to highlight only four important characteristics.

3.1.1. *Convention double*

The Convention deals with jurisdiction (*Entscheidungszuständigkeit*) as well as with the enforcement of foreign judgments. It is a convention double in contrast to most other treaties on recognition and enforcement of judgments.

3.1.2. *Jurisdiction*

For civil and commercial matters the Convention fixes jurisdiction and replaces insofar all domestic rules on the same subject matter. If there is a international case of civil or commercial law covered by the Convention suit can only be brought in courts having jurisdiction according to the Convention.

It is interesting to mention that the rule on prorogation clauses (Art. 17) is more liberally than many domestic provisions of national codes. This is one example for a trend to treat international commercial situations more liberally than locally concentrated matters.

3.1.3. *Recognition and enforcement*

The provisions of the Convention on recognition and enforcement of judgments are exceptional insofar as in many cases jurisdiction of the foreign court (*Anerkennungszuständigkeit*) is no more a prerequisite for recognition and enforcement (Art. 26 – 28). This demonstrates a special feature of the Convention: it tries to imitate a situation in a single state where the free movement of final judgments is normal.

3.1.4. *European Court of Justice*

Of utmost importance is that the European Court of Justice has been empowered to give preliminary rulings on the interpretation of the Convention.⁴⁸ This is unique because many instruments of international unification may lose their unifying force because of divergent domestic interpretation by national courts.

⁴⁶ *Supra* n. 3 and 4.

⁴⁷ *Supra* n. 5.

⁴⁸ Protocol of 3 June 1971 on the Interpretation of the Convention by the European Court of Justice, *Official Journal of the EC* 1978, L 304, p. 97.

The European Court of Justice breaks this sad tradition by giving binding advice how to interpret the provisions of the Convention.

3.2. Rome Convention

The Rome Convention of 1980 on the law applicable to contractual obligations⁴⁹ has unified European conflict rules on contracts.

3.2.1. Choice of law

Parties to a contract are allowed to choose the law to be applied to their contract (Art. 3). There is only one limitation to this freedom: the parties cannot derogate from mandatory rules of that country with which the parties and the subject matter were exclusively connected at the time of contracting (Art. 3 § 3). This provision, more or less excludes domestic contracts from the choice of law rules.

3.2.2. No choice by the parties

If the parties did not select the law applicable to their contract the law of the country applies with which the contract „is most closely connected” (Art. 4 § 1). Of course such a rule is without any value if the closest connection is not determined more precisely. This is done by Art. 4 § 2 which reads as if it had summarized and boiled down the idea of Art. 27 § 1 of the Polish statute on private international law: A contract is supposed to be „most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or ... its central administration.” This provision may be called a piece of „European legal heritage”. The idea of „characteristic performance” dates back to the beginning of this century. It has been advocated by the Institut de Droit International,⁵⁰ by Gustav Walker and his draft of 1913 for an Austrian statute on private international law,⁵¹ has been approved by the Polish statute of 1926 on interstate conflicts and today we meet it again in Eastern and in Western Europe!

3.2.3. Foreign mandatory provisions

The Rome Convention is rather traditionally drafted with one exception: Art. 7 § 1 is a provision vigorously debated in all countries. It reads as follows:

„When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be

⁴⁹ *Supra* n. 7.

⁵⁰ 22 *AIDI* 255 (1908).

⁵¹ §§ 13, 14 and 15 Austrian draft, in: M a k a r o v: *Quellen des internationalen Privatrechts*, 2d ed., Vol. 1 Austria 30a, 32 (1953).

applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

To explain this provision in detail would require another lecture. To summarize it briefly: Foreign mandatory rules may be taken into account even if these rules do not form part of the foreign law governing the contracts as *lex causae*. Several states, including Germany, have declined to introduce this provisions and therefore made the reservation according to Art. 22 § 1 (a). Nevertheless foreign mandatory rules may be and already have been taken account of by invoking domestic rules of unconscionable contracts.⁵²

3.3. Other instruments

There are other European instruments having impact on private international law. To be mentioned are here the Rome Treaty of 1957 itself, directives of the Council of Ministers and regulations. Other organizations as the Hague Conference and the Council of Europe contribute to the unification of law and will do so in future together with all European countries.

4. Aspects for the future

It is hard to be prophet. What, however, can be given for granted for the future are three expectations: international relations also in private matters will increase, create problems and demand for solutions. Second, international cooperation between all European countries will intensify considerably on the platform of international and supranational organization. Finally, also the scientific exchange will become normal and will become a „characteristic performance" for scientific institutions such as universities and research institutes.

⁵² Cf. Bundesgerichtshof 22 June 1972, 59 *Entscheidungen des Bundesgerichtshofs in Zivilsachen* 83 (*Nigeria case*).

POLISH PRACTICE IN INTERNATIONAL LAW

1) Selected Jurisprudence of the Supreme Court and the Constitutional Court Comprising Cases Connected with Public and Private International Law, Published in 1993

I. The Judgment of the Polish Constitutional Court of 20 October 1992 (K. 1/92), published in the Jurisprudence of the Constitutional Court n° 2/1993

The Polish Ombudsman has addressed the Constitutional Court with the request to recognize that the amended Articles 15 al. 4, 16, 18 and 19 of the Aliens Act of 29 March 1963 (unified text Official Journal n° 7/1992, item 30) are inconsistent with the Articles 87 al. 1, 63 al. 2 and 86 al. 2 of the Polish Constitution.

The alleged Articles of the Aliens Act are introducing the three new institutions into the Polish legal system. These institutions are related to the treatment applied to foreigners by Polish authorities:

1) the placement of the alien on the strength of the decision of the Voivodeship (organ of the local state administration in Poland) in the guarded centre for the period not exceeding 90 days in the case when there is a justified suspicion that an alien would not obey the decision ordering his expulsion from the Polish territory. The decision of the Voivodeship can be passed before, simultaneously or after the decision ordering the expulsion (Art. 15 al. 4 of the Aliens Act);

2) the detention of the alien during 48 hours by the Police or the Border Guard, if there is a justified suspicion that he will not observe the regulations governing the life in the guarded centre or that he will leave this centre without authorisation (Art. 16 al. 1 and 2 of the Aliens Act);

3) the placement of an alien under arrest for the period not exceeding 90 days on the strength of the decision of the Voivodeship passed on application of the Head of the Police at the Voivode level or of the Commanding Officer of the Border Guard (article 16 al. 1 and 3 of the Aliens Act).

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The Constitutional Court has declared that:

1) Art. 15 al. 4 of the Aliens Act is inconsistent with the Art. 87 al. 1 of the Constitution of the Polish Republic;

2) Art. 16 al. 1 and 2 in relation with al. 3 of the same article of the Aliens Act are inconsistent with Art. 87 al. 1 of the Constitution of the Polish Republic;

3) Art. 15 al. 4, Art. 16 al. 1 and Art. 18 of the Aliens Act are not inconsistent with Art. 86 al. 2 of the Constitution of the Polish Republic.

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Reasoning:

Declaring that the alleged Articles of the Aliens Act are inconsistent with Art. 87 al. 1 of the Constitution of the Polish Republic, the Constitutional Court has primarily resolved the question of a general value. It has recognized that the provisions of Polish law, and in particular Articles of the Constitution which concern fundamental rights and freedoms of Polish citizens are applicable also to aliens residing in Poland. Such a conclusion is the consequence of the introduction of the new Art. 1 to the Polish Constitution. This article holds that the Polish Republic is a democratic state of law. The recent amendments made to the Law on the Ombudsman of 24 August 1991 (Official Journal n° 83/1991, item 371), which authorize the Ombudsman to control acts of state agencies in respect of aliens, confirm the reasoning by the Court.

Subsequently, the Constitutional Court has declared that the three new institutions such as: the placement of the alien by the decision of the Voivodeship in the guarded centre for up to 90 days (Art. 15 al. 4 of the Aliens Act), the detention of the alien during 48 hours by the Police or the Border Guard (Art. 16 al. 1 and 2 of the same Act) as well as the placement of the foreigner by the decision of the Voivodeship under arrest for the period not exceeding 90 days (Art. 16 al. 1 and 3 of the same Act) constitute the cases when a person is deprived of his liberty.

Art. 87 al. 1 of the Polish Constitution rules: „Polish Republic guarantees the right to liberty to its citizens. The deprivation of this liberty is possible only in cases defined by law. Every detained person should be released, if during 48 hours he has not received the decision of the Court or of the prosecutor ordering his arrest. „The Constitutional Court has adopted the position that the term «arrest» used by Art. 87 al. 1 of the Constitution must be interpreted extensively, and can not be limited only to deprivation of liberty during the criminal process. Therefore, the decisions of the Voivodeship concerning: the placement of an alien in the guarded centre, and the arrest in view of expulsion provided for in Articles 15 al. 4 and 16 al. 1 of the Aliens Act are inconsistent with Art. 87 al. 1 of the Constitution since they give the power to deprive someone of liberty to the organ of state administration, thus omitting the court. As to the detention of an alien by the Police or the Border Guard for the period not exceeding 48 hours the Constitutional Court declares that it is not inconsistent with Art. 87 al. 1 of the Constitution.

During the proceeding, the Ombudsman has withdrawn the charge that the alleged Art. 15 al. 4 of the Aliens Act is violating the right to defense provided

in Art. 63 al. 2 of the Constitution. The Constitutional Court has shared this opinion declaring that Art. 63 of the Constitution refers only to persons accused during the criminal procedure, which is not the case.

Considering the problem of an eventual inconsistency of Art. 15 al. 4 and Art. 16 al. 1, 2 and 3 with Art. 86 al. 2 of the Constitution which guarantees the citizens the right to address all the state organs with complaints and grievances as well as the right of appeal, the Constitutional Court declared that the alleged Articles provide for the necessary means of protection of the rights of foreigners in their application. The decisions of the Voivodeship are falling under the normal regime of the administrative procedure which assures to the interested person the right of appeal to the administrative organ of the higher rank, while Art. 18 of the Aliens Act gives to that person also the right of appeal to the district court in the event the arrest has been applied without observing the conditions stipulated in Art. 16 al. 1 of the Law.

The detention by the Police or the Border Guard can be executed according to the rules provided for in the Articles of the Law on Police (Official Journal n° 30/1990, item 179, with posterior changes) and the Law on the Border Guard (Official Journal n° 78/1990, item 462 with posterior changes). Both acts guarantee the detained person the protective measures prescribed in the Code of criminal procedure (Art. 207a). Finally, the Constitutional Court declared Articles 15 and 16 of the Aliens Act compatible with the Art. 86 al. 2 of the Constitution.

The Constitutional Court has also reviewed the regulations included in Art. 15, 16 and 18 of the Aliens Act from the point of view of the international treaties to which Poland is a party. It has considered such an evaluation necessary because Art. 29 of the law holds that in the scope of the matters covered by this act it is recognized that the priority of the international treaties contains different regulations.

The Constitutional Court has examined Articles Art. 9 al. 3 and 4 of the International Covenant on Civil and Political Rights of 16 December 1966 as well as Art. 5 al. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950. The Court has declared that the condition resulting from Art. 9 al. 3 of the Covenant demanding all the decisions restricting personal liberty of the person to be issued by the Court of other persons authorised by Law is not applicable to the case of Art. 16 al. 1 of the Aliens Act. The reason of its inapplicability is that the abandonment of the governed centre by an alien does not constitute a crime. At the same time, the Court recognized that the possibility of appeal to the district Court, provided for in Art. 18 of the Aliens Act, is not consistent with Art. 9 al. 4 of the Covenant since it does not guarantee to an alien the immediate sentence given in his case. Finally, the Constitutional Court declared that the right of appeal resulting from the alleged Articles of the Aliens Act is inconsistent with Art. 2 al. 3 of the Covenant since there are too many delays encountered while justice works its way

through the instances of the administrative procedure as well as too weak control of the Supreme Administrative Court.

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Commentary:

The problem resolved by the Constitutional Court in the presented judgment is very controversial, based upon the three dissenting opinions submitted by its judges.

During the last four years Poland has ratified some important international treaties in the field of the international protection of human rights, namely: the Convention on the Status of the Refugees of 28 July 1951 (ratified by Poland in 1991, Official Journal n° 119/1991, item 515), European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ratified in 1993, Official Journal n° 61/1993 item 284) and Protocol Facultatif to the International Covenant on Civil and Political Rights of 16 December 1966 (Poland acceded in 1991). During the same time the Polish Constitution of 22 July 1952 contained Art. 1 ruling that the Polish Republic is a democratic state of Law. Consequently, the provisions of the modified Aliens Act of 1963 should be examined in a contemporary legal situation than totally different than that existing in Poland before 1990.

It is the sovereign power of each sovereign State to regulate the conditions of the entrance and stay of foreigners within its territory. On the other hand, the state is obliged to observe international treaties concluded in this field, to which it is a party. Especially, in the present case, Art. 29 of the Aliens Act refers to the international treaties ruling that when an international treaty governs the matter covered by the Aliens Act in a different way than a domestic act, the provisions of the international treaty should be applied. This is the reason why the Constitutional Court has considered the consistency of the Art. 15 and 16 of the Aliens Act not only with the appropriate Art. 87 al. 1 and 86 al. 2 of the Polish Constitution (which normally falls under its competence) but also with Art. 9 al. 3 and 4 of the International Covenant on Civil and Political Rights of 1966 and Art. 5 al 3 of the European Convention on Human Rights of 1950.

The position of the Constitutional Court that the protection attributed to the citizens of a country should be given also to foreigners residing in its territory is consistent with international standards. In particular, in view of the process of integration going on in Europe most of the countries apply a national treatment to the foreigners. Consequently, the provisions of the Polish Constitution concerning the protection of the fundamental rights of its citizens should be applied to foreigners.

Undoubtedly one of the most important freedoms guaranteed by law is the right to liberty. The guarantees of this freedom are provided in the Art. 87 al. 1 of the Polish Constitution. According to this regulation the deprivation of this freedom beyond the limit of 48 hours is possible only in conditions described by

law and under the control of the court. The Constitutional Court has rightly declared that all the three new institutions applicable to foreigners by virtue of the Aliens Act are in fact the forms of imprisonment and because their application is executed without sufficient judicial control, they must be considered as a step back in the field of the protection of human rights in Poland.

As to the second charge claimed by the Ombudsman that the new regulations introduced to the Aliens Act infringe Art. 86 al. 2 of the Polish Constitution, which guarantees the right of appeal, the appreciation must be different. The thorough examination of the legal acts potentially applicable in the cases covered by Art. 15 and 16 of the Aliens Act, that is: the Code of the Administrative Procedure, the Code of the Criminal Procedure as well as the Laws on Police and on Border Guard, Art. 2 and 3 of the Aliens Act are not inconsistent with Art. 86 al. 2 of the Polish Constitution.

The Court's ruling has been an occasion for the Constitutional Court to express its view on the eventual inconsistency of the alleged Articles of the Aliens Act with the international treaties. The grounds for this has produced Art. 29 of that Act. The Constitutional Court has avoided to declare its opinion on the general problem of the effectiveness of international treaties in the Polish legal system since in the discussed case it is the Polish Law, namely Art. 29 of the Aliens Act which refers to international treaties. According to this article when there is an inconsistency between the Aliens Act and international treaties the international acts have priority and should be applied. However, the Constitutional Court has reasonably observed that Art. 9 al. 3 and 4 of the International Covenant on Civil and Political Rights and Art. 5 al. 3 of the European Convention on Human Rights concern cases when a person is detained or arrested with the charge of committing a crime while neither of the regulations of the Aliens Act contains such a hypothesis. In the case of a crime committed by an alien, the only competent organ to try the case would be the independent Court.

On the other hand, there is an inconsistency between the Aliens Act (Art. 18) and the International Covenant on Civil and Political Rights (Art. 9 al. 4 and Art. 2 al. 3) because neither Art. 18 nor any other means of appeal resulting from the internal legal acts in force in Poland give to the detained or arrested foreigner an effective means of protection which would enable immediate examination of his case by the court in view of its legality. The method of administrative procedure with the supervision of the Supreme Administrative Court as the main possibility to control the legality of arrest or detention applied by the non judiciary organs make the „way to justice” much too difficult and will result in the fact that usually the whole proceeding will take place after the expulsion of the foreigner from the Polish territory.

II. The Resolution of the 3 Judges of the Polish Supreme Court of 23 April 1993 (III CZP 7/93), published in the Jurisprudence of the Supreme Court (OSN) n° 11/1993, item 199

The Supreme Court answered the two following questions submitted to it by Voivode Court of Łódź:

1) whether the foreign enterprise which has not got legal personality can be considered as the subject which is capable to draw a promissory note?

2) whether it can be considered valid that the promissory note on which the order to pay reads: „he will pay” instead of „I will pay”, and which at the same time fulfils all the remaining conditions of the validity of the promissory note?

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The Supreme Court has passed the following Resolution:

1) The foreign enterprise which hasn't got legal personality is not capable to draw a promissory note.

2) The interpretation of the promissory note is not excluded, in particular as to: the evident writing errors, the associations between the words, and the conjugations and declensions of the words included into the contents of the promissory note.

Because only the first question is comprising the foreign element, namely the capacity to draw a promissory note of the foreign enterprise executing its economic activity on the Polish territory, therefore this first problem will only be addressed.

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Reasoning:

By virtue of the Law of 6 July 1982 on the rules governing the economic activity in the field of small business by the foreign subjects in Poland (Official Journal n° 27/1989, item 148) the Supreme Court has established that a foreign economic subject not having legal personality can be considered as having the capacity to be a party before the independent court. The source of the above mentioned capacity is the economic activity of this subject.

However, this procedural capacity does not imply giving to this subject legal capacity in the field of the relations resulting from the substantive law.

The Law on the Bills of Exchange of 28 April 1936 (Official Journal n° 37, item 282) does not define who can have the capacity to draw a bill of exchange. The Supreme Court in the Resolution of 7 Judges of 31 March 1993 (III CZP 176/92) has recognized that this capacity can be evaluated according to the provisions of the civil law concerning legal personality in general. The analysis of these provisions leads to the conclusion that the capacity to draw a bill of

exchange is the quality which is possessed by all the physical and legal persons having legal capacity. As the foreign enterprise in the discussed case does not have legal capacity, subsequently it neither has the capacity to draw a bill of exchange.

According to Art. 33 of the Civil Code the legal capacity of the subject can result from the notion of the legal person attributed to it by the provisions of law relating to it. The legislator, whenever he wants to create a new legal subject, says it *expressis verbis* in the legal norm (e.g. Art. 81 of the commercial code giving that attribute to the public company). Consequently, since the Law of 1982 governing the economic activity of foreign firms in Poland does not attribute to them the quality of the legal person – it means that they do not have the capacity to draw a bill of exchange.

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Commentary:

At present, the basic legal source governing the economic activity of the foreign natural and legal persons in Poland is the Law of 14 June 1991 on the companies with the foreign capital (Official Journal n° 60, item 253). According to the provisions of this act, the foreign subjects can create on the territory of Polish Republic the limited companies or the joint-stock companies, eventually they can acquire or take over the shares or stocks in the commercial companies having their legal seat in Poland.

In the economic relations in our country there are also the foreign subjects acting on virtue of the Law of 6 August 1982 in the rules governing the execution of the economic activity in the field of small business by foreign subjects in Poland (Official Journal n° 27/1989, item 148 with the posterior changes). This Law can be applied to the foreign enterprises which have been established before 31 December 1988 or for which the process of their establishing started before that date. The principal feature of all the foreign enterprises acting on virtue of the Law of 1982 is that they do not have legal personality.

The problem submitted to the Supreme Court concerned the capacity to draw a promissory note of the foreign enterprise acting in Poland on the strength of the Law of 1982. Polish Supreme Court has recognized that such enterprises do not have the capacity to draw a promissory note either in the passive or in the active form, and in result neither of them can become debtors (which means: drawers, acceptors, endorsers or avalers of the bills of exchange) nor creditors (which means: payees or endorsees).

This reasoning of the Supreme Court is based on the constataion which was presented earlier by the Supreme Court (reasoning for the Resolution of the 7 Judges of the Supreme Court of 31 March 1993, III CZP 176/92), that the capacity to draw a bill of exchange can be possessed only by physical persons or other subjects, to which the status of legal personality was given by the parti-

cular act. Lack of legal personality of the foreign subject determines in a negative sense its capacity to draw a bill of exchange.

The position of the Supreme Court can be considered doubtful. Since 1990 the Polish market of bills of exchange is being restored. Hence, the deprivation of the important – from the economic point of view – group of subjects of the capacity to draw a bill of exchange (in its passive and active form) cannot be considered reasonable. The validity of the obligation incorporated in the bill of exchange drawn by the foreign enterprise which does not possess legal personality status can be evaluated in the light of Art. 8 of the Law of 28 April 1936 on the Bills of exchange (Official Journal n° 37, item 282). This provision determines conditions of the efficacy of the liability accepted in the bill of exchange drawn by the representative, and in particular by the plenipotentiary. In general, it would be difficult to find grounds for the position which assumes that the foreign enterprise which does not have legal personality status cannot become the creditor on the basis of the bill of exchange.

In conclusion it should be recognized, that the position of the Supreme Court presented in the above mentioned Resolution of 23 April 1993 restricts to a large extent the legal capacity of the foreign enterprises in Poland.

Fortunately the standpoint of the Supreme Court in the commented Resolution does not refer to the most common enterprises which are present in Poland acting in the form of the commercial companies with legal personality.

III. The Resolution of the 3 Judges of the Polish Supreme Court of 30 December 1992 (III CZP 153/92) published in the Jurisprudence of the Supreme Court (OSN) n° 6/1993, item 99

The Supreme Court has been requested by the Voivode Court of Opole on the basis of the Art. 391 of the Code of Civil Procedure to answer the following question:

„Whether in the light of Art. 8 of the Law of 24 March 1920 on the Acquisition of immovable property by the Foreigners, in the tenor given to it by the Announcement of the Ministry of the Internal Affairs of 4 March 1933 (Official Journal n° 24/1933, item 202 with the posterior changes), a disposal of the immovable property to the foreigner, who is a son of the owner, requires the permission of the Ministry of Interior given in cooperation with the Ministry of the National Defense?”

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The Supreme Court has passed the following Resolution:

„The transfer of the property of the immovable to the foreigner, who is the son of the vendor, requires the permission of the appropriate state organ”.

Reasoning:

The legal problem solved by the Supreme Court was submitted to it by the Voivod Court of Opole which in the appeal procedure, had to decide, if the donation agreement concerning the immovable was valid when it was concluded without the permission of the Ministry of Internal Affairs between the father – owner of the immovable property and the son who, at the moment of the conclusion of the agreement was a foreigner. According to the Law on Acquisition of immovable Property by Foreigners of 24 March 1920 (unified text: Official Journal n° 24/1933, item 202 with the posterior changes), the acquisition of the immovable by the foreigner without the adequate permission is void (Art. 7).

In the appeal from the decision of the district Court the claimant was reasoning that Art. 8 of the Law of 1920 contains the exception of the general rule contained in Art. 1 stating that all transfer of property of immovable demands prior permission of the State organ, if the buyer is a foreigner. Art. 8 rules that the permission of the Ministry of Internal Affairs is not necessary when the case concerns the transfer of property of immovable to the heir. The appeal refers also to the sentence of the Supreme Court of 13 March 1931 (C. 406/30) which reads: „the foreigner who is the heir of the owner of the land can, according to Art. 8 of the Law of 24 March 1920 acquire land also on the basis of the agreement concluded between the living persons without the prior permission of the appropriate authorities”.

Passing its Resolution in 1993 the Supreme Court did not pay attention to the sentence of the Supreme Court of 13 March 1931 quoted by the party because it had not been approved and had never been written among the Rules of Law before World War II. At the same time the whole Civil Chamber of the Supreme Court had given on 10 March 1934 the Resolution (C. Prez. 33/33, Official Collection n° VI/1934, item 354) which reads that in Art. 8 of the Law of 1920 the term „transfer of property to the heirs” should be understood solely as the transfer of the property by the heritage after the death of the owner. In the presented Resolution of 1993 the Supreme Court has expressed the opinion that in the context of the legal acts actually in force in Poland, the rule of 1934 is still applicable and should remain unchanged.

The Supreme Court has in 1993 accepted the reasoning of the Supreme Court given in 1934. In the inter-war period the Polish legal system was not unified and so the interpretation of the term „heir” must prevail the common understanding of this notion which explains it as the real and not only potential heirs. By using the term „heir” the legislator has situated the hypothesis of Art. 8 of the Law of 1920 among the events not depending on the will of the person, that is among the rules of the law on succession.

Another argument used by the Supreme Court is that Art. 8 of the Law of 1920 is *lex specialis* to the general rule expressed in Art. 1 of that Law. Hence, it cannot be interpreted extensively. The restrictions on the acquisition of the immovable property by the foreigners in Poland introduced by the Law of 1920

protect the interests of the state and the limitation of the state control over the real estate market must be excluded.

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Commentary:

The Resolution of the Supreme Court relates to the very controversial problem, that is to the rules applied by the Polish authorities to the legal transactions concerning immovable property when in such a transaction the purchasing party is a foreigner. The legal act in force which governs such transactions originates from the pre-war period of the Polish history since it was passed on 24 March 1920.

The basic regulation contained in this Law reads that every transfer of property of immovable to the foreigner requires the prior permission of the Ministry Interior passed in cooperation with the Ministry of Foreign Affairs (Art. 1 of the Law of 1920). Art. 7 of the same Law rules that the acquisition of the immovable property by the foreigner without such permission is void. These provisions constitute the serious limitation of the liberty on the real estate market in Poland: to the foreigner this rule causes the restriction in the exercise of his subjective rights in the field of civil law, while to the owner of the immovable it constitutes the public interference in the exercise of his right of property. It is evident that the rules of the Law of 1920 apply only in the case when the property is situated in Poland and when the purchaser is a foreigner.

According to Art. 8 of the Law of 1920 „the provisions of the Law do not apply when it relates to the transfer of the property to the heirs”. The provision of Art. 8 is unclear. It can only be sure that a foreigner can succeed an immovable property in Poland without the permission required by Art. 1 of the Law of 1920 after the death of the owner. It is not evident though, if it relates only to inheritance *ab intestato* or also to the inheritance by will.

What constitutes the real problem in the presented case is whether the exception resulting from Art. 8 applies also to the legal acts concluded between the living persons. The Supreme Court has expressed twice the opinion that in such cases the permission is obligatory and so the legal act passed without such a permission should be considered void (Resolution of the Civil Chamber of the Supreme Court of 10 March 1934 and the commented Resolution of 30 December 1992). However, the authors are not unanimous in this matter.

First argument against the restrictive interpretation of the Art. 8 of the Law is that the letter of this provision leaves room for liberal interpretation. Although art. 8 uses the word „transfer” of the property to the heir while talking solely about the inheritance, it should employ the word „descend”.

The second argument in favour of the enlarging interpretation of Art. 8 of the Law of 1920 is that there is a general principle that the possibility to conclude legal acts *inter vivos* should not be restricted in the cases when they lead to the effect which could be obtained by inheritance *ab intestato*.

The acceptance of the standpoint that the Art. 8 of the Law of 1920 concerns also the legal acts *inter vivos* when the transferee belongs to the group of the heirs *ab intestato* would mean that the permission would not be necessary also in the case when the property is transferred to the spouse as the result of the division of the joint ownership of the immovable property or as the consequence of the division of the community property after the introduction during a marriage of the regime of separation (Art. 52 and 53 of the Family and Custody Code).

In fact the restrictive interpretation of Art. 8 of the Law of 1920 does not seem adequate in the new situation created in Poland by the entering into force on 1 February 1994 of the Agreement on Association of Poland with the European Communities and their Members of 16 December 1991 (Official Journal 11/1994, item 38). This agreement foresees the abolition of all the existing restrictions in the acquisition of the immovables by the foreigners in Poland in the near future.

EWA SKRZYDŁO-TEFELSKA

2) International Treaties Entered into Force with Respect to Poland in 1993

The list published below comprises the most important bilateral and multilateral international agreements which became binding on Poland in 1993. The list includes agreements concluded on behalf of the Republic of Poland or the Polish Government, but does not present agreements concluded on the level of ministers, protocols, plans or executive programs.

The acceptance of international treaties by the Republic of Poland is accomplished by either ratification or approval. Under the Polish Constitution, the President has the power to ratify and denounce international treaties. However, the prior authorization of the Parliament is required for the ratification or denunciation of treaties concerning state borders, defence alliances or treaties which will entail financial encumbrances for the state budget or make necessary the introduction of changes to Polish domestic legislation.

The Constitution is silent as to which treaties require ratification. Pursuant to the Joint Resolution of the Council of State and the Council of Minister dated 28 December, 1968, the procedure of ratification should be applied to the following treaties of „special importance”:

- peace treaties and treaties of friendship, cooperation and mutual assistance;
- other treaties of political character;
- treaties concerning matters regulated by acts of Parliament in domestic law;
- treaties containing regulations different from those found in domestic legislation;

- other treaties by which Poland is committed to apply the procedure of ratification in order to satisfy the legal requirements of other contracting parties or if the parties have chosen this procedure for special reasons.

The Joint Resolution does not specify which treaties should be subject to the procedure of approval.

All ratified treaties are published in *Dziennik Ustaw* (Official Journal), an official journal in which laws and regulations are published. There exists no official collection of treaties binding on Poland.

Bilateral treaties have been presented below according to the names and countries in alphabetical order and the following pattern: title of treaty, place and date of its signature, way of expressing consent to be bound by the treaty, date of entry into force with respect to Poland. Multilateral treaties follow a similar pattern.

Bilateral Treaties

Albania

- Agreement on the reciprocal promotion and protection of investments; Warsaw, 5 March 1993; ratification; 19 August 1993.
- Agreement on cultural and scientific cooperation; Warsaw, 4 May 1993; ratification; 3 July 1993.

Armenia

- Agreement on cooperation in the field of trade and commerce; Warsaw, 24 February 1992; approval; 19 November 1993.

Australia

- Agreement for the avoidance of double taxation and prevention of tax evasion with respect to taxes on income and property; Canberra, 7 May 1991; ratification; 1 January 1993.

Belarus

- Agreement on the reciprocal promotion and protection of investments; Warsaw, 24 April 1992; ratification; 18 January 1993.
- Treaty on good neighbourhood and friendly cooperation; Warsaw, 23 June 1992; ratification; 20 March 1993.
- Agreement for the avoidance of double taxation with respect to taxes on income and property; Minsk, 18 November 1992; ratification; 20 July 1993.
- Agreement on civil air service; Warsaw, 8 June 1993; approval; 8 June 1993 (provisionally).
- Agreement on the opening of a road frontier crossing-point at Bobrowniki–Bierestowica; exchange of notes; 26 March 1993.

Bulgaria

- Agreement on cultural and scientific cooperation; Warsaw, 25 February 1993; ratification; 29 April 1993.
- Treaty on friendly relations and cooperation; Warsaw, 25 February 1993; ratification; 16 September 1993.

Chile

- Commercial agreement; Santiago, 15 October 1991; approval; 26 November 1993.

China

- Agreement on trade and commercial relations; Warsaw, 13 September 1993; approval; 25 December 1993.

Cyprus

- Agreement on the promotion and reciprocal protection of investments; Warsaw, 4 June 1992; ratification; 6 July 1993.
- Agreement for the avoidance of double taxation with respect to taxes on income and property; 4 June 1992; ratification; 7 July 1993.

Czech Republic

- Agreement on the delivery of persons across the common state frontier; Prague, 10 April 1993; approval; 30 October 1993.
- Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and property; Warsaw, 24 June 1993; ratification; 20 December 1993.

Egypt

- Agreement on legal assistance in civil and commercial matters; Cairo, 17 May 1992; ratification; 21 February 1993.
- Agreement on legal assistance in criminal matters, on the delivery of convicted persons and extradition; Cairo, 17 May 1992; ratification; 20 February 1993.

Estonia

- Treaty on friendly cooperation and Baltic neighborly relation; Tallin, 2 July 1992; ratification; 6 May 1993.
- Agreement on international road transport; Tallin, 9 September 1992; approval; 30 October 1993.

Georgia

- Agreement on cultural and scientific cooperation; Tbilisi, 20 April 1993; ratification; 5 July 1993.
- Agreement on inter-regional cooperation; Tbilisi, 20 April 1993; approval; 2 September 1993.

Germany

- Agreement on inland navigation; Warsaw, 8 November 1991; approval; 4 November 1993.
- Treaty on the further facilitation of legal turnover pursuant to the Hague Convention dated 1 March 1954 relating to civil procedure; Warsaw, 14 December 1992; ratification; 1 December 1993.
- Agreement on the passage of ships through marine internal waters in the region of the Uznam Island; Bonn, 17 February 1993; approval; 1 June 1993.

Hungary

- Agreement on cultural and scientific cooperation; Budapest, 13 October 1992; ratification; 17 June 1993.
- Agreement on cooperation in the field of transport services; Warsaw, 5 January 1993; approval; 23 September 1993.

Indonesia

- Agreement on the promotion and protection of investments; Warsaw, 6 October 1992; ratification; 1 July 1993.
- Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; Warsaw, 6 October 1992; ratification; 25 August 1993.

International Organization for Migration

- Cooperation Agreement; 19 April 1993; signature; 19 April 1993.

Israel

- Agreement on trade and scientific and technical cooperation in the field of agriculture and food industry; Poznań, 4 October 1991; approval; 26 April 1993.

Italy

- Agreement on the promotion and protection of investments; Warsaw, 10 May 1989; ratification; 9 January 1993.

Jordan

- Agreement concerning air services; Annam, 22 November 1993; 22 November 1993 (provisionally).

Kirgistan

- Agreement on inter-regional cooperation; Warsaw, 5 June 1993; signature; 5 June 1993.
- Agreement on reciprocal protection of graves and places of remembrance of the victims of wars and repression; Warsaw, 5 June 1993; approval; 18 November 1993.

Republic of Korea

- Agreement concerning a loan financing Telekomunikacja Polska S.A. (modernization of the communications network of the Opole voivodship); exchange of notes; 11 February 1993.
- Agreement on the abolition of the visa requirement; Warsaw, 24 November 1993; signature; 24 December 1993.

Kuwait

- Agreement on the promotion and protection of investments; 5 March 1990; ratification; 18 December 1993.

Latvia

- Consular Convention; Warsaw, 17 December 1992; ratification; 20 October 1993.
- Agreement on the reciprocal promotion and protection of investments; Warsaw, 26 April 1993; ratification; 19 July 1993.

Lithuania

- Agreement on train service across the state frontier; Shestokai, 7 September 1992; approval; 3 January 1993.
- Agreement for the reciprocal promotion and protection of investments; Warsaw, 28 September 1992; ratification; 6 August 1993.
- Agreement concerning civil air transport; Vilnius, 27 October 1992; approval; 26 January 1993.
- Agreement on the opening of the frontier crossing-point at Kalwaria-Budzisko; exchange of notes; 1 September 1993.
- Consular Convention; Vilnius, 13 January 1993; ratification; 15 December 1993.
- Agreement on legal assistance and legal relations in civil, family, labour and criminal matters; Warsaw, 26 January 1993; ratification; 18 October 1993.

Luxembourg

- Agreement on cultural and scientific cooperation; Luxembourg, 19 March 1990; ratification; 27 April 1993.

Russia

- Agreement of the avoidance of double taxation with respect to taxes on income and property; Moscow, 22 May 1992; ratification; 22 February 1993.
- Treaty on friendly and neighborly cooperation; Moscow, 22 May 1992; ratification; 8 May 1993.
- Agreement on cooperation of regions in Poland with the Sankt Petersburg region; Warsaw, 2 October 1992; approval; 15 March 1993.
- Agreement on cooperation in the field of science and technology; Warsaw, 25 August 1993; signature; 25 August 1993.

- Agreement on the construction of a pipe-line system for transit of Russian gas through the territory of Poland and on supplies of Russian gas to Poland; Warsaw, 25 August 1993; approval; 21 September 1993.
- Agreement on cooperation in the field of environmental protection; Warsaw, 25 August 1993; approval; 11 November 1993.
- Agreement on cooperation in the field of culture, science and education; Warsaw, 25 August 1993; ratification; 15 December 1993.

Singapore

- Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; Singapore, 23 April 1993; ratification; 25 December 1993.
- Agreement on the promotion and protection of investments; Warsaw, 3 June 1993; ratification; 29 December 1993.

Slovakia

- Agreement on the replacement of Annex No. 1 to the Agreement between the Government of Poland and the Government of Czechoslovakia on cooperation while inspecting rail and road frontier traffic, signed in Prague on 8 July 1971, by an updated Annex No. 1 to this Agreement; exchange of notes; 14 December 1993.
- Agreement on the delivery and acceptance of persons at the common state frontier; Bratislava, 8 July 1993; approval; 12 November 1993.

Slovenia

- Agreement on the abolition of the visa requirement between both states; exchange of notes; 14 January 1993.

Spain

- Agreement for the reciprocal promotion and protection of investments; Madrid, 30 July 1992; ratification; 1 May 1993.

Switzerland

- Agreement concerning the exchange of professional creating; Bern, 11 June 1993; approval, 29 July 1993.

Thailand

- Agreement on the promotion and protection of investments; Bangkok, 18 December 1992; ratification; 10 August 1993.

Tunisia

- Agreement on the promotion and reciprocal protection of investments; Tunis, 29 March 1993; ratification; 22 September 1993.
- Convention for the avoidance of double taxation with respect to taxes on income; Tunis, 29 March 1993; ratification; 15 November 1993.

Ukraine

- Agreement on international road transport; Warsaw, 18 May 1992; approval; 7 May 1993.
- Agreement on the reciprocal promotion and protection of investments; Kiev, 12 January 1993; ratification; 14 September 1993.
- Agreement on cooperation in the field of science and technology; Kiev, 12 January 1993; signature; 12 January 1993.
- Agreement on legal relations at the Polish and Ukrainian state frontier and cooperation and reciprocal assistance in matters relating to the frontier; Kiev, 12 January 1993; ratification; 21 December 1993.
- Agreement on inter-regional cooperation; Kiev, 24 May 1993; approval; 29 October 1993.

Uzbekistan

- Agreement on economic cooperation and trade; Warsaw, 10 September 1992; approval; 29 April 1993.

Multilateral Treaties

- General Agreement on Privileges and Immunities of the Council of Europe with Protocols (Additional, Second, Forth and Fifth); Paris, 2 September 1949; ratification; 22 April 1993.
- Convention for the Protection of Human Rights and Fundamental Freedoms (with Protocols No. 2, 3, 5 and 8); Rome, 4 November 1950; ratification; 19 January 1993.
- Protocol concerning the European Conference of Ministers of Transport; Brussels, 17 October 1953; accession; 30 June 1993.
- Annexes A and B to the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR); Geneva, 20 September 1957; ratification; 1 January 1993.
- European Convention on Extradition; Paris, 13 December 1957; ratification; 13 September 1993.
- Additional Protocol to the European Convention on Extradition; Strasbourg, 15 October 1975; ratification; 13 September 1993.
- Second Additional Protocol to the European Convention on Extradition; Strasbourg, 17 March 1978; ratification; 13 September 1993.
- Protocol revising the Convention signed at Paris on 22 November 1928 relating to International Exhibitions; Paris, 30 November 1972; ratification; 28 October 1993.
- Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure; Budapest, 28 April 1977; ratification; 22 September 1993.
- European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities; Madrid, 21 May 1980; ratification; 19 June 1993.

- Protocol on the loss of binding force of the Treaty on Friendship, Cooperation and Mutual Assistance signed in Warsaw on 14 May 1955 and of the Protocol on the prolongation of its validity, signed in Warsaw on 26 April 1985; Prague, 1 July 1991; ratification; 18 February 1993.
- European Convention on Transfrontier Television; Strasbourg, 5 May 1989; ratification; 1 May 1993.
- Convention on Biological Diversity; Rio de Janeiro, 5 June 1992; ratification; 29 December 1993.

Declarations

- Declaration on the recognition of the competence of the European Commission of Human Rights and the jurisdiction of the European Court of Human Rights; as of 1 May 1993.
- Declaration on the recognition of the competence of the Committee against Torture; as of 12 May 1993.

JOANNA GOMUŁA

OBITUARIES

Remigiusz Bierzanek (1912 – 1993)

On November 23, 1993 the Polish international law community lost one of its leading members with the death of professor Remigiusz Bierzanek.

Born in 1912 in Opatów near Sandomierz, Remigiusz Bierzanek was educated in Poznań and Warsaw. He graduated from the Faculty of Law of Warsaw University in 1936, and received his doctor of laws in June 1939. His thesis on the adjudication of the Permanent Court of Justice was destroyed when a German bomb hit the printing house in September 1939.

During the September campaign R. Bierzanek served in the Polish forces. In 1940, after four months of imprisonment, he took up work with the Union of Co-operative Societies. There he worked until 1945, and from this time dated his interest in co-operative issues which found expression in the publication in 1946 of a handbook on co-operative law (which subsequently had many editions – the last in 1984).

In September 1945 he presented a paper on international emigration as a legal question and received the title of "docent" (associate professor). Thus began his long and distinguished teaching career at the Law Faculty of the University of Łódź. There, too, he received in 1948 the title of professor, and was in charge of the chair of international law till 1967. Professor Bierzanek also served during this time at the University School of Commerce in Łódź as a teacher, dean and chancellor. In 1967 he was appointed professor at the Warsaw University where he taught international relations until 1983. Since then he has been professor emeritus.

For twenty years professor Bierzanek also worked at the Polish Institute of International Affairs (1959 – 1978), first as an editor and subsequently being in charge of the Department of International Relations and International Law.

In 1957 Remigiusz Bierzanek was elected member of Parliament (independent), where he served two terms i.a. at the Foreign Affairs Commission. He also served for many years as a member and president of the Polish United Nations Association, and later on as a member and vice-president of WFUNA, being elected in 1983 its Honorary President. For many years he had also been a member and president of the Polish International Law Association Branch.

His outstanding reputation as a student and writer in international law was well known. In 1967/1968 he was appointed director of studies at the *École Pratique des Hautes Études* in Paris. In 1974 – director of studies at the Centre of Studies and Research in The Haag, visiting professor at the University of Sudbury in Canada (1973), and at the International Christian University in Tokyo (1976, 1983). He also held lectures at numerous universities all over the world.

Taking profound interest in humanitarian law professor Bierzanek not only had published books and papers on the law of war and on human rights in armed conflicts but also took part in the activities of the Polish Red Cross. He had been a member of the Board (1979 – 1989), and director of the Warsaw Summer School of Humanitarian Law (1981 – 1990). Since 1986 he had also been a member of the Council of the International Institute of Humanitarian Law in San Remo.

His mastery of many topics of international law made him an effective participant of many diplomatic conferences: the United Nations conference on the law of sea (1958), conferences of the International Labour Organization (1965, 1966), conferences on humanitarian law of armed conflicts (1974, 1975), the United Nations conference on territorial asylum. He represented Poland at the United Nations Special Committee on Codification of International Principles on Peaceful Relations among States (1964 – 1970). He also lectured as an expert of the International Labour Organization in seminars on co-operative societies issues.

Among his numerous publications one should mention the following books (in Polish): *The High Seas in International Law* (1958), *The Settlement of International Disputes 1945 – 1973* (1974), *Contemporary International Relations* (1980), *Human Rights in Armed Conflicts* (1972), *War in International Law* (1982), *Studies on the International Community: Sources of International Law* (1991).

By generations of students he has been regarded as mentor and friend. We, who have been privileged to work with him for long years will remember him not only as a true scholar but also as an extremely modest and kind person with a fine sense of humour. Some of us are especially indebted to him for his understanding and help which we received during a difficult political period in Polish history.

RENATA SONNENFELD

BOOK REVIEWS

B. CONFORTI, *International Law and the Role of Domestic Legal Systems*, Martinus Nijhoff Publishers, Dordrecht–Boston–London 1993, pp. 207.

Fife years after his lectures at the Hague Academy B. Conforti has published their updated version. The lectures have concerned several issues of fundamental importance for the effective implementation of international law within domestic legal systems.

Chapter I examines the question of legal/non-legal character of international law, and obstacles in the application of international law in the sphere of municipal law (the doctrines of political question and act of state, non-self-executing character of international norms, binding force of resolutions of international organizations and an absolute application of the *lex posterior* principle). A fundamental conclusion of Conforti seems to be that in fact judges decide upon the application of international law (even notwithstanding constitutional regulation and political considerations), and that the implementation of international law in the domestic sphere is the most important factor of international norms. The former statement goes too far; a margin of freedom of judicial decision is limited by political factors. This can be observed e.g. in the jurisprudence of the Polish Constitutional Court and the Supreme Court dealing with the application of human rights instruments (also in the decisions reviewed in the present volume).

Chapter II presents different aspects of theory and practice of sources of international law. The author has used this opportunity to present his views on the contemporary role of customary law, as this part of his presentation is to a narrow extent connected with the general topic of the book. He rejects a concept of customary law as *pactum tacitum* because customary rules come into being through different state acts which are not coordinated (in our opinion, this phenomenon is clearly visible if one takes into account that acts of domestic agencies of different states have important influence upon the creation of international customary norms). He criticizes also a concept of *persistent objector*; however, he does not indicate how a state objecting to the creation of a customary norm could be bound by it against its will (of course, Conforti is right stating that a persistent objector cannot bar the creation of a customary norm). We agree also with the author's view that from the point of view of the practice, general rules of international law are exclusively a particular form of customary norms. We would like to point out also interesting comments concerning the position of domestic judges with respect to treaties violating international law, as well as the competence of municipal judges to ascertain the invalidity of a treaty on a municipal law level without any international legal effects.

These considerations are followed by Chapter III discussing problems of enforcement of international law. The author has concentrated upon the limits of internal enforcement by states connected with the scope of territorial, functional and personal jurisdiction. In fact he seems to identify the state jurisdiction with a possibility to use

effective enforcement measures. The only limits of such a possibility are human rights and the duty not to cause damages to other states (however, the author is extremely sceptical as to this question; for example he expresses serious doubts as to the importance of the *Lac Lanoux* case as precedent in this context).

Chapter IV is devoted to state responsibility. Conforti seems to accept a position taken by the ILC excluding fault as a constitutive element of responsibility (according to him, international practice confirms such a solution). He emphasizes also correctly that the duty of restitution constitutes the most important consequence of an international delict; different forms of self-help (including self-defense) are allowed to eliminate the effects of a violation of international law. Finally, he considers the effects of international crimes, taking the very existence of such crimes as granted (in our opinion, it is not clear under contemporary international law).

It is not possible to point out all new ideas presented by Conforti. The problems discussed and illustrative material (state practice) are extremely interesting. However, some arguments are based on the effects of EC law within municipal law; in our opinion, one cannot generalize its importance for the presented problem.

Władysław Czapliński

CH. TOMUSCHAT (ed.), *Modern Law of Self Determination*, Martinus Nijhoff Publishers, Dordrecht-Boston-London 1993, pp. 347.

The book contains papers presented during a colloquium held in Bonn in August 1992 devoted to recent developments in the field of the law of self-determination. Leading scholars considered different aspects of internal and external self-determination, a right to secession and human rights including rights of indigenous peoples.

In an introductory presentation Ch. Tomuschat remarks that according to the dominant position of authors, prior to the changes in East-Central Europe in 1989 the right to self-determination was considered in international instruments almost exclusively in a colonial context. The reunification of Germany and the dissolution of the USSR and Yugoslavia have led to an increase of claims towards self-determination. However, the world community is reluctant in recognizing the claims by different ethnic groups to create separate states in a way of secession. Even if creation of states cannot be subjected to review from the point of view of legality, international law can elaborate criteria of recognition of claims for self-determination. Finally, the author states that different ethnic groups cannot be treated as peoples as soon as a state in their territory has been created. However, in our opinion the last statement is more of political than of legal character, as it is very difficult to draw distinction between a people as subject of self-determinations and a minority entitled to autonomy.

Several speakers (D. Murswick, O. Kimminich, A. Eide) have dealt with the right to secede. D. Murswick has referred to his own distinction between an offensive and defensive self-determination. He has emphasized a great importance of the rights of peoples to protect their identity (every attempt against this identity should be treated

as a violation of the right of self-determination). He has analysed an international legal writing and concluded that the claim to self-determination can be justified only in exceptional cases. However, the author's thesis is controversial in the light of his own presentation of the Yugoslav conflict (it is difficult to prove that the claims of Croatia and Slovenia have been really justified by the scope of Serbian domination). O. Kimminich has accepted the right to secession when the rights of an ethnic group are consistently and manifestly violated by a state of residence; however, he has not indicated any convincing criterion of legitimacy of secession. In fact, legality of a claim depends upon its acceptance by the international community (which is reluctant in supporting self-determination by the recognition of new states). For this author, as well as for the others (P. Thornberry, A. Rosas, J. Salmon), internal self-determination (understood as the right to democratic government in general, and as an autonomy and federal form of government with respect to minorities) is as important as external self-determination.

D. Sanders has presented the situation of indigenous peoples under international law. He has concluded that in fact there is no difference between such peoples and minorities, as the states are not willing to recognize their special status. The same view has been presented by G. Alfredsson who has emphasized that indigenous peoples are entitled exclusively to internal self-determination (even the actual works in the framework of the UN do not change the situation).

The paper by A. Eide corresponds with the opinion by O. Kimminich and indicates that there is no dispute as to the existence of the right of self-determination, but exclusively as to its scope (contemporary international law protects the stability of existing states). It contains also some critical remarks on the position of international community towards Yugoslavia. Finally, J. Frowein accentuated that though self-determination was an important principle of international law, it was not accepted as *jus cogens* and could not be opposed to other principles of international law aiming at the preservation of international peace and security.

Władysław Czapliński

W. CZAPLIŃSKI, *Skutki prawne nielegalnego użycia siły w stosunkach międzynarodowych* [Legal Effects of Illegal Use of Force in International Relations], Agencja Scholar, Warszawa 1993, pp. 233.

The book written by Dr. Czapliński pertains to one of the most significant issues in contemporary international law – to legal effects of use of force. This issue has been constantly acquiring attention of international lawyers during the interbellum period and immediately after WW II. Lack of violent acts in Europe after that time has caused that this problematic issue attracted relatively less attention. However, new developments on the former Soviet and Yugoslav territories, although most regrettable for obvious reasons, have reactivated interest of lawyers in the said area. For these reasons, the book by Czapliński corresponds very well not only with interests of legal doctrine, but also (and mainly) with needs of states' practice.

The book consists of a general introduction discussing main legal vocabulary of international responsibility of states and individuals, and three main parts describing, history of formation of rules on prohibition of use of force and on notion of aggression in international law, forms of state responses to acts of aggression and other means of use of force, and forms of international responsibility of states respectively. The final chapter concerns penal responsibility of individuals for committing crimes against peace.

The author makes extensive use of state practice and jurisprudence of international courts and arbitral tribunals, paying comparatively less attention to theories developed by other writers. This particular feature makes the whole book very well anchored in authenticity of past and present international relations, which in turn fits properly into the needs of our times.

Another feature worth mentioning (also stressed by the author in the preface) is that the concept of the book has been initially formed and subsequently developed during the author's studies of various problems of Polish-German legal relations. For that reason, practice related to responsibility of Germany after the two world wars, and to reparations imposed on that state, plays significant role throughout the whole book. Czapliński, however, carefully weights and balances cases and examples of state practice, and the book does not create impression of being one-side oriented.

History of formation of legal principle prohibiting use of force in international relations shows that while all are willing to accept this principle on high level of abstraction (with possible exception of contestants of international law as such, like certain terrorist groups or religious fundamentalists), much less agreement is achieved as regards application of this principle *in concreto*. Czapliński rightly points out (p. 21) that use of multiple terms, like war, acts of war, *de facto* war, intervention, military intervention etc. has contributed to dilution of the said principle. No wonder that the states concentrated then on defining the notion of aggression in international law, attempting that way to extract more precise rights and obligations from the general principle.

Czapliński discusses contents of both the London Conventions of 1933 and the General Assembly resolution No. 3314 (XXIX). In that context he stresses ambiguity of certain parts of the GA resolution. One may add here a comment that from perspective of art of legal drafting, the formulation of the resolution constitutes rather a step back than forward, if compared with the London Conventions. The author adds, however, the interesting observation that the resolution has not intended to create a final legal catalogue of acts constituting aggression (containing an open clause allowing the Security Council to qualify other acts as the aggression), but, instead, its purpose has been limited to provide certain guidance for the Security Council to take political decisions (p. 34). As a consequence, the Security Council is able to decide on action under Chapter VII of the UN Charter without necessity to identify an aggressor (p. 36).

Discussion of forms of responses of states for use of force begins with the author's analysis of the notion of self-defence. In this context, two issues merit for particular attention: *s.c.* anticipated self-defence, and collective self-defence. As to the former, analysis of states' practice (particularly UN resolutions pertaining to acts qualified by performers as self-defence against imminent threat of armed attack) shows that legality of that behaviour has rather not been accepted (pp. 56 – 58), although there are some cases to the contrary. Collective self-defence is understood in the book along the lines drawn by the ICJ in the *Nicaragua (Merits)* judgment.

Further on the author discusses countermeasures applied by the League of Nations, United Nations and other organizations. Sanctions (this term being restricted to actions undertaken within framework of international organizations) are interpreted by Czapliński as acts directed at termination of acts of force, and as such are separated from the issue of responsibility for unlawful use of force. The former aims at cessation of illegal situation, the latter one at liquidation of effects of such illegal act (pp. 62 – 64). With respect to legal means taken against Iraq after its invasion of Kuwait, the author joins other writers qualifying that action as collective self-defence under Art. 51 of the Charter, and not UN sanction under Chapter VII. The fact that the military operation was carried out without any effective UN control is stressed as decisive argument (pp. 86 – 88).

The most interesting part of the book discusses forms of international responsibility of states. Czapliński starts with description of basic forms of responsibility for any violation of international law (restitution, compensation, satisfaction), and then places these forms against the background of illegal use of force. However, his comments on notions of *jus cogens* and *actio popularis* are set forth in the context of international crime as defined in Art. 19 of ILC Draft Articles (Part One) on state Responsibility. The Draft of the International Law Commission differentiates regimes of responsibility for violating essential norm of international law, and violations of other norms. The author points out that this differentiation boils down to establishing a separate (more stringent) regime for violation of a peremptory norm of international law.

However, the notion of *jus cogens* is not finally settled in contemporary international law. While Vienna Convention on Law of Treaties has introduced this concept into positive realm of international law, it is still controversial whether the notion of *jus cogens* has acquired already recognition as part of customary law. Logically, the notion of *jus cogens* cannot have status inferior as the *jus cogens* rules themselves. Otherwise universal recognition of principles of qualification of norms may be impaired. On the other hand, peremptory rules must by their very nature be customary norms (p. 161), because otherwise their character would be dependant upon universal participation of all states in a relevant convention. As a result, Czapliński stresses that this whole concept is still controversial (pp. 164 – 165).

The ILC Draft states that committing an international crime affects any and all states. Author of the book rightly stresses that this may mean that either any state is entitled to claim its rights as affected by an international crime, or such right is granted only to the international community acting as a whole (p. 184). Acceptance of the latter concept is hampered by the fact that there is no procedure through which the world community may present its claim related to responsibility. Chapter VII of the UN Charter, as it has been shown in the preceding part of this book, does not deal with responsibility, but with countermeasures.

Lack of *actio popularis* in present international law means that only a state that has a legal interest may validly claim responsibility of another state. In other words, the international crime should be understood as a violation of an international norm binding *erga omnes*. Czapliński tries to structure international rules, putting norms *erga omnes* as embracing the *jus cogens* rules (if any exist at present), and international crimes being the fraction of the latter (p. 189). He admits, however, that this categorisation does not fit very well into system of Part Two of the ILC Draft. Although this is not explicitly spelled out, a reader gets an impression that the author is sceptical

about the whole concept of extracting international crimes being cause for special regime of state responsibility. One should note that the whole book proves that this scepticism is well founded.

At the end it should be stressed once again that the book is extremely useful to assist in international legal description of contemporary international relations pertaining to the use of force. The author's concentration on state practice makes the book an effective tool not only for scholars, but mainly for diplomats and other practitioners of public international law.

Rudolf Ostrihansky

CH. CHINKIN, *Third Parties in International Law*, Clarendon Press Oxford 1993, pp. 385.

Bilateralism is a dominant feature of international law. The traditional position of third parties has been expressed by a rule *pacta tertiis nec nocent, nec prosunt*. However, exceptions to this rule can be found, and with respect to several aspects the discussions on the role of third parties in international law is more and more vivid. Ch. Chinkin examines recent developments concerning the position of third parties in the law of treaties, in the judicial settlement of disputes, and in the law of armed conflicts and state responsibility.

Chinkin has started with development and exceptions to the rule *pacta tertiis*. She shares a view that certain multilateral treaties (in particular those establishing territorial regimes) can be effective *erga omnes* (she refers in this context to the Antarctic Treaty and the UN Convention on the Law of the Sea); however, she avoids a fashionable notion of *opposability*. Surprisingly, she does not consider in a detailed way Article 60 of the Vienna Convention on the Law of Treaties, neither the problem of third states in the law of state succession. Then she moves to the problem of law of international organizations and tries to answer the question to what extent the member states of the organization should be treated as third parties with respect to it. An interesting theoretical analysis of the position of non-member states in the light of Chapter VII of the UN Charter is not followed by the study of a rich practice in this field (in fact, references or non-references to international practice belong to rare weak points of the presented volume). Finally, Chinkin investigates problems concerning the position of individuals as third parties to human rights treaties. She has restrained her study to the practice of the Commonwealth states, leaving aside the whole complex of individual complaints under the European Convention for Human Rights.

Considering problems dealing with an intervention before the ICJ, the authoress presents the conditions of admissibility of intervention, without analysing particular aspects (while e.g. the notion of a legal interest is not quite clear). Then she passes to the rights of the intervening state, and she accepts the decision of the ICJ in the *Salvador v. Honduras* case that an intervenient cannot claim material (pecuniary) reparation. She indicates also that the Court usually is not very willing to accept intervention, probably because of Article 63 of the Statute (according to which the protection of third

parties by the Court *ex officio* should be sufficient). It is surprising that Chinkin does not consider the problem of an admissibility of *actio popularis* (proceeding in a public interest). She concludes that the intervention plays much more important role in the proceedings on regional level than before the World Court.

The third part of the book refers to the law of armed conflicts. Neutrality has been traditional position of third states. However, it is no more accepted if the Security Council undertakes enforcement measures according to Chapter VII of the Charter. In fact, the Security Council avoids to declare the existence of aggression, what makes the support for a victim of aggression impossible (such a position by the authoress is correct because there is a general agreement among authors that any form of collective enforcement action – except a collective self-defense – can take place exclusively upon the acceptance by the Council). In the end Chinkin has considered the conditions of such an action. It is interesting that she has not mentioned a humanitarian intervention (or, generally, an intervention in order to protect human rights) which is the most frequent form of collective (or – more often – unilateral) action by third states.

We have pointed out numerous advantages and some disadvantages of the book (the balance sheet is decisively in favour of the former). We can recommend it to every international lawyer as the best study of the position of third parties in contemporary international law.

Władysław Czapliński

T. GADKOWSKI, *Odpowiedzialność międzynarodowa państwa za szkodę jądrową* [International Liability of State for Nuclear Damage], Poznań 1990, pp. 190.

The book of Tadeusz Gadkowski is certainly the first in-depth study of the issue in Poland aiming to find out the specific features of international liability of state for nuclear damage as an institution of public international law. The issue is presented on the broad background of difficult questions of international responsibility of states for wrongful acts and for injurious consequences arising out of acts not prohibited by international law.

The author rightly emphasizes the weakness of the institution of international responsibility of states as such, as well as a thesis of its customary or based on general rules of law character, especially the weakness of its enforcement due to lack of *actio popularis* in international law (author recognises only its in *statu nascendi* character – it seems that he finds out the further evolution of this institution as useful). He also sees no remedy in doctrinal concepts of international community as passive subject of responsibility. Nevertheless, he shares the view that some general rules of international responsibility governing relations between the neighbouring states exist in contemporary international law and they might apply to nuclear damage as well, but he warns against their automatic application. In his opinion nuclear damage possesses very specific features requiring some modification of rules of responsibility of states applicable to it.

The necessity of establishing of a such institution is stemming from several reasons. The transfrontier environmental pollution caused by nuclear damage has much broader

and incomparable to any other form of pollution effects as to the area (effects distantiae loci) and time (effects distantiae temporis), to the health of the people, their property or environment. The sole activity seems also specific since it does not belong, according to Gadkowski, to the category of ultra-hazardous activities. He opposes the view expressed by some authors that the provisions of the Convention of 1972 on the responsibility for damage caused by space objects might be applied *mutatis mutandis* to the liability for nuclear damage. He warns once again against any automatism in that field and refers to the law of the sea where the specific requirements of the character of nuclear damage were noticed and resulted in the Brussels Convention of 1962 on responsibility of persons exploiting ships using nuclear fuel. Also the survey of the existing treaties referring directly or indirectly to nuclear activity incline the author to the conclusion that a new convention on liability for nuclear damage should be elaborated in the nearest future. He discusses the Convention on the long-range transboundary air pollution of 1979, Convention on notification of a nuclear accident, Convention on assistance in the case of a nuclear accident, Convention on assistance in the case of a nuclear accident or radiological emergency, both of 1987, noticing their limited scope. The conventions create the obligations of states to prevent, to inform, to consult, but avoid the question of liability for nuclear damage.

The lack of conventional provisions on the subject-matter as well as insufficiency of building liability for nuclear damage on principle of territorial sovereignty or good neighbourhood, mostly because of peculiar character of the discussed phenomenon, are further reasons speaking in favour of author's thesis.

The above-mentioned conclusions allow Gadkowski to formulate prerequisites, principles and legal consequences of international liability for nuclear damage. According to him, the existence of transfrontier material damage due to nuclear accident and casual nexus between two of them are essential prerequisites. The compensation of damage is seen by the author in a very broad manner and comprises *damnum futurum*, *lucrum cessans*, *lucrum separatum*, but he rightly expresses serious doubts as to the compensation of preventive measures taken by the concerned state. He states that classic concepts of evaluation of damage should not be applied to liability for nuclear damage, especially the *Trail Smelter* criterion of a substantial injury (substantial transfrontier damage), or civil law concepts of causality. He postulates *de lege ferenda* the acceptance of the standard of absolute liability for any activities involving the use of nuclear energy.

The last Chapter is devoted to civil liability for nuclear damage. The author presents and discusses here fundamental regulations of international law and the municipal law of selected states (with special reference to Polish nuclear law) and formulates interesting *de lege ferenda* remarks also in this field.

The book is an interesting study of one of very current and important issues of international law, broadly discusses doctrine of international law (including theories presented by Soviet or former Eastern Germany writers), the work of the ILC and views presented by Polish representatives in different international fora on the subject. Ideas, remarks and thesis expressed by Gadkowski are interesting, though one may not entirely share his views.

Anna Wyrozumska

W. GÓRALCZYK, *Obszary morskie i ich delimitacja* [*Maritime Areas and Their Delimitation*], Wydawnictwa Uniwersytetu Warszawskiego, 1993, pp. 128.

The legal problems connected with the delimitation and uses of the sea areas have always presented an interesting field of consideration for international lawyers. First of all, because the law of the sea had and still has to provide an answer to some of the most challenging issues faced by the international community, and secondly, because the regulation in question has to accommodate different, sometimes contradictory, interests of individual states and at the same time this law has to give recognition to the common interest of international community. In other words, the law of the sea reflects the approaches and expectations of states, interpreted mainly from the point of view of their own national interests, with respect to economic, military and other uses of the areas in question, as well as aims at the protection of common interest of the community in order to secure the implementation of common goals.

The book by Prof. Wojciech Góralczyk offers a comprehensive presentation of most significant issues relating to the uses and the delimitation of sea areas. It is structured in three parts. Part One „General Problems”, covers the following topics: (a) the relation of the law of the sea to the domestic law of particular states; in this respect, the relevant domestic regulations must be in accordance with the principles of international law but, as stated by W. Góralczyk, international law does not determine the manner in which the municipal legal order is to be harmonised with international principles; (b) the sources of the international law of the sea – this chapter discussed the importance of international custom and international conventions as the source of rights and obligations of states; (c) contemporary changes in the law of the sea – this part presents the changing approach to the law of the sea, which resulted in delimitation of the freedom of the seas due to technical, economic and political reasons (pages 15 – 16) and finally, (d) Third Conference on the Law of the Sea – in this part the history and the influence of this Conference of the Law of the Sea upon a contemporary regulations (both treaty and customary) is presented.

Part Two of the book – entitled „The Maritime Areas” – analyses the basic legal issues relating to the use of the sea areas having a different legal standing from the point of view of international law. Thus consideration is given to the territorial sea, contiguous zone, exclusive fisheries zone, continental shelf, exclusive economic zone, the high seas and the deep seabed as well as to issues arising out of the use of straits and sea canals. The presentation of the legal status of each of the above mentioned areas includes the historical perspective, basic rights and obligations of actors involved, and the regulations of the Republic of Poland (where applicable) in force with respect to such areas. The detailed analyses of problems discussed in this part of the book would exceed the framework of the present review. However, attention should be given to this part which refers to an exclusive economic zone (EEZ). The author points out that this concept, in its essence, reflects an attempt of the developing countries (mainly Latin American and African states) to equalise economic differences by the new legal institutions (page 58). Thus the rights recognised in this zone are primary of economic nature (page 61). The author correctly indicates that the main theoretical legal problem here is that of legal status of exclusive economic zone, for the acceptance of this zone as being of *sui generis* nature may present a source of conflicts between coastal and other states as to the exact scope of respective rights and obligations.

Part Three of the book – „The Delimitation of Sea Areas” – discusses the techniques of establishing of a baseline, problems relating to the determination of the breadth of the different sea areas (e.g. territorial sea) as well as legal issues connected with islands and artificial structures on the sea. This part of the book is based not only on the relevant international norms (both treaty and customary) but also makes references to the relevant judgments of International Court of Justice as well as to the practice of selected states.

Generally speaking the most recent work of Professor Góralczyk presents a comprehensive guide through the complicated issues of the law of the sea, in the wide meaning of this term. Any reader, whether a student or a scholar of international law, will find in this book not only the analysis of the basic provisions and concepts of the law of the sea, together with the evaluation of an impact of these concepts on the relating rights and obligations of actors, but also the indication of how these provisions should change in order to meet the changing aspirations. The selection of issues to be considered is always a difficult choice for an author. Thus one may argue that problems relating for example to the protection of the marine environmental should be given more attention for as a consequence the coastal states received a substantial freedom of unilateral action with respect e.g. to foreign ships. It seems, however, that the aim of this book was not to discuss in details all the problems of the law of the sea but rather to present or indicate legal issues of most significant importance. The reader is introduced not only to the basic legal instruments, but is also presented with their history and impact upon the states interaction with respect to the areas in question. However, it is strongly suggested that in order to accommodate the needs of foreign readers the book should be supplemented with an English summary. In its present form the book is available only to Polish speaking persons.

Ryszard Hara

J. KRAMER (ed.), *Föderalismus zwischen Integration and Sezession. Chancen und Risiken bundesstaatlicher Ordnung*, Nomos Verlagsgesellschaft, Baden Baden 1993.

Political events of recent years, in particular in Central and Eastern Europe, have caused a growing interest for a federalism and phenomena connected with it, like decentralisation or democratisation. These problems have been investigated also by Polish authors.¹

The problem is so important that the German Institute of Research on Federalism has been created in Hannover (FRG).² The creation of the Institute was accompanied by an international symposium *Federalism between Integration and Secession*. Materials of this symposium have been published in the reviewed volume. A common denominator

¹ Cf. L. J a n i c k i: Federalizm i jego aktualne aspekty, 48 *Przegląd Zachodni* 3 – 23 (1992), and the authors quoted by him.

² Deutsches Institut für Föderalismusforschung e. V.

of the studies is the problem of chances and risks of federal systems. This problem has been considered by 17 authors coming from various countries, in five sections: creation of federal states, dismemberment of such states, and their transformations through conflicts, consensus and integration. The research concerned not only existing or dissolved federal states (Yugoslavia, the Soviet Union, the Czecho-Slovak Federation, Belgium, Canada, Austria, the FRG, the USA, Australia and Switzerland), but also decentralized unitary states (Spain, Italy). The first part of the book dealing with the problems of these states, contains also a Polish presentation by J. Cierniewski. The author discusses from the perspectives of 40-year-long centralist government system and of the European Communities the problem of regionalisation, introduced by the self-government on the local level.

We would like to indicate the conclusions of the book, according to which growing trends towards decentralisation in the world can be resolved on four planes. The first stage is the decentralisation on a communal level. It should constitute a basis for the second stage: different forms of regionalism within a unitary state. The third stage is federalism, and the fourth one – separatism. Separatist tendency can be observed in Belgium and Canada, not to mention the former Yugoslavia. One should refer here to a controversial problem of secession of a federal unit, which has not been discussed in the reviewed volume, and which is still contested by the contemporary legal writing and political practice. An example of Biafra can be referred to in this context.

It is clear – and it has been emphasized also in the reviewed book – that the trends towards federalism are accompanied by opposite unionist trends. This leads to a paradox: there exist federal states which are highly centralized (the USA, Germany), and unitary states which are decentralized (Italy, Spain).

The book constitutes an important contribution to the research on contemporary state structures.

Lech Janicki

P. DARANOWSKI, *Międzynarodowa ochrona praw obywatelskich i politycznych in statu nascendi. Międzynarodowy Pakt Praw Obywatelskich i Politycznych [International System for Protection of Civil and Political Rights in Statu Nascendi. International Covenant on Civil and Political Rights]*, University of Łódź Publishing House, Łódź 1993, pp. 282.

The Daranowski's book is the first, in the Polish literature on international law of human rights, monograph concerning exclusively the International Covenant on Civil and Political Rights. It is also the first work in which the law based upon this treaty is perceived so completely: the writer considers the International Covenant norms, related norms of the Optional Protocol and the rules of the Provisional Rules of the Procedure dealing with the Human Rights Committee as well as the practice of this Committee

connected with state reports, General Comments and individual communications system. The analysis is restricted to the period of twelve years (1976 – 1988).

The main goal of the Author is to answer two questions: 1) what is the normative effectiveness of application of the Covenant on Civil and Political Rights for the protection of these rights in the legal order of a Party? and 2) what is the role of international implementation mechanisms in the stimulation of this mechanisms?

The Daranowski's book is divided into five chapters. The first and the last of them are of theoretical value. This kind of considerations has great importance for the book and is closely interrelated with dogmatic considerations which occupy the other three chapters. Thus, the theoretical parts of this book make a clasp fastening the dogmatic ones.

The beginning chapter deals with the treaty source of the international protection of civil and political rights. It consists of two parts. In the first part the author suggests that only a treaty is the real source of international obligations in the field of human rights. He proves this thesis analysing the place of human rights in customary international law (including the problems of *jus cogens* and obligations *erga omnes*), the relationship between human rights and Art. 2 para. 7 of the UN Charter, the question of the applicability of the principle of reciprocity to human rights area, and, finally, the treaty source of human rights obligations while studying the judgement of the ICJ in the *Nicaragua Case*.

The author is right that treaties are the basic source of human rights obligations, but he is wrong when he excludes totally *de lege lata* customary international law. In my opinion, we can speak about customary law obligations to a small extent on the universal level (the most, if not all, of the rights enumerated in the art. 4 para. 2 of the Covenant benefit of such a protection) and to a larger extent on the regional (e.g. African and American regions) and, perhaps, on bilateral levels. We cannot exclude either that under the influence of the normative and widely accepted treaties, like the International Covenants, customary international law will emerge. Obviously, the question of customary obligations in the domain of human rights is still open, but we cannot completely disregard this problem.

The second part of the first chapter has an introductory character. Namely, one describes there the problem of conceiving a human right as a legal norm and touches, in general, the international mechanisms of implementation of the human rights guaranteed by the Covenant which are developed in the next chapters of the book.

The first of the dogmatic parts of the Daranowski's monograph is devoted to the state reports procedure provided especially in the Art. 40 of the Covenant. One examines this question considering step by step the travaux préparatoires, the different kinds of reports, the General Comments as a result of the work of the HR Committee on them. One also writes about the place of state reports on the background of the problem of cooperation of the Committee with UN specialised agencies. Daranowski rightly remarks that the Covenant differs only between initial, subsequent and ad hoc reports. The achievement of the HR Committee is distinction of periodic reports and development of the so-called supplementary reports. The author correctly underlines different nature of distinct reports and their different functions. Furthermore, he shows in an interesting manner the consequences of a failure of the duty to report.

An important fragment of this chapter refers to the General Comments of the HR Committee. One characterizes there especially their object (material and procedural law stemming from the Covenant, the questions of implementation), addressee (every

Contracting State), procedure of elaboration (synthesis of remarks dealing with analysis of state reports and opinions made on the basis of individual communications), functions (the model for domestic legislative action of the Contracting states, the suggestions for improvement of international procedures known under the Covenant) and character (they are of obligatory nature). Daranowski accurately points out that General Comments play a very important role in the process of unifying the interpretation of the norms (notions) contained in this treaty. Nevertheless, we have to be aware that the practice of the HR Committee concerning General Comments is criticised an interpretation of certain clauses of the Covenant as too optimistic (cf. the Second General Comment on Art. 6). I add that they establish not only a synthesis of the works of the Committee, but they also indicate new trends in the international understanding of the Covenant norms. These new conceptions are not included into the corpus of international law yet.

The system of individual communications is the subject of the next chapter. Here, the author concentrates his attention principally on two important questions – the premises of admissibility of an individual communication and the form, character and value of the opinion of the HR Committee. As to the first one, he observes that the individual communications can be presented only by individuals (not legal or para-legal persons, like political parties, trade unions etc.) who are victims of a violation of their rights or freedoms. Daranowski remarks in this context that in the jurisprudence of the Committee a victim is perceived as a person actually and directly affected. In my opinion, a victim is understood in a more restricted sense under the Covenant. It means that we can speak in principle of an actual and direct victim. The cases where an indirect or, especially, a potential victim appears are exceptional. Moreover, in the case of an indirect victim only the familial or personal links with the real victim are decisive.

Further premises of admissibility of a communication are: competence of the Committee *ratione materiae*, *ratione temporis* and *ratione loci*, incompatibility of an act with the dispositions of the Covenant, abuse of a right to communicate, examination of the same matter by another international organ and exhaustion of all available domestic procedures. These considerations are clear and well elaborated and they don't cause any major doubts or objections. Very interesting remarks concern the form, character and value of opinion of the HR Committee. One contends, inter alia, that the opinion settle a case, but the opinion joined by an individual opinion of a member of the Committee develops the law emanating from the Covenant. I think this view simplifies the reality because such an opinion of a member can influence it, but it does not have to. An individual opinion can simply express a separate view of a member and in the majority of cases it solely does.

The fourth chapter is very important as it shows. Two aspects related to the interpretation of the Covenant. The first aspect, material in nature, concerns some examples of rights protected by the Covenant. Daranowski describes their contents on the basis of General Comments. He speaks of the right to self-determination (Art. 1), the clause of the Art. 4, the right to life (Art. 6; he does not mention, however, the Second Protocol of 1989 on the Abolition of the Capital Punishment), the freedom from torture (Art. 7), the right to liberty (Art. 9), the right to fair trial (Art. 14), the right to privacy (Art. 17) and the ban on aggression (Art. 20). This aspect of the interpretation process is duly presented.

The second aspect, procedural in character, is more controversial. The author discusses here of the sources of the streams of information taking into account, in the course of interpretation, the dynamics of interpretation, the applied rules and their

relation to the Art. 31 of the Vienna Convention on the Law of Treaties and, at last, of the formula of interpretative conclusions. I have some doubts concerning the notion of the subsequent practice as a source of information useful for the interpretation. In my opinion, the HR Committee considers to some extent (but not very much) national laws and practices as well as their evolution. We cannot, however, treat them as a subsequent practice because they exist and often change independently of the Covenant norms. In this case, such a practice based on the Covenant has no international dimension. Furthermore, the opinion that General Comments are the expression of the conscience pertaining to the interpretation of the Covenant norms is too simplified. The General Comments are not often mentioned before the HR Committee when it pronounces on individual communications (this is also the case of other international instruments). Moreover, one criticises them sometimes for too dynamic approach, going beyond the rules of the Covenant. I think that the author is too pessimistic when he neglects the role of the HR Committee in the interpretation of the Covenant and maintains the Contracting Parties have main, predominant position. Naturally, the character of this organ is different comparing for instance the European or Inter-American bodies which examine the human rights petitions. It does not mean, however, that its role is restricted solely to the organisation of the State Parties views.

Finally, the author analyses two problems, directly referring to the very goal of the a book. The first one is the position of the Covenant within national legal systems of the state Parties. Daranowski describes an incorporation and a transformation as forms of introduction of this treaty into national legal orders and the premises of effectiveness of this implementation constituting the basis for an international protective system. In the latter respect, he writes of formal premise – the form of constitutional regulation, and the operational one – mainly the autonomy of the Covenant human rights notions. The author notices, *inter alia*, that some of the Covenant norms are recognized as self-executing norms, but the others are not. He finds as well that a *milieu juridique proche* for the Covenant human rights notions are not only international instruments, but also and above all the domestic legal orders of the Contracting Parties.

Nonetheless, we cannot accept the practice too easy. If we observe that the HR Committee admits in general a self-executing nature of the Covenant norms and that the exceptions in this domain differ in the case of the Committee and of the national practice of the Contracting Parties (and between themselves) we should criticize that situation. We should propose to recognize all norms of the Covenant as self-executing. The Author seems also to overestimate the influence of municipal orders on autonomous notions of this treaty. In fact, the HR Committee creating these notions is much more conservative and static than, for example, the European Court of Human Rights and bases above all on the international Covenant itself.

The concluding part of the book deals with the problem of perceiving the international Covenant on Civil and Political Rights as an objective regime. One summarizes here arguments and assertions. One stresses that the Covenant is an independent and autonomous system for the protection of human rights. Daranowski thinks at the same time that the norms of the Covenant are too general, and that it is necessary to make them positive by the process of interpretation. Further on, he suggests that the HR Committee is rather an organ assuming the interpretation of the treaty than an organ of Control. The author maintains also that we can inquire after the real standards of the protection of the rights and freedoms examining the General Comments and not the state reports. He concludes then that the Covenant is a system of norms, principles and

decision-making procedures around which actor's expectations converge in a given area of international relations (objective regime; Daranowski accepts a Krasner's definition).

It is true that the Covenant is a system for the protection of human rights. Nevertheless, one must point out that this system is not closed. In particular, it is more and more open for general international law (treaty and customary). Therefore, its autonomy is rather relative. A vagueness of the notions used in the Covenant certainly exists, but, in my opinion, has been constructed this way intentionally, in order to embrace the most different legal orders of the Contracting Parties. In the past, we could observe certain influence of this treaty on national laws – and to some extent – on domestic practices. It appears as well that the control function is at least as important as the interpretative one. Obviously, the effectiveness of the HR Committee action is weaker than in the case of – namely – the European organs. Its recommendations are, however, often more detailed and concrete than the judgments of the European Court. At last, it seems that the construction of an objective regime is not very instructive in a juridical analysis (what would be the legal consequences of that qualification). It appears that the author transfers here a foreign notion for international law. This one indicates more usefulness in the international relations science.

One can observe that the Daranowski's book has some strong and weak points the strong point. One elaborates them exhaustively and, in principle, well. The weaker points are namely the first and last chapters. The author could develop the theoretical issues. In particular, he does not examine sufficiently four important topics: 1) character of the state obligations resulting from the Covenant; 2) relationship of the Covenant system to the regional ones; 3) state responsibility for violations of its international obligations in the mentioned areas; 4) methodology of interpretation of the rights and freedoms, and of their implementation into national legal systems. Despite my criticism (which are still subjective and can be also criticized) we have to recognize that the Daranowski's monograph is valuable and constitutes a significant contribution to the doctrine of international law.

Cezary Mik

R.ST.J. MACDONALD, F. MATSCHER, H. PETZOLD
(eds.), *The European System for the Protection of Human Rights*, M. Nijhoff Publishers, Dordrecht–Boston–
London 1993, pp. 940.

The reviewed book has been published on the occasion of 40th anniversary of the entrance into force of the European Convention on Human Rights (1953). It contains 40 articles by eminent professors, judges and officials. The book is founded on four pillars: general questions, rights and freedoms, control machinery and a future of the protective system.

In the first part (9 articles) one considers: introductory problems (P.-H. Teitgen), the place of the Convention in international law (J.A. Carillo Salcedo), the relationship between the Convention and domestic law (R. Bernhardt), the role of principles of sub-

sidariety (H. Petzold) and proportionality (M.-A. Eissen), methods of interpretation (F. Matscher, H. Golsong) and a problem of „Drittwirkung“ (A. Clapham).

The second fragment of the book is composed of 15 works concerning in principle main rights and freedoms protected under the Convention. Here we can read about the right to life (T. Opsahl), prohibition of torture (two articles by A. Cassese and H. Danelius), liberty and security by persons (S. Trechsel), the right to fair trial (also two studies by P. van Dijk and O. Jacot-Guillarmod), respect for private and family life (G. Cohen-Jonathan), freedom of thought, conscience and religion (M.N. Shaw), freedom of expression (A. Lester), freedom of association (C. Tomuschat), right of property (J.A. Frowein), parental rights and right to education (L. Wildhaber), electoral rights (J. De Meyer), discrimination (K.J. Partsch) and rights not covered by the Convention (M. Melchior).

The following part deals with the control system and consists of 12 articles. They refer to three principal control organs: European Commission, European Court and Committee of Ministers (E. Fribergh and M.E. Villiger, P. Mahoney and S. Prebensen, C. Ravaut), main elements of the European procedure: right of application, fact-finding, conciliation, judgments and decisions as well as costs, expenses and right to compensation (H.C. Krüger and C.A. Norgaard, K. Rogge, A. Kiss, J. Callewaert, A. Drzemczewski, N. Sansonetis, M. Enrich Mas) and, finally, implementation of judgements and decisions and their effects in domestic law (P. Leuprecht, G. Ress).

The last and the smallest part of the book contains only four works. Thus, M. Pellonpää writes about economic, social and cultural rights, A.B. Baka on an eventual possibility of the protection of minority under the Convention, J.P. Jacqué on relationships between the Convention and the European Communities, J. Meyer-Ladewig about a reform of the control system.

Of course, it is not possible here to note every article in this illuminate book. All of them show that the authors have a very high degree of knowledge in the field of human rights. Considering this, I would like to confine myself to make some observations in particular of more general character.

First of all, I want to refer to the conception underlying the reviewed book (title and its relationship to the book's contents). The intention of the authors was to celebrate the 40th anniversary of the European Convention. However, the title of the book is „European System for the Protection of Human Rights“. It could rise a false impression that there is only one system of human rights in Europe whereas there are three better or worse established systems: of the Council of Europe, of the European Communities and of the CSCE. Of course, one can say that it does not matter because the intention of authors was quite different. This argument is right solely *prima facie*.

In my opinion, even if we desire to celebrate the anniversary of the European Convention, we should take into account the reality existing in Europe, processes and phenomena which influence each other stronger and stronger. The European Convention is not isolated from this rich environment. I am convinced that nowadays we should speak about the European law of human rights based on three mentioned systems. These systems have reciprocal and deep substantive, procedural and institutional relationships, formal and informal ones. The European Convention (to some extent also the European Social Charter which is marginalized in the book) plays the main role but it does not mean at all that the role of other systems is marginal. They show new substantive and procedural perspective of development, help in the process of implementation of human rights set forth in the Convention, inspire it and reveal new threats. The European law

of human rights can not be rejected by the fact that the CSCE system is not obligatory in a juridical sense and the EC system is of supranational character and therefore it is not consistent. As we know very well every law is not static but dynamic. In this light we can observe that the CSCE tries to find its own legal identity and that its political standard often modelled on the conventional norms and jurisprudential standards (including these of the European Convention) are implemented by domestic laws, bilateral treaties or even multilateral treaties (CSCE Convention on Conciliation and Arbitration, not yet in force). One can add that in the context of the EC system the problem of supranationality can be resolved if we agree that the Community law did not break the links with international law (treaties instituting the Communities are still international treaties, acts of institutions can be treated as binding resolutions of organs of the integration international organization) and that the strict and static dualistic perception of the relationship between international and domestic laws is unjustified and artificial. So, the systems are not only complementary but also interdependent and should be apprehended together as the European law of human rights (regional international law).

What could be the influence of this new perception on the contents of the reviewed book? Its first part should contain articles on the notion of European law of human rights (autonomy vis-a-vis universalism, American and African laws of human rights, substantive scope and internal consistency, and the place of the European Convention therein). In the second fragment, the authors should take into consideration substantive links of the rights and freedoms with rights and freedom existing in the framework of the EC and CSCE systems. They ought to enlarge a list of rights by including economic, social and cultural rights. Finally, the third and the last part should accentuate the problems and perspective of cooperation or coordination between all European procedures. For now, only few articles express these new trends (i.a. A. Lester considering the freedom of expression, P. Mahoney and S. Prebensen writing on the European Court of Human Rights, M. Pellonpää and J.P. Jacqué). However, in general the CSCE system is ignored (except of P. Mahoney and S. Prebensen's work). Thus, the book reflects classical thinking about human rights in Europe, too traditional to be accepted today.

My second observation concerns some articles from the first and the last parts of the book. There, I feel some deficiency of international legal considerations. I think in particular that have not been the very character of the human rights obligations resulting from the Convention (J.A. Carillo Salcedo)³ as well as the question of implementation of international obligations (some elements are contained in articles on subsidiarity and proportionality) not sufficiently explored. The principles of the implementation of international obligations like good faith, effectivity, due diligence and others could help to put in order the European theory of obligations. Especially, the articles dealing with interpretation of the Convention are well elaborated. To the contrary, the problem of responsibility is not. And the opinion of A. Clapham that the international law of responsibility „is not, and should not be, considered appropriate in the context of the European Convention” (p. 170 and footnote 32) appears as an exemplification of this state of facts. I find his point of view not only wrong but also dangerous for international laws, and which leads to fragmentarization of international law and society. There are no special treaties which could escape from international law and especially from the

³ See my article on specific character of State obligations in the field of human rights in this volume.

law of responsibility. Even if, like in the European Communities, they provide self-contained procedures and rules (although it is not quite sure that they do), these procedures and rules have to be consistent with general international law (*vide* GATT, maritime conventions and etc.). One should notice that the practice of European organs is taken into account in the International Law Commission in connection with elaboration of the Draft Convention on the Law of Responsibility.⁴ Thus the international law of responsibility cannot be ignored in relation to the European Convention, though some elements of this responsibility should be understood in a specific way.⁵

Finally, my third observation relates to some particular ideas stated in the book. Judge Macdonald writes for example (maybe correctly) that the institution of margin of appreciation can not be defined in abstract because of its context-dependent nature (p. 85). I agree with prof. Macdonald only partially. The margin of appreciation can preclude the international responsibility of a state. So, it is important for an individual to know at least in general what his chances for success are. The European organs should try to determine general criteria of application of that institution. In my opinion, we can distinguish two kinds of margin: „certain margin of appreciation” where the proper test of lawfulness is necessity (pressing social need) and „wide margin of appreciation” where that test is reasonableness (usefulness).

H. Golsong in turn states in the context of the famous Turkish declaration of 1987 that the European Convention is a classical multilateral treaty, it does not function in the system similar to that of the European Communities, and therefore the analogy between the Art. 25 of the Convention and the Art. 36 of the ICJ Statute can be drawn. The result of this thesis is that a state can accept an optional clause also partially and can go beyond temporal condition (new reservations). He reproaches the European organs with a *détournement de pouvoir*. However, it is really difficult to approve that the difference between the Convention and the Statute of the ICJ is solely technical and procedural. The purpose and object of a treaty cannot be neglected by its interpretation. And it is quite different in both cases. Besides, the deposition of a state declaration can not be perceived as a creation of new obligations. Reservations, according to the Vienna Convention, can be made at a moment of signature or definitive acceptance of a treaty. Thus, H. Golsong's criticism is not justified.

The concept of *Drittwirkung* is discussed by A. Clapham. The author tries to prove that it is actual in the light of the European Convention. He argues that a classical idea of state functions undergoes changes or even disintegration (distinction for public/private functions). It discovers new threats and fields of activity and a state can not be longer neutral vis-a-vis private relations. The author write about ecological liability of a state (for all actions within its jurisdiction) and proposes „but for” test as a kind of filter to establish responsibility. Clapham's theory is to differentiate a state responsibility depending on aims to be protected (dignity of an individual: „the state may have a duty to act where, but for the state's commission, the violation may have been prevented or remedied”; or democracy: „if democracy is thwarted or threatened, the Commission or Court can find that the state has failed in its duty to secure the rights in the Convention”, p. 206).

⁴ Compare i.a. E. W y l e r: „Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite”, 95 RGDIP No. 4 (1991).

⁵ Such an opinion is presented by the human rights doctrine. Compare for instate Th. M e r o n, *Human Rights and Humanitarian Norms as Customary Law* (1989).

I agree with A. Clapham that contemporary world calls for rethinking the human rights protection. Nevertheless, the international law of responsibility teaches us that the state is responsible not only for acts of their agencies or public emanations but also for its own undue diligence (violation of international law by private persons whose activities have not been prevented or remedied). So, the presented idea is not new in international law. In my opinion, the basic problem of the law of state responsibility under the European Convention is to define the causal link. But it is not the question of aims, but rather of causes (theory of necessary/accidental causes). Dignity and democracy may serve both as arguments for human rights and against them (protection of rights of others, public morality or public order etc.). The *Drittwirkung* on the international level does not exist (only the state is responsible) and on the domestic one depends on formal status of the Convention and expresses rule of the national law (namely the constitution), or eventually on the position of national courts (there is no such an international obligation). On the contrary, the state is both the sole subject responsible for violation of national human rights norms (for example, non-respect for father's parental rights causes that he will plaint not against his former wife but against the state) as well as for international ones.

Cezary Mik

A. BLOED, L. LEICHT, M. NOWAK, A. ROSAS
(eds.), *Monitoring Human Rights in Europe. Comparing
International Procedures and Mechanisms*, M. Nijhoff
Publishers 1993, pp. 338.

The presented book is concerned with one aspect of the international (European) human rights law – the procedure. It consists of 12 articles. Authors are members of the Working Group on International Mechanisms created by the International Helsinki Federation for Human Rights.

The scheme of the work is in principle logical. The first five articles refer to general procedural aspects. Thus, V. Dimitrijevic writes on reporting procedures as a form of monitoring human rights obligations. R. Mülleson describes individual complaint procedures. Further, A. Bloed discusses monitoring of the CSCE Human Dimension. M. Panitikäinen and M. Scheinin compare the monitoring mechanisms and the important institutional frameworks existing within the Council of Europe, the CSCE and the European Community. Finally, R. Brett examines the contribution of NGOs to the monitoring and protection of human rights in Europe.

The second group of articles relates to sectoral procedural problems like mechanisms for the prevention of torture (M. Nowak, W. Sutinger), for the monitoring and the protection of minority rights (G. Alfredsson, D. Türk), for the protection of economic and social rights (A. Eide) and for the protection of human rights in armed conflicts (A. Rosas). This part is closed by L. Boisson de Chazournes who writes on the collective responsibility of states to ensure respect for humanitarian principles. The last two articles are of particular character. They are concentrated on Yugoslavia. N. Howen refers to

the idea of the international war crimes tribunal and R. Wieruszewski to different mechanisms applied during the crisis in Yugoslavia.

As I have mentioned above, the structure of the book is clear. However, one may remark that its contents is not completely concordant with its title because many authors write not only about the mechanisms functioning in Europe, but also (especially) on the universal level. This practice enriches the reviewed work, albeit is not a proof of consequence. It lacks an article on the EC procedural mechanisms (despite of its special and in general non-human rights character).

Every article is worth to be noticed. They contain a set of necessary and very actual information and deep analysis. Every article (and the book as a whole) is concluded by very useful and inspirational conclusions and recommendations. I would like to make only modest comments on some of them.

Thus, prof. V. Dimitrijevic rightly observes that in the reporting procedures the problem consists of their co-ordination (states should not be obliged too often to report to different human rights bodies). To the contrary, reports ought to contain a complete information about situation of human rights in a country (it means about its legislation and practice). A public (NGOs namely) should be included into the process of reporting. It could contribute to the efficacy of this procedure. Dimitrijevic accurately thinks that complaint procedures which exist in the framework of the European Convention on Human Rights should be completed by a systematic reporting procedure.

R. Müllerson compares the individual complaint procedures from the Covenant on Civil and Political Rights, the Convention on Elimination of Racial Discrimination, the Convention against Torture and the European Convention. He correctly finds that the European system is not perfect. The States-Parties to the European Convention ought to ratify the Additional Protocol to the Covenant.

The contribution by A. Bloed is very satisfactory. He describes briefly the CSCE nature, the different mechanisms of the Human Dimension and their practice. Bloed concentrates on barriers for effectiveness of the CSCE Human Dimension procedures. He rightly stresses that humanitarian concepts containing in the CSCE instruments are badly defined. The procedures are not co-ordinated (especially different kinds of missions), are too complex and they lack the follow-up mechanisms. A. Bloed correctly observes that within the CSCE the Human Dimension is superseded by security issues. His article, however, could be more transparent if the author would join the description of procedures with their practice.

M. Pentikäinen and M. Scheinin's comparative study concerning the Council of Europe, the CSCE and the EC procedural systems is dominated by a negative thinking. The authors do not find any actual co-operation elements between them. Nevertheless, they postulate strict collaboration based upon exchange of information, minimal coherent interpretation of fundamental rights and joint data bank. I do not share such a pessimistic point of view. Of course, the procedures are different. Nonetheless, it does not mean that there is no co-operation between them. In the field of substantial law, we can observe, that for example, human rights rules adopted in the CSCE and in the jurisprudence of the ECJ are generally modelled on human rights norms and standards set forth in the European Convention, and the jurisprudence of its control organs. The system of the European Convention changes under influence of the EC and the CSCE rules and standards (minority rights, economic prolongements of human rights). One should also perceive the formal and informal influences between all three European institutions (i.a. an agreement between the EC and the Council of Europe of 1987, the

role of the Council of Europe and the EC before and during the CSCE meetings). One can conclude that the European systems are coherent in the substantive plan, linked in the institutional one and co-existing in the procedural field.

The future protection of economic and social rights in Europe is a subject of an article by A. Eide. The author writes on step-by-step recognition of economic and social rights as human rights, analyses rights and duties linked with the rights, describes in general the procedures. He asserts that today we do not face a problem whether the economic and social rights should be protected but how they should be. The situation requires nowadays „protection form of more aggressive and expansive private parties“. At the same time, the state economic and social policies ought to be controlled and NGOs should be joined to the international monitoring procedures as well. New individual complaint procedures should also be accepted.

A. Rosas considers international monitoring mechanisms in situations of armed conflict. He rightly finds that we have to speak about three kinds of armed conflicts; international armed conflicts, non-international armed conflicts and mixed armed conflicts. In the light of law the best protection, albeit non-satisfactory one, is guaranteed for international armed conflicts (the Geneva Conventions and the Additional Protocol I grant it in forms of Protecting Powers, possible activities of International Red Cross, and especially of the International Fact-Finding Commission). These procedures can be in principle extended to mixed conflicts, but not to non-international armed ones. Rosas writes about monitoring by IGOs (the UN, including namely the Security Council, regional organizations and arrangements – like the CSCE, the EC, the Inter-American Human Rights Commission). He shows some fields of possible activities for treaty-based bodies in time of public emergency regimes. The international humanitarian standards are badly respected. Therefore, Rosas presses upon acceptance of standard minimum rules for all armed conflicts, recommends the states to take advantage of fact-finding procedure of the International Commission, and the treaty-based bodies to treat emergency situations more flexibly. Rosas supports the idea of the International Penal Court for former Yugoslavia and finds it a step towards the establishment of a permanent penal court. As for his last remarks I am more pessimistic. Maybe these courts will be established but I do not believe that they will be active indeed.

L. Boisson de Chazournes occupies with the collective responsibility of states to ensure respect for humanitarian principles. She mentions very briefly the ideas expressed by the ICJ in *Barcelona Traction* case. Next, she ascertains the existence of states obligation to ensure respect for international humanitarian law (based on Articles 1 of Geneva Conventions and Article 1 of the First Additional Protocol of 1977). Finally, the authoress presents the implementation of the obligation within the UN Organization. Boisson de Chazournes indicates that Art. 10 – 14 of the UN Charter are not used in a satisfactory. Chapter VII of the UN Charter should be treated as a *ultimum remedium*. She recommends non-selective approach to gross violations of human rights found by the Security Council. She correctly thinks that humanitarian aid should be understood in a broad manner, as a search for peaceful solution of international crisis, that is founded on human rights policy. Her proposals as regards the establishment of the GA Committee which would provide opinions on the validity of the decisions of the Security Council as well as giving advisory opinions on the legitimacy of a decision of this body by ICJ, have less chance of realization in the present state of international society.

The book is very useful and valuable. It reflects a new approach to the human rights law in Europe which requires taking into account not only the European Convention on

Human Rights and, eventually, the European Social Charter, but also the EC and the CSCE systems. The book proves the necessity of change in the sphere of human rights procedural mechanisms. It points out the strong need to co-ordinate different mechanisms (a postulate to establish one universal judicial body responsible for implementation of different human rights instruments is accentuated), to simplify the procedures, to strengthen the international centres of human rights, to create data banks and to make them more accessible for NGOs and the public in general. The book shows that the main borderline in the process of effective implementation of human rights does not run between protection of civil and political rights on the one hand and in time of economic and social rights on the other, but between protection of human rights in time of peace and in time of crisis and armed conflicts where the humanitarian procedures to the large extent fail nowadays. In my opinion, it proves, as R. Wieruszewski rightly says, that „human rights only play a secondary role in the context of international politics” (p. 316).

Cezary Mik

J. ILIOPOULOS-STRANGAS (ed.), *La protection des droits de l'homme dans le cadre européen. L'adhésion des Communautés européennes à la Convention européenne des droits de l'homme*, Nomos Verlag, Baden Baden 1993, pp. 391.

The reviewed book is a result of the international conference on the protection of human rights in Europe in the context of accession of the European Communities (EC) to the European Convention on Human Rights (ECHR) organized in Athens from 11 January to 12 February, 1991. It certainly concerns one of the most important and current problems of the effective protection of human rights in the European countries.

The volume is divided into four parts and contains 15 contributions in two languages (10 in French and 5 in German). A. Manassis's article constitutes the first part. It is devoted to the constitutional protection of human rights in Greece and in other member states of the European Communities. The second part is composed of five contributions concerning the protection of human rights and the ECHR. Thus, a report of Judge Valticos pertains material and procedural aspects of the protection of human rights within the framework of the ECHR. Then, D. Briolas and E. Kroustalakis consider in their articles the status of the ECHR in the Greek legal order (consequently in the light of articles 5, 6, 7, 11, 12 of the Convention and articles 1 and 2 of the First Protocol – the former report; articles 8, 9, 10 of the ECHR – the latter). The contribution of G. Gaja is a more general. It relates to the problem of a situation of the ECHR in the legal systems of the member states of the EC. The last contribution of this part is an article written by Judge Pettiti on the evolution of the jurisprudence of organs of the ECHR.

The next part of the book is concentrated on the protection of human rights in the Community law. It comprises four contributions. K. Kakouris examines the jurisprudence

of the European Court of Justice in the field of human rights. F. Mancini and V. di Bucci try to determine the development of the fundamental rights as a part of Community law. M. Zuleeg's article concerns the attitude of the national judge and doctrine towards the protection of human rights in the Community law and the jurisprudence of the ECJ. The last contribution in this part (by C. Kerameus) explains the position of the Greek legal system towards the protection of human rights within the Community law.

The final part of the volume corresponds with the title of the conference and refers to the relationship between the European Communities and the European Convention on Human Rights. Here, one can find five reports. The opening one is an article by Ch. Rosakis devoted to the jurisprudence of the European Commission of Human Rights in the field of the Community acts. Subsequently, J.P. Jacqu  writes on the accession of the EC to the ECHR from the point of view of the Communities (this is a commentary to the Commission's Communication of November 19th 1990). Then, M. Hilf presents some observations on the catalogue of human rights in the perspective of the European constitution. J. Iliopoulos-Strangas describes the point of view of the member states of the ECM, and P. Leuprecht that of the Council of Europe, concerning the accession of the Communities to the European Convention on Human Rights.

The contributions contained in this book are of a different value. Thus, some texts have an importance for the conference itself because they are introductory and describing in their nature. The others have an informative value. There is also a group of reports which are instructive on a new perception of the human rights protection or on new ideas they bring to the discussion.

One can include the reports by N. Valticos, K. Kakouris, F. Mancini and V. di Bucci, M. Zuleeg and Ch. Rosakis to the first category. There is no need to comment them. The papers by A. Manassis, D. Briolas, E. Kroustalakis, G. Gaja and C. Kerameus belong to the second group. They realize that the ECHR plays more and more important role in domestic legal orders of the member states of the EC (in ten legal systems its norms are directly invocable). Nevertheless, the central place in the protection of human rights is occupied constantly by the constitutions and laws which are concentrated in particular on citizens' rights (but it is doubtful whether these acts protect third generation rights as A. Manassis wants). The ECHR and fundamental rights recognized in the Community law are of secondary value. In the former case the conformity of national laws is assumed by new laws or amendments of laws in force and not through the judicial interpretation of those laws with the help of the international norms of human rights. In the latter case, there is a tendency (like in Greece) to guarantee human rights rather in the framework of domestic legal order than through accepting direct effect of the general principles of law – fundamental rights. One signals lack of information and of access as to the jurisprudence of the organs of the ECHR.

The last group of reports are those by L. Pettiti, J.P. Jacqu , M. Hilf, J. Iliopoulos-Strangas and P. Leuprecht. L. Pettiti presents the evolution of the jurisprudence of the organs of the ECHR. He indicates three stages of development (research, construction and prospects). Judge Pettiti describes fields of activities of the European Commission and the European Court and the problems which they have faced (especially in a time of construction of the system of protection; a need to resolve the interpretative controversies between the notions applied within common law and continental law, e.g. of civil rights and obligations, of reasonable procedure; an attitude towards commercial publicity and press, transboundary television and radio). He indicates also the main pillars – principles of the ECHR: legal security, legal confidence, reasonableness,

efficacy and precedence of effectivity before formalism. Finally, L. Pettiti observes that there are problems which should be decided very soon, like, *inter alia*, minority rights or whether a bad social situation can be perceived as unhuman treatment in the sense of art. 3 of the Convention.

M. Hilf reflects above all upon the functions of the human rights catalogue in the future European constitution. He thinks it could be a base of the European Union. The catalogue could help in the preventive and repressive protection of human rights within the EC. Fundamental rights could be restricted only according to the co-decision procedure (with participation of the European Parliament). They should express the consensus as to the constitutional values and standards, strengthen the competence of protection of human rights and integrate European nations creating the European identity. M. Hilf believes that the EP Declaration of Fundamental Rights and Freedoms of 1989 should have been a good basis for such a catalogue. Nevertheless, this opinion is still a postulate because the Treaty on European Union contains only a narrow group of human rights.

Three last contributions concern strictly the problem of accession of the EC to the ECHR. Thus, J.P. Jacqu   rightly rejects a theory of succession of the member states of the ECs by the Communities in the field of ECHR. Today the European Convention is a source of inspiration of a particular importance is the stage of formulating of the general principles of Community law. The accession could not expand the Community powers and the responsibility of the EC could be borne exclusively in the field of Community law (here, the problems of determining the scope of the Community law appear as a field of possible conflicts).

J. Iliopoulos-Strangas on his part, comparing the legal position of the ECHR in the national orders of the member states, concludes that there are no serious obstacles to access to that Convention. There are only some technical and political difficulties but they can be eliminated. Last but not least, P. Leuprecht represents the point of view of the Council of Europe. He emphasizes that the act of accession should be an additional protocol accepted by all parties of the ECHR. The accession, according to the Communication of the EC Commission, will be effectuated in relation to the Convention and some protocols as well as the arts. 25 and 46. The EC should be able to delegate their representants to the European Commission and the European Court of Human Rights. The Committee of Ministers should be excluded from the process of control of the Community acts but not from the process of supervision on the basis of art. 54 of the ECHR. P. Leuprecht sees some difficulties as to the possibility of introducing complaints by member states against the EC and vice versa and in the sphere of financial contribution of the EC to the budget of the Council of Europe.

Cezary Mik

M. TRAßL, *Die Wiedergutmachung von Menschenrechtsverletzungen im Völkerrecht*, Duncker & Humblot, Berlin 1994, pp. 148.

International responsibility for violations of human rights belongs to extremely acute and not explored areas of international law. Traßl has undertaken the task to examine this problem.

The first part of the study concerns the practice of reparation based upon Article 50 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to the author, this provision concerns exclusively a natural restitution; if it is not possible, a pecuniary reparation should be paid. On the other hand, the European Court is not competent to intervene directly within the municipal law of the state concerned (e.g. to cancel a legal act contrary to the Convention), but it can decide upon pecuniary reparation. This inconsistency has not been remarked by the author. Further Traßl has presented the problem of reparations based on the other international human rights instruments, in particular on the American Convention on Human Rights.

Subsequently the author has passed to different forms of reparations for violations of human rights. He has analysed this problem from the point of view of the practice of the European Commission and the European Court. He concludes that the premises of state responsibility in this field correspond with those required under general international law. However, he remarks also that the responsibility under Articles 50 of the European Convention and 63(1)(2) of the American Convention is conditioned by the existence of a damage. Such a requirement exceeds the conditions of responsibility in general international law.

Then the author has examined different forms of responsibility for infringement of human rights; he has paid special interest to the pecuniary reparation granted by the decisions of the European Court. He has concluded that the trend to grant such a reparation instead of a natural restitution is a characteristic feature of the responsibility in the field of human rights law. The scope of the reparation is – according to the jurisprudence of the European Court – larger than in the case of reparations for other international delicts. It would be interesting to compare these conclusions with the practice of other international human rights agencies.

We agree with the conclusions of the author concerning the active legitimation to claim the responsibility for violations of human rights. It is regrettable, however, that the *erga omnes* effect of violations of customary human rights has not been confirmed by any practical decisions. Some detailed conclusions would require more detailed justification: e.g. it is hard to accept an opinion that a 6-months term of prescription with respect to human rights violations constitutes a customary rule.

In the end Traßl has discussed the local-remedies rule, renunciation of claims by a person concerned and some other practical problems of responsibility for human rights. We would like to stress a complete bibliography concerning the subject of the study.

Władysław Czapliński

J.A. FROWEIN, R. HOFMANN, S. OETER (eds.),
Das Minderheitenrecht europäischer Staaten, Teil 1,
Springer Verlag, Berlin–Heidelberg–New York 1993, pp. 536.

The problem of ethnic, national, religious etc. minorities has become extremely acute during the last years, at least partially because of the events in Central and Eastern Europe, but also in connection with a growing consciousness of groups of population all over the world. Papers published in the present volume have been prepared in the framework of the project realized at the Max-Planck-Institute for Public International Law, Heidelberg, inspired by the recent developments.

The book contains reports concerning the situation of minority groups in Belgium, Germany, Finland, France, Great Britain, Italy, Austria, Poland, Switzerland, Spain, Czechoslovakia, Turkey and Hungary. The reports have been drafted according to similar pattern and present legal regulations concerning a legal status of minorities, a right to use a minority language, an access to culture and education, a participation in the political life and a limitation of a freedom of association.

The authors have elaborated very detailed reports, based upon the legislation of respective states, literature on minorities and information received from the state officials and representatives of the minorities concerned.

This excellent work surprises on certain points. For example, it presents the regulations concerning the use of languages and access to culture in Belgium in such a form that it is difficult to differentiate between a minority legislation and a specific structure of the federal state. The presentation of minority problems in Poland is far from being complete. It seems to be influenced by the perspective of the German minority. In fact, its existence is not disputable because of the changed concept of a minority in Polish law and policy: earlier based on objective criteria, it has turned into subjective criteria (a will of a person concerned decides upon its status). Contrary to the view presented in the report, the existence of the Ukrainian, Belarussian and Lithuanian minorities has never been denied. Finally, the report does not mention an ethnic group, the minority status of which is disputable: the population of Kaszuby region (East Pomerania). The report on Hungary clearly indicates the most important feature of the minority policy of democratic Hungary: it is directed by the idea of reciprocity in external relations and aimed at the creation of the same rights for Hungarian minorities in the neighbouring countries. The same remark is actual with respect to Poland. The report on Czechoslovakia indicates positive developments in the treatment of minorities. It refers mostly to the former federal regulation and then declares that the position of minorities in the Czech Republic remains unchanged after the dissolution of the Federation. The practice is more complicated, e.g. the situation of the Polish minority in Silesia has become more difficult because of the system of financial aid for minorities (a partition of financial means must take into account the needs of a new minority: Slovak).

The minority protection in Austria seems to be model: it is based on the State Treaty (directly applicable) and federal legislation; minority rights are based on a mixed personal/territorial scope of application. The opposite stance is presented by Turkey denying any rights to minorities.

Finally, it is worth to remind an interesting conclusion concerning France. She has consequently rejected the existence of any minorities within its territory. This position has found its expression also in the legal system which ignores the claims presented by

the existing groups. However, certain forms of special regulation in electoral system and financial law have been introduced in Corsica. Any other claims (e.g. by the population of Brittany) has been consequently rejected.

Summing up, we can conclude that the present volume is an important source of information on legal solutions concerning minorities in Europe, but it is not equally authoritative as to the practical implementation of these regulations.

Władysław Czapliński

A. PAULY (ed.), *Les accords de Schengen: Abolition des frontières intérieures ou menace pour les libertés publiques?*, European Institute of Public Administration, Maastricht 1993, pp. 269.

The conclusion of the agreements of Schengen of 1985 and 1990, and of the agreement of Dublin of 1990, has raised numerous controversies. Proponents of these agreements have treated them as an important element in the construction of common European legal order in the field of the movement of persons, while their opponents maintain that they constitute an important danger for human rights within the European Union. Different problems of the agreements of Schengen and of the system of their implementation have been presented at a colloque held in Luxembourg in June 1992.

Papers presented during the colloque concern judicial and police cooperation, information system and protection of refugees within the territory of the parties to the Schengen agreements. As to the police cooperation (paper by A.M. Delvaux), it has been underlined that the regulation creates condition for much more effective struggle against certain types of crimes (drugs trafficking, arms trade etc.). The most important conclusion by Ch. Elson (presenting the administrative structure of the Schengen system) is that the entry into force depends upon the fulfilment of certain premises by all states and the difficulties they should meet are of a various character. According to P. Billaud, the system of data protection has just been ameliorated according to the proposals made by the European Commission (its introduction has forced several states to pass an internal legislation in this field). It still contains important gaps and it does not protect rights of persons directly concerned. Up to now, the system has not been introduced because of technical reasons, and the implementation of the agreements is not possible. An interesting opinion has been presented by G. Polimeni. He has stated that the Schengen system has not introduced any new elements in the field of judicial cooperation.

Several papers (J. Charpentier, G. Ress, L. Drüke and D. O'Keefe) concern the immigration and asylum policy. Even a very general analysis of these presentations shows the most important controversy connected with the Schengen regulation: though formally it does not constitute part of Community law, in fact it has created a general framework binding upon the EC. This regulation is combined with the agreement of Dublin and tends to eliminate the abuse of a right of asylum. The authors have not taken into account critical opinions expressed by different circles with respect to rights of refugees; all of them present official optimism as to the functioning of the system. In an outsider's

view these agreements can constitute a serious obstacle for deepening of contacts between the European Union and the signatories of the Europe Agreements.

Wladyslaw Czapliński

K. HAILBRONNER, *Die Rechtsstellung der De facto-Flüchtlinge in den EG-Staaten*, Nomos Verlagsgesellschaft, Baden Baden 1993, pp. 162.

The author, one of the leading experts in the field of refugee law, presents an interesting comparative analysis concerning the status of de-facto-refugees in the Community Member states, followed by some comments concerning possibilities and perspectives of harmonization of refugee regulations within the EC. He starts with the analysis of the notion of a de-facto-refugee, which occurs to be disputable (it has been introduced by the Council of Europe and in the practice of the UNHCR, but it has not been generally accepted). Even, if all states of the European Union accept the de-facto-refugees, their positions vary and it is even difficult to establish common criteria under existing regulations. The scope of regulation proposed by Hailbronner includes a common visa and asylum policy, harmonization of substantive norms concerning the status of de-facto-refugees, an introduction of special proceeding concerning this category of refugees and an obligation of states to deport persons not granted with a right of residence.

Views expressed by Hailbronner correspond with a general trend of a highly political discussion on the refugee problem in Western Europe; the discussion has been followed by legal measures on municipal (new asylum legislation in the FRG, France etc.) and international plan (the agreements of Schengen and Dublin). Hailbronner recognizes very well existing difficulties in the treatment of refugees, in particular different forms of an abuse of asylum by aliens, but also inconsistency in the state policy towards asylum seekers (many of them have been denied the right of asylum but their presence has been tolerated).

It is important to indicate that the roots of the present situation can be found in the refugee policy of the Western states in the 70-s. Economic refugees from Eastern Europe have usually been granted with the political asylum. This pattern has been followed by enormous number of Third World asylum seekers. In effect, it is difficult to draw distinction between political and economic refugees now, what makes an effective help to persons really needing such a help impossible. The policy described above have had also important consequences for the attitude of Western societies and public opinion towards the refugee problem. The more restrictive policy towards refugees seems to be the only possible solution, but the de-facto-refugees will be its first victims.

Wladyslaw Czapliński

M. MENKE, *Bedingungen einer Asylgesetzgebung der Europäischen Gemeinschaft*, Nomos Verlagsgesellschaft, Baden Baden 1993, pp. 242.

The abolition of internal frontiers within the Common Market and the conclusion of the agreements of Schengen and Dublin resulting from it gave rise to intensive discussions concerning a refugee and asylum policy of the European Community. The parties to these agreements have emphasized that although the agreements themselves do not form a part of the Community law, they trace a way for a future Community legislation in the field of immigration. It is unclear whether the Community has been competent to legislate before the entry into force of the Treaty of Maastricht; Menke tries to justify this competence.

He has indicated three possible bases of the Community legislation: Articles 48 – 66, 100 and 235 of the Treaty of Rome. After having analysed the Treaty and Community legislation, Menke emphasizes that the provisions of Articles 48 ff. do not deal with the abolition of control on the internal borders (in fact, they deal more with the creation of conditions for an economic activity of individuals). Also Article 100 cannot constitute a basis for the Community competence, as its scope is limited to actions directly connected with the creation of the Common Market (in our opinion, such an interpretation should be excluded because the Declaration on Articles 13 – 19 annexed to the Single European Act has expressly reserved immigration for the exclusive competence of the member states; even if Menke indicates a certain possible interpretation of this Declaration in favour of the Community's competence, he is not convincing as the letter of this Declaration is clear and unequivocal). Article 235 is therefore the only possible justification. However, it seems that it might be difficult to draw a clear distinction between Articles 100 and 235 from the point of view of immigration policy.

The author has considered also substantive aspects of possible Community legislation in the field of asylum law. He is a proponent of instruments containing conflict rules with respect to a competence of states to deal with asylum requests. In our opinion, there is no need for Community legislation, as this task can be fulfilled by the Schengen and Dublin agreements. Menke proposes finally general framework for the Community legislation: it should be restricted by international human rights law, non-refoulement rule and by protection of de-facto-refugees. Let us remind that according to numerous opinions the agreements concerned violate human rights and are contrary to the 1951 Geneva Convention on Refugees, that the bar to enter a state territory is very close to refoulement and that the de-facto refugees in practice cannot count upon an effective help because of the same reason.

The competence of the Union in the field of aliens and immigration law and policy cannot be questioned after the entry of the Treaty of Maastricht into force (even, if Article K.1 – 9 speaks of cooperation between the Member states and not of a legislation). Up to now, no legal acts in this field have been passed, and the agreements of Schengen have not been implemented yet because of technical problems connected with the information system. However, it seems clear that the Union policy towards aliens, refugees and asylum seekers will be restrictive. This policy is generally accepted in Western Europe, and Central East European states wanting to join the Union will be forced to follow this policy in the future. Legislative bodies, in particular of Poland, Hungary, Czech Republic and Slovakia, should take this imperative into account.

Władysław Czapliński

S. RICHTER, *Die Assoziierung osteuropäischer Staaten durch die Europäischen Gemeinschaften*, Springer Verlag, Berlin–Heidelberg–New York 1993, pp. 285.

If one takes into account a number and scope of publications devoted to the association of Central and Eastern European states with the European Communities, one must conclude that it has been of much greater importance for these states than for the Communities. Publications dealing with this problem are surprisingly rare in the Western legal writing. Because of that one must greet with great interest the first monograph on the association agreements with the Visegrad Group states: Poland, Hungary and Czechoslovakia. Contrary to studies published e.g. in Poland, S. Richter has not analysed the consequences of the association for the Central European states, but has concentrated upon the foundations for these association agreements in the EC law and in the GATT.

The author has started with the discussion of the impact of the association agreements upon the earlier treaties concluded either by the Communities or by the member states with the three associated parties. He has concluded that the association agreements have replaced earlier trade agreements. On the other hand, the Community is not bound by the trade agreements concluded by its member states (what – in fact – is clear from the Community perspective and does not require a detailed examination). Further analysis concerns the right of the Communities to conclude international agreements including, in particular, association agreements. This brilliant reasoning proves an eloquence of the author, but is not necessary from the point of view of the construction of the book.

Richter has indicated that the concept of the mixed agreements allows the Community to enlarge the scope of association. However, this scope is not as wide as in the case of the accession treaties, what is clearly connected with the fact that the association does not amount to the accession. He has referred in this context to a notion of a *gradual integration (abgestufte Integration)*; however, it is regrettable that he has not discussed it in a detailed way (the proposals of the gradual integration are more and more often presented with respect to the future integration of the Visegrad states into the EC). Richter states that there is no category of the *association aimed at the accession* – such a statement is questionable, as the Court of Justice has clearly emphasized that certain association treaties should lead and prepare conditions for the future membership. Finally, the author has indicated an element of the association agreements which is often neglected in the discussions, and which is revolutionary from the perspective of the associated Central–East European states: the transfer of legislation powers to the association organs and the character of their acts. Richter concludes that such a transfer cannot be treated as a transfer of sovereign powers. We are of a contrary view. Legislative power belongs to the most important elements of sovereignty, and the scope of the association agreements excludes numerous important areas from the competence of the authorities of respective states. If one recognizes direct applicability and direct effect of acts of the association organs within the municipal legal system of the associated state, one must recognize that a part of sovereign powers has been transferred to the external body. This problem, as well as the position of the association organs and their acts within the Community legal order requires also more detailed examination. The part of the study concerning the competence of these organs is the most interesting.

The final part of the book concerns the relationship between the association and the GATT.

The research on the Community law in Poland is still underdeveloped. The book by S. Richter should constitute an important and recommended reading, as it indicates possible directions of increased research for Polish lawyers and law students.

Władysław Czapliński

K.E. SCHENK, H.J. SEELER (eds.), *Ost-Europa auf dem Weg in die EG*, Nomos Verlagsgesellschaft, Baden-Baden 1993, pp. 144.

The volume contains a collection of papers presented during a colloquium organized in 1991 by the Europa-Kolleg Hamburg. The conference with a participation of economists, lawyers and politicians from both parts of Europe has aimed to elaborate a clear perspective of future mutual relations between the Twelve and the states of Central and Eastern Europe.

Dr. H.J. Seeler, the president of the Europa-Kolleg, has presented general problems connected with the integration of the states of Central and Eastern Europe. In his opinion, the relationship between a deepening and a largening of the Communities belongs to the most crucial questions in this field. The solution should be found in a specific legal nature of the European Communities, consisting in the transfer of a part of sovereign rights by the states to the Communities. One must agree with the author who states that in fact there is no alternative between the deepening and the largening, as the deepening is a premise of the largening.

The book contains five chapters; the first and longest is entitled *EG-Osteuropa: Beziehungen in der Transformation*. The history of these relations has been written by B. Schloh, legal adviser to the Council of the European Communities. The paper is extremely imaginative and unswervingly logical. In the end it presents the premises of the membership: formal (based upon Article 237 of the Treaty on the European Community and Article 0 of the Treaty on the European Union) and substantive (not mentioned in the treaties). The paper by Schloh is the only one containing references. The other authors neither indicate any publications nor even refer to sources of quotations! It is an important and inexcusable shortcoming.

Two following articles have been devoted to the perspectives of membership of two states. Dr. V. Barta (Prague) has presented different aspects of economic reforms in Czechoslovakia and concluded by presenting a short analysis of current economic relations between Czechoslovakia and the Communities. The paper by P. Balazs (Budapest) contains less statistical data and more interesting theses. The author has emphasized that association agreements cannot constitute a basis of claims on future adhesion and consequently he indicates three possible developments: 1) association lasting till 2000 or even longer; 2) peripherisation understood as leaving Hungary out of the Communities; 3) integration of Hungary, based upon real cooperation and partnership.

Second part of the book is devoted exclusively to Poland. The first paper (by R. Jacyno, Warsaw) has discussed a program of economic stabilization and a construction of a free market economy. It handles particular problems connected with the Polish economic reforms, like struggle against inflation, elimination of price control, deregulation of foreign trade, privatisation of state property, tax system, new regulations concerning foreign investments, relations with foreign financial circles. A. Polkowski (Hamburg) has concentrated his study on the question of an influence of privatisation upon the competition. A short history of Polish privatisation and a presentation of different concepts and methods cannot oppress even an unprepared reader. The author emphasizes that the Plan of Balcerowicz has been an experiment, as there has not been any passage from a socialist planned economy to a market economy in the history. The British *Iron Lady* privatized 2000 enterprises in the 1980s, while Poland is confronted with ca. 8000 firms to be privatized. Another interesting analysis concerns conditions of foreign investments in Poland.

The third part of the book is a little incoherent and contains two studies. Prof. H.J. Krupp (Hamburg) has discussed external economic and currency relations of the Central and East European states, and Prof. O. Kovacs (Belgrade) has presented an optimistic view of new conditions of relations between Yugoslavia and the European Communities. Unfortunately, it seems difficult to speak of a convertibility of Dinar when it is impossible to assure a mutual convertibility of post-Yugoslav currencies. The reasoning of Krupp is more realistic. He is a proponent of a strengthening of economic ties between Poland, Czechoslovakia and Hungary, as an element of their approachment to the Communities. According to the author, it would be useful to create an East European monetary union, similar to the Western European union of the 1950-s. He argues that such a union would be advantageous also for the Western states. However, he has forgotten of critical attitudes of the states directly concerned, influenced by a negative experience in the framework of the COMECON.

The following part of the volume is also incoherent. It is entitled *EG-Osteuropa: Institutionelle Fragen und Technologie-transfery*. A study by Ch. Randzio-Plath (MEP) is devoted to a new quality of relations between the Communities and Visegrad Group and it could be placed in the first part of the book. Its most interesting part concerns the institutionalisation of cooperation after the entry into force of the association agreements, the economic complications resulting from the association and, in particular, the problem of the so-called sensitive products. It remains unclear why K.E. Schenk has presented in his study concerning a transfer of technology three Community programs (Eureka, Esprit, Race), as the Central East European states do not participate in these programs? As to the PHARE program, it would be useful to present some data on the degree of its utilization. Concrete enterprises are much more important for the economic life than mere offers. It is generally known that not only the participating states are responsible for the low degree of utilization of the program.

The reviewed volume is one of the first steps towards a complete study of the signalized problems. Notwithstanding certain terminological inconsistencies (the authors define the states of the Visegrad Group as *East European states* or *the states of Central and Eastern Europe*, or even as poetic but unclear *the states of the New East*; except B. Shloh, they use the notion *European Community* with respect to all the three Communities), we can recommend this book as an introduction to more increased research.

Andrzej Graś

The Legal, Economic and Administrative Adaptations of Central European Countries to the European Community, Nomos Verlagsgesellschaft, Baden-Baden 1993.

The ESCA study group, which gathers outstanding representatives of the East-Central European countries and European Union countries, has compiled a report concerning the transformation process in Poland, Czechoslovakia and Hungary, titled „The Legal, Economic and Administrative Adaptations of Central European Countries to the European Community”.

The report consists of two parts. The first part concerns the economic transformation and adaptation of the East-Central European countries' economic systems to the free market economy of the European Community, transformation of administration and the position of public enterprises. The second part of the report includes the analysis of the principles of the free market economy (four freedoms, competition rules etc.), the analysis of the transformation from a *command* economy into a free market economy in Poland, Czechoslovakia and Hungary, the evaluation of possibilities of implementing free market mechanisms and principles of cooperation between the EC countries and the Central European countries. The aim of the analysis of transformation processes is to evaluate the extent of changes and reforms in the three East-Central European countries. The statement, that even though the extent and pace of the reforms show diversity, the common factors which characterise the transformations may be the proper starting point for analysis.

The rejection of the old system in these countries is the dominating feature of the reforms. Unfortunately the reforms are not preceded by necessary analysis of the countries needs in reforming administration. The authors emphasise the political and economical context which determines the pace and scope of reforms. They stress the stabilizing function of the new constitutional solutions in reforming the administration. The still insufficient progress in this respect indicates a great need for discussion on the form of the new constitution. The reform of the state includes the restoration of power for the local governments, this process is still far from being completed. Another element which indicates the transformations in the state institutions is the control over public administration, which has been implemented in Poland in the most advanced form. The authors examine also the limitations of the transformations. The report includes a formal and legal analysis of the adaptation transformations in East-Central European countries since 1989 and earlier, without the insight on how the system works in practice. They also emphasise the progress in the three countries in the political and legal spheres by implementing rules of law, observing human rights and the development of democratic structures. This stabilizes the economic reforms. The reports include a comprehensive evaluation of the transformations adapting the new economic system to the system of the European Community. The evaluation covers the transformations of the private sector, position of public enterprises, state subsidies and the range of cooperation with the European Community.

The authors emphasise that the transformation and especially the privatisation processes are impeded by the lack of private capital. Without foreign investments a quick completion of the process cannot be expected. Nevertheless, no significant barriers for foreign investors who wish to enter the East-Central European markets have been found (vide – the conference organised with the EC Commission, on

environmental protection in 1992 where it has been indicated that lack of stable legislation and especially lack of regulations determining the responsibility for pollution in the past, may be such a barrier). The general conclusion of the report indicates that there are possibilities to increase the pace of the transformations and adapting the legal systems by implementing the European Agreements in East-Central European countries. The analysis of the market economy in the European Community (presently the European Union) shows the distance between the East-Central European Union Member States.

Maresceau wrote that reforms have brought Poland, Hungary and Czechoslovakia closer together in terms of politics, that is in implementing democratic structures.

Nevertheless the progress is insufficient in many spheres (protection of consumer rights, industrial policies, environmental protection). The provisions of the Europe Agreements may be treated as an instrument which puts more pressure in the sphere of adapting legislation and economy of the East-Central European countries to the expectations of the European Union. This is a transition stage before becoming full members of the Union, which requires appropriate preparations from the applicant states as well as from the members of the European Union.

Hanna Machińska

L. KRÄMER, *Focus on European Environmental Law*, Sweet & Maxwell, London 1992, pp. XII + 321.

The author, as the Head of Legal Matters and Application of Community Law in the European (Commission the Directorate of Community Law in Environmental Matters) is very well located to know the mechanics of Community legislation treated in the book under review.

Publication in one book of the author's various articles, conference papers and other contributions of 1987 – 1991 written originally in three West European languages is at present much welcome, since it makes the access to all previously dispersed works, easy and I am sure, it will be greatly appreciated by all interested lawyers and especially by those of East and Central European countries (already associated or considering a possible association) with the European Union.

Unlike the previous book,⁶ where the author deals mainly with one subject matter, i.e. EEC Treaty and environmental protection (connected with the amendments in the *Single European Act* of 1987 the *environmental* protection), this one deals with a variety of topics. They are ably arranged in a certain logical total. All of them are comprehensively updated and include the development in the EC until 1992. Practically all the most important questions are treated in the 14 chapters of the book.

Thus, through the *Focus* the reader can see the birth and development of the EC's environmental policy and law, and namely: the right to a clean environment and Community Law; Community environmental policy; the *Single European Act* and environmental protection; the Community, the environment and regional policy; par-

⁶ L. Krämer: *EEC Treaty and Environmental Protection*, 1990, pp. 116.

ticipation of environmental organisations in the activities of the Community; elaboration of Community environmental legislation; effect of Community environmental directives on the Member states; Community environmental law and unilateral action by member states; monitoring and enforcement of Community environmental legislation; the individual's right of complaint on environmental matters in Community law; the „polluter pays” principle in Community law (the interpretation of Article 130r of the EEC Treaty); compensation for disaster damage and Community law; the open society, its lawyer and its environment; and the directive 90/313 on the freedom of access to information on the environment: origins and prospects for implementation. The book is supplied with a very well done subject index.

Since it is not possible in this short summary to discuss even the most interesting questions, let me express but a few impressions. The reader will certainly gain a lot of the author's ability to present complicated problems in a very concise and clear juridical language. Secondly, one would suspect that the author being an official of the European Commission would be somehow biased and reluctant to criticism concerning the Community policy and legal solutions in environmental matters. Nothing like that has occurred. On the contrary, almost every chapter of the book contains evaluation of the Community environmental policy and law and their deficiencies and shortcomings (see: for instance pp. 25, 227 – 228 and in particular pp. 57 – 61).

The book under review is a good academic guide to legal and policy problems of the environmental protection in the European Union.

Kazimierz Równy

P.-CH. MÜLLER-GRAFF (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, Schriftenreihe des Arbeitskreises Europäische Integration e.V., vol. 33, Nomos Verlagsgesellschaft, Baden Baden 1993, pp. 501.

The book contains texts of papers held on symposium „Common private law in European Community”, organized by the Trier University from 2 to 4 April 1993. In the 13 papers and 4 studies enclosed after the end of the symposium, the authors of which are eminent representatives of law theory and practice, have discussed a complex of questions of „European” private law. These questions refer to private law set up by the organs of the European Community (Community private law) as well as to fundamental similarities between the systems of private law in the member states of the Community, and between these systems and the Community private law.

The papers are divided into 4 thematic groups: 1) historical and domestic bases of common elements in legal systems of the European Community states, 2) basic questions of the Community private law, 3) evolutionary tendencies and main problems in separate sections of the Community private law, 4) drafts in the field of legal policy.

In the first group there are papers indicating that the making of the Community private law is facilitated by existing similarities of the legal systems and of the legal thinking in states of the European Community: R. Zimmermann (Historical connections

between civil law and common law) – despite of the simply but wide-pread opinion on isolation of the English law development, the medieval England stayed in permanent contact with basic streams of the continental *ius commune*; R. Schulze (All-European private law and history of law) – contribution of historical analysis to the making of the Community private law lies in proving of historical similarities in development of law in Europe (awareness of these similarities should make easy the shaping of law in the scale of all Europe, e.g. through elaborating of all-European rules of the obligations law and of the property law); H. Kötz (Comparative law and all-European private law) – comparative law can contribute to development of the Community private law through laying down of the peculiarity of domestic legal systems and of similarities and differences occurring between these systems; G.H. Samuel, J.G.J. Rinkes (The English law of obligations) – an attempt to construct a system of notions and rules common for English law of contract, tort and restitution and for law of obligations of continental Europe comes on obstacles hardly to surmount.

The second group of the papers refers to basic and cross section issues of development of the common private law in the European Community, especially in the shape of Community private law: H.C. Taschner (Development of private law in the European Community – legal bases, aims, law divisions, procedure), R. Hayder (Unification of private law in the European Community – commentary to the paper by H.C. Taschner) – development of the Community private law makes a reflection of stage of market integration of the Community members – relative rash is developing in the frame of the Communities e.g. of law of obligations, labour law, law of enterprises (especially company law), law of protection of industrial property, copyright, international private law, jurisdiction and enforcement of judgements, whereas there are developing slower – law of property and law of combating unfair competition – certain legislative competencies of the European Community on the field of private law are very doubtful; J.A. Usher (Community law and private law – A view from the United Kingdom) – observing of the Community law in the United Kingdom is made difficult especially by necessity of the translation of these law regulations, which are conceptually strange for the English law, and the way of legal thinking, into the system of English legal notions and institutions.

The papers composing the third group contain discussion of actual state, lines and problems of development of separate Community private law branches, and also of influence of this law on domestic law: Ch. Joerges, G. Brüggemeier (Europeisation of law of contractual and extracontractual obligations); P. Hommelhoff (Outlines of the Community law enterprises); R. Birk (Elements of the Community law of labour relations); H. Ullrich (Outline of the Community competition law and intellectual property protection law); K.F. Kreuzer (Europeisation of the international private law); W. Habesied (Europeisation of the civil procedure law).

The fourth group combines the papers which refer to the projects and perspectives of the unified private law of the European Community: O. Lando (Rules of the European contract law) showed work results of the Commission of European Contract Law directed by him, and W. Tilmann (Codification of private law for European Community?) referring to the resolution of 26 May 1989 adopted by the European Parliament on undertaking necessary preparations to elaborate a uniform „European“ code of private law, sketched an outline of content of future private law of the European Community.

It is derived from the papers that premises, present state and perspectives of development of the Community private law were shown in the book from different points

of views: historical, comparative, Community law, substantive private law, law of civil procedure and policy of law. In the frame of private law, problems from the sphere of the law of contractual and extracontractual obligations, law of companies and other enterprises, law of competition, cartel law, intellectual property law, labour law, civil procedure law and bankruptcy law were touched. Therefore, the discussed book makes a compendium of knowledge on European Union private law worthy of recommendation.

However, it is hardly not to notice that the texts which the book includes are examples of manipulation relatively common in the Western Europe with the qualification „European“, which is used in these texts often with reference only to the part of Europe. The authors of the most papers seem to forget that Central and Eastern Europe belong also to the European continent, with all consequences of this fact.

Jerzy Poczobut

M. GRUSON, S. HUTTER, *Acquisition of Shares in a Foreign Country. Substantive Law and Legal Opinions*, Graham and Trotman, London 1993, pp. 502.

The book is composed of the Report of the Subcommittee on Legal Opinions of the Committee on Banking Law of the Section on Business Law of the International Bar Association and the Committee on Business Organisational Bar Association.

The authors of this book are the well-known experts in the field of international business law. This book contains a register and also survey of basic legal institutions regulating by the principles and methods of shares (or stocks) acquisition in the companies acting in the particular country.

The authors have chosen the countries of which systems of law are typical, and describe similarities of basic legal regulations to the Latin American countries or Asian countries.

The book contains rich substance of information and legal opinions about principles and methods of the shares acquisition and also the terms of managing the companies. The authors describe and make comments on:

1) principles which authorize the issuance and bear the shares in the original issuance, and in the case of capital increase,

2) principles of shares transfers with consideration of the differences according to several kinds of the shares, and also the principles of assessment of the endorsable and nonendorsable shares and taxes connected with transfers,

3) principles of adverse claims made by both parties of the contract, including describing warranties and restrictions on transfer, encumbrances and bona fide purchases regulations,

4) principles and procedures with lost or stolen shares, especially voidability of shares,

5) principles on which government and third party can approve transfer of shares acquisition.

The reviewed book includes the rich supply of information and legal opinions according to these legal institutions valid in 27 countries, for example 17 countries from Western and Central Europe (Czech Republic) and Australia, North and South America, Republic of South Africa, Mexico, Hong Kong and Japan.

The study explains in a simple way how to conclude transfers of shares acquisition also in the connection with the loan transaction.

This report fully meets the requirements made by the authors to:

1) give the basis to improve communications between the lawyer requesting the opinion and the lawyer giving the opinion,

2) give good position to analyze the opinions rendered in connection with the some transaction.

It is probably the first issue which makes so good opportunities for legal comparative analyses and constitutes a source of the knowledge to Polish lawyers to prepare the transactions of share acquisition with participation of Polish companies or persons.

Krzysztof Tor

***Problemy Prawne Handlu Zagranicznego*, vol. XVII,
Katowice 1993.**

„Problemy Prawne Handlu Zagranicznego” (Legal Problems of Foreign Trade – Polish abbr. PPHZ) has been published by Silesian University in Katowice 1977. Scientific editor-in-chief and president of the Program Board of this legal periodical. Prof. M. Pazdan is the scientific editor-in-chief, and eminent Polish and foreign experts collaborate (with PPHZ) in theory and practice of legal problems of international trade.

The contents of PPHZ vol. XVII has been divided in the following sections: a) studies and articles, b) materials, c) reviews and discussions, d) selected Polish publications in the field of legal problems of foreign trade.

The range of issues presented in the articles is very wide. To the fore comes a group of articles referred to various aspects of the European Union law. B. Fuchs writes on franchise contracts in the light of the European Union cartel law, B. Lamastre and F. Auque-Warembourg (France) discuss the adjustment of French law to the EEC directive on commercial agency, F. Madl (Hungary) shows in a systematic way the development of Hungarian law against a background of law evolution on the world scale, with special reference to european law.

Articles concerning broadly understood private international law are arranged in the second thematic group. L. Burian (Hungary) presents the regulation of torts in Hungarian private international law against historical background, M. Minas reports on the new tendency in the qualification of limitation in the Anglo-American law, M. Pazdan discusses the Basel Resolution of 1991 on the autonomy of will in the sphere of contracts concluded in international circulation of goods.

The above mentioned problems are completed by articles by F.-K. Beier, Germany (An outline of German patent law, law of applied and ornamental patterns) and by W. Popiolek (The Polish act of companies with foreign participation).

We emphasize the high level of translation of articles written originally in foreign languages. Each article is followed by a short summary in French and German. Publishing of English summaries would be also advisable.

In the section containing materials two translations by K. Terlecka have been inserted: the French act no. 91 – 503 on the relations between commercial agents and their orderers of 25th June 1991, and the Resolution of the Institute of International Law (65th meeting in Basel 1991): autonomy of will of the parties in international contracts signed between private persons.

Reviews and discussions contain basic information on accurately choosen monographies and collections of laws, among which are: J. Ghestin, B. Desche, *Traite des contrats. La vente*, Paris 1990; F. Wooldrigde, *Company law in the United Kingdom and the European Community: its harmonisation and unification*, London 1991; *Polskie ustawy. Zbiór przepisów prawa prywatnego, gospodarczego, karnego i sądowego* (Polish laws. Collection of provisions of private law, public economic activities law, penal law and judiciary law), ed. Z. Radwański, S. Lautsch-Bendkowski, Warszawa 1993; *Yearbook of Commercial Arbitration*, gen. ed. A.J. v. den Berg, Deventer 1986 – vol. XI, 1987 – vol. XII, 1988 – vol. XIII, 1989 – vol. XIV, 1990 – vol. XV.

The last section of PPHZ vol. XVII contains selected Polish publications in the field of legal problems of foreign trade for 1991 and 1992 prepared by I. Terlecka. Despite a limited scope this review is very helpful for scholars and practitioners, especially nowadays, when relatively few new legal books and periodicals appear on Polish publishing market.

One may wish that such an interesting and representing high substantive level legal periodical is published more frequently than once a year.

Jerzy Poczobut

HUNGDAH CHIU (ed.), *Chinese Yearbook of International Law and Affairs*, Vol. 11 (1991 – 1992), Published by the Chinese Society of International Law – Chinese (Taiwan) Branch of the International Law Association 1993, pp. II + 678.

Cumulative Index to the Chinese Yearbook of International Law and Affairs (Volumes 1 – 10, ed. by Su Yun Chang with the Assistance of Chun I Chen, published by Chinese Society ... [as above], 1993, pp. IV+253.

With these volumes the *Chinese Yearbook* has entered its second decade of presence at the international scene. Most of the *Articles Section* of the vol. II consists of papers presented at the Symposium (Dec. 7 – 10, 1992) sponsored jointly by the Chinese Society of International Law, the Red Cross Society of China, and the Chinese Association for Human Rights. They cover the following questions: the development and implementation of international humanitarian law (S. Kuan-tsy Yu), the international laws of war and China (Kuen–chen Fu), comprehensive plan of action for Indochinese

refugees – a NGO approach (J. Stuyt SJ) and the protection of human rights in the Council of Europe (J. Makarczyk).

In addition to the above questions one can find in this section two articles on the Law of the Sea. The first one deals with the „United states Ocean Policy: High Seas Driftnet Fisheries in the North Pacific Ocean” (Yann-Hunei Song) and the second with „Issues on the South China Sea: a Case Study” (P. Kien-hong Yu).

The second standing section of the Yearbook entitled „Recent Developments” embraces articles and materials on: „The Republic of China’s Fair Trade Law: A Brief Review of the Earliest Cases” (N.L. Meyers), „Selected Foreign Cases concerning Taiwan/the Republic of China” (Hungdah Chiu – editor in chief of the *Chinese Yearbook* ... since its beginning under this present name); the list of countries or territories subject to reciprocal tariff rate (Most Favored-Nation’s Rate, approved by the 2329th Meeting of the Executive Yuan Council on April 29, 1993) and the Request by the Seven Central American Countries to Include the Republic of China U.N. Membership Issue in the Agenda of the Forty-Eight Session of the U.N. General Assembly. The third section deals with the „Contemporary Practice and Judicial Decisions of the Republic of China Relating to International Law, 1991 – 1992” (pp. 266 – 349).

The mentioned three sections are followed by the Book Reviews (on Intl’ Affairs) and Book Summaries (Intl’ Law and Affairs). The other materials embrace: the list and Texts of Bilateral Treaties/Agreements and Official, Semi-Official or Unofficial Agreements Concluded by the Republic of China with Other Countries in 1991 (most of them with the far Eastern and South American states – interesting to note that some 7 of 39 agreements were concluded with Russia and one even with Buryatian Republic of Russian Federation); the list and text of Agreements Concluded between American Institute in Taiwan (AIT) and the Coordination Council for North American Affairs (CCNAA) in 1992; Republic of China’s Diplomatic/Consular Missions Abroad (and vice-versa).

At the end the *Yearbook* includes Bibliography on Selected Books and Articles Published in the Republic of China relating to International Law and Affairs (1991 – 1992), and indexes.

Simultaneously with vol. II of the Yearbook an Index with corrigenda to all previous volumes is published. This assiduous work has been done by Su Yun Chang with the assistance of Chun-I Chen.

It is nice to have these items in the Institute of Law Studies of the Polish Academy of Sciences Library. Together with the previous ones they contribute to better understanding of the Republic of China’s position in the international field.

Kazimierz Równy

R. HARNDT, *Völkerrechtliche Haftung für die schädlichen Folgen nicht verbotenen Verhaltens. Schadensprävention und Wiedergutmachung*, Duncker & Humblot, Berlin 1993, pp. 924.

An extremely thick volume (presented also as a Ph.D. dissertation) concerns a field of international law of great actuality and importance, but also of much doubt and uncertainty. In a contemporary international practice this form of responsibility (or – precisely speaking – of liability) is strictly connected with environmental damages.

Harndt starts with activities of the ILC in this field; his evaluation is extremely critical and fully justified. Notwithstanding long disputes and efforts the topic is far from being closed. An evaluation of the practice (*Icelandic Fisheries*, *Trail Smelter* and *Lac Lanoux* cases) is unequivocal. The author emphasizes that although the problem of liability has been reflected in Draft Article 35 on state responsibility, it has never been rightly commented. We agree with him that under these circumstances it is really difficult to find out whether there are any customary rules governing this branch of international law.

Harndt continues with an examination of legal regulations concerning a liability for acts not forbidden by law, adopted in different domestic legal systems. We are not fully convinced whether such an approach is correct: one should start rather with international practice. The method of Harndt would be useful to ascertain general principles of international law in the meaning of Article 38 of the ICJ Statute, but it is less convenient with respect to customary rules. The analysis of German, French, socialist and common law systems leads to a conclusion that it is hard to find a common denominator as to grounds, scope and forms of liability. Surprisingly, both drafts prepared by the ILC have followed certain models of liability adopted by particular legal orders. The author criticizes this solution.

This analysis is followed by the examination of different multi- and bilateral international agreements concerning liability for environmental damages and similar issues (like space activity). The author rightly states that these patterns cannot serve as a general model for state liability in international law. In our opinion, international agreements *per se* cannot constitute a sufficient basis for the creation of customary rules if they are not followed by other forms of practice. Such practice is rare, in particular diplomatic documents are often unpublished. It is therefore difficult to accept a general conclusion by Harndt: a principle *dulde et liquidere* (known in German law as *Aufopferungsprinzip*) is accepted in several international agreements, but it is not universally accepted under customary international law. Harndt is aware of this difficulty, as he indicates different problems connected with international liability: in particular, problems of active and passive legitimation to claim damages. Finally, he tries to point out possible further basis of liability (like liability for hazardous activities, strict liability etc., which are typical for domestic private law).

In the end, we would like to emphasize enormous efforts of the author to complete full bibliography of the topic.

Władysław Czapliński

B I B L I O G R A P H Y

Polish Bibliography of International Law

Public International Law

BOOKS

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