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XIII

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A R T I C L E S

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Hugo Grotius in Historical Perspective and Today

by REMIGIUSZ BIERZANEK

The quartercentenary of Hugo Grotius' birth gives occasion and provides incentive to reflect on the views of that man, one of the most outstanding representatives of the European philosophy and the science of international law, and also on the impact of these views on the further development of the social sciences.

Grotius was born on April 10, 1583 at Delft, in the vicinity of The Hague. His extraordinary intellectual powers led the French king, Louis XIII, to call him *le miracle de la Hollande*. His career as a lawyer, politician and publicist, which he took up already in his early youth, ended abruptly with his condemnation to prison for life in a period of a severe and uncompromising struggle for power between the Gomarists and the Arminians. After two years, he succeeded in escaping to France where he first served as a counsellor to the French court and then, from 1635 to his death, as diplomatic envoy of the queen of Sweden. He died in 1645 near Rostock while travelling from Sweden to Paris.

Grotius' versatility, though common to many Renaissance authors, is nevertheless highly impressive. Among his prolific publications we find historical, theological, literary, philosophical and legal works. But it was *De jure belli ac pacis* and *Mare liberum* that exerted the strongest influence both during his life and in the subsequent historical periods.

In old textbooks Grotius was called "father of the law of nations". Although the originality of many of his views has been questioned in this century as a result of the historical investigations which disclosed the important role of Grotius' forerunners in the initial development of the science of international law, such as the Spanish theologians of the 15th and 16th centuries (the Dominicans Domenico Soto and Francisco Vitoria, and a Jesuit Francisco Suarez) and Alberigo Gentilis, an Italian refugee professor lecturing in England, his merit in creating a system of the law of nations, based on the rationalist principles of the law of nature and

understood as a set of norms and values independent of theology, remains still unchallenged.

Grotius who lived in a chaotic and confused period of Europe's history, wanted to base relations between states on the rule of law, securing thus stability and peaceful co-operation. He regarded the human nature as a permanent basis of the law binding upon states. According to him, "the trait characteristic of man is an impelling desire for society (*appetitus societatis*), that is, for the social life — not of any and every sort — but peaceful and organized according to the measure of his intelligence (*Prolegomena* 6)". It is the concern for the preservation of society, corresponding to the traits of men who are dependent upon each other, that is the source of the law of nature. And the instrument enabling us to discover the law of nature is the human mind. Grotian conception of the law of nature differed from that prevailing in the Middle Ages mainly in that its basic tenets remained valid even under the assumption that God did not exist. His famous assertion *etiam daremus* [...] ("even if we should conceded that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him [...] (*Prolegomena* 11)) contributed to putting *De jure belli ac pacis* in the Index, but, on the other hand, it permitted many posterior authors to extol him for his rationalistic point of view and for the liberation of the law of nature from the ties of theology. Karl Marx, in discussing the legal and political conceptions of the Middle Ages, included Grotius — together with Hobbes and Spinoza — in the group of writers who, following the example of Copernicus "began to see the state with human eyes and derive its laws from reason and experience".¹

According to Grotius, the sources of laws are: nature, the will of God, and the will of men. "For the very nature of man, which even if we had no lack of anything would lead us into mutual relations of society, is the mother of the law of nature. But the mother of municipal law is that obligation which arises from mutual consent; and since this obligation derives its force from the law of nature, nature may be considered, so to say, the great-grandmother of municipal law. The law of nature nevertheless has the reinforcement of expediency; for the Author of nature willed that as individuals we should be weak, and should lack many things needed in order to live properly, to the end that we might be the more constrained to cultivate the social life" (*Prolegomena* 16).

Grotius rejects the view that law is supposedly not binding in relations between states. "But just as the laws of each state", he argues, "have in view the advantage of that state, so by mutual consent it has become

¹ K. MARX, F. ENGELS, *Dziela* [Works], Warszawa 1960, vol. 1, pp. 123—124.

possible that certain laws should originate as between all states, or a great many states; and it is apparent that the laws thus originating had in view the advantage not of particular states (*coetus*), but of the great society of states (*universitas*). And this is which is called the law of nations, whenever we distinguish that term from the law of nature" (*Prolegomena* 17). This law is also binding during the war: "in order that wars may be justified, they must be carried on with not less scrupulousness than judicial processes are wont to be" (*Prolegomenon* 25). Polemizing with Carneades, who reduced justice between states to foolishness, he wrote: "For since, by his own admission (i.e. of Carneades), the national who in his own country obeys its laws is not foolish, even though, out of regard for that law, he may be obliged to forgo certain things advantageous for himself, so that nation is not foolish which does not press its own advantage to the point of disregarding the laws common to nations. The reason in either case is the same. For just as the national, who violates the law of his country in order to obtain an immediate advantage, breaks down that by which the advantages of himself and his posterity are for all future time assured, so the state which transgresses the laws of nature and of nations cuts away also the bulwarks which safeguard its own future peace" (*Prolegomena* 18).

It has been rightly pointed out that Grotius' work *De iure pacis ac belli* has opened a new epoch in the development of the science of international law, and that in two ways. Although not all views expressed in that work are original, since many of them had been borrowed from his forerunners, he had nevertheless synthetized the heretofore achievements. His work is far from any ordinary compilation; he takes from the works of his forerunners only those elements that are necessary for the construction of his own system. However, Grotius' work is not only a creative synthesis of what had been achieved in the past, but also a starting point and basis of the law of nature school which was to dominate in the following centuries. According to the eminent Polish philosopher, Władysław Tatarkiewicz, "Grotius identified the philosophy of law with the theory of the law of nature, and this view — due to his authority — determined for many years to come direction of studies on the philosophy of law".² Alone the number of editions of *De iure pacis ac belli* indicated that it was an exceptional phenomenon. From 1625, when the first edition had become available, to 1775, that is, in the period of 150 years, there were 49 editions of this comprehensive, and the then expensive, work needed to satisfy the demand of the readers. Moreover, it appeared in the same period of

² W. TATARKIEWICZ, *Historia Filozofii [A History of Philosophy]*, Warszawa 1970, vol. 2, p. 30.

time in 30 foreign language editions. In some countries, as in Sweden and Russia, where it had been translated for the use of rulers only, without being printed, it became a textbook for kings and diplomats. Somebody has calculated that during that period Grotius' work had been surpassed in number of editions only by the Bible.

Already during Grotius' lifetime chairs of the law of war and peace began to be set up at the universities. Grotius' book assumed the position of a classical work. There appeared many glossarial writings commenting on the entire *De iure pacis ac belli* or its particular parts. Especially numerous were editions with commentaries — *cum notis variorum*. It should be admitted that this method was particularly suitable for Grotius' work, since in many questions he had indicated the direction in which a specific thought should be developed. Following Tacitus, he wrote tersely, and some of his phrases and expressions had to be explained or expatiated. Somebody said not without reason that Grotius thought more than said. To understand his text, the reader must sometimes concentrate his whole attention or even read it through several times. No wonder that Grotius' terseness did not satisfy the Frenchmen of the Enlightenment period. Voltaire said that Grotius was very learned but too meticulous and boring: "*La raison et la vertu touchent peu quand elles ennuient*".³

As a rule, the life and work of Grotius are presented as connected first with Holland, where he was born, educated, and commenced his brilliant though short political career, and then with Paris, where he found refuge and acted first as a counsellor to the French king and then as diplomatic envoy to the Swedish queen, Christine, and where his work *De iure pacis ac belli* was first printed. But the impact of Grotian ideas, as well as his personal contacts and interests encompassed considerably wider areas than Western Europe alone. In this respect, his particular interest in the religious, political and legal problems of the Polish-Lithuanian monarchy and his sustained and close contacts with the Poles deserve perhaps a closer attention.

In the 16th and 17th centuries, there existed various contacts between Poland and Holland. At the time, Poland was the main exporter of grain to Holland, and a number of Poles studied at the University of Leyden. But apart from that there were specific reasons for Grotius' closer contacts with Poland. He was a member of the Protestant sect of Arminians who were persecuted by their political and religious adversaries: the Gomarists. The Arminians spoke for religious tolerance, and maintained lively contacts with the Polish Arians, though they differed on many issues with the Arians, particularly as to integral pacifism which they had rejected.

³ VOLTAIRE, *Dialogues philosophiques*, Dialogue XXI.

The leaders of the Polish Arians had contacts with the leaders of the Arminians, (i.e., with Vossius who was in correspondence with Grotius), and, while in Holland, participated in religious gatherings of the Arminians. Particularly close ties of friendship existed between Grotius and the Ślupecki family whose three members, Christopher, Nicolaus and George, had maintained close contacts with him during their studies; one of them had endeared himself to Grotius so much that — as Grotius said in one of his letters — “he gets from me something that no one has hitherto gotten, and that is that I am reading with him Tacitus and showing him what is applicable to political education therefrom”.⁴ Also many other Poles from Protestant and Catholic families appeared in the circles surrounding Grotius in Paris. There were plans to invite Grotius to Poland and offer him the post of a counsellor to the Polish king, Władysław IV. Grotius was inclined to consider seriously such an invitation, and expressed his disappointment that the Polish diplomatic envoy Zawadzki had not approached him on this matter.⁵ We do not know the reasons which prevented Grotius from obtaining an official post at the royal court in Poland. It is believed that the whole thing misfired because of the illness of Minister Zawadzki or the then already close and widely known contacts of Grotius with Chancellor of Sweden, Oxenstjerna. Having been induced by Oxenstjerna to enter into the service of Sweden, Grotius tried to avoid anything that might have exacerbated the Polish-Swedish relations, and expressed his joy of every sign of détente. Informing Jerzy Ślupecki about his new-acquired post of Minister of Sweden in Paris, Grotius expressed his desire that “peace between your native country and that of my choice would set in as quickly as possible”, so that “I will not have to learn sinister things either about those who raised me to such a dignity or about those among you who — as you and other illustrious men — are so devoted friends to me”.⁶

Being constantly in touch with his Polish friends, Grotius was well acquainted with Polish internal matters. He regarded Poland as a country of religious tolerance. In his letter of October 21, 1637 to a Gdańsk patrician, I. Jaski, he wrote that “to impose religion by law is not Polish” (*religionem legi imponere non est polonicum*).⁷ When Jaski informed him that the Polish Sejm was discussing restrictions concerning the Orthodox Church, Grotius expressed his astonishment that such a matter was debated in a state about which “I knew that it had stipulated by law that no one be prevented from worshipping God according to his creed”.⁸ He

⁴ *Grotii Epistolae*, Amsterdam 1687, p. 85.

⁵ Ś. KOT, *Hugo Grotius a Polska [Hugo Grotius and Poland]*, Kraków 1926, p. 8.

⁶ *Grotii Epistolae*, p. 168.

⁷ *Grotii Epistolae ad I. Jaski*, Gdańsk 1670, p. 14.

⁸ Cf. Ś. KOT, *op. cit.*, p. 13 ff.

rightly estimated the contemporary Polish foreign policy. He did not share the view that king Władysław IV might through marriage come over to the Habsburg dynasty since, as he argued, such a rapprochement would alarm the nobility, and since "in matters of religion the Poles, apart from bishops and a handful of others, are lenient (*lenes sunt Polonorum motus*), whereas they are unanimous in their attachment to liberty (*in libertatis studio conspirant*) which would feel itself endangered by affinity with such a powerful and widely ruling court".⁹ At the same time he referred to the deathbed warning of Jan Zamojski that "a connection by marriage with the Habsburg house will be disastrous for Poland's liberty";¹⁰ and as to the Polish-Swedish relations he rightly considered that the Polish nobility was not inclined to support the Polish king's claims to the Swedish throne.¹¹ Grotius took great interest in Polish law, especially in that concerning contracts and compensations, stating in one of his letters that Roman law exerted its impact also in Poland, though Roman sword had never reached that country.

Having been educated in the atmosphere of struggle of the Dutch cities against the despotism of foreign rulers, Grotius was, as to his political views, rather adverse to all endeavours aimed at the strengthening of royal power. He praised, however, the states in which power belonged to aristocracy headed by individuals with limited powers, and—with reference to an information published by J. Bodinus—he appraised positively the Polish system which accords power to a king under certain conditions. Such a view he also expressed in his *De jure belli ac pacis*. Although he did not mention there Poland, as he used to avoid mentioning any contemporary state by name, he nevertheless, while presenting and appraising restrictions of royal power by way of conditions imposed by the subjects, referred in the notes to his work to the Polish historian, Martin Kromer, who had mentioned the existence of a clause envisaging that the subjects would not support or obey a king who violated *pacta conventa*.¹²

The impact of Grotius' views on those of the Polish Arians, concerning their internally disputed attitude to war, was very significant. Whereas the followers of this religious group in central Poland stood firmly for the ban on wars, those in Lithuania, which was endangered by invasions from the East, opposed integral pacifism. Although the Synod of 1569, to express its disapproval of bloodshedding, enacted a ban on carrying arms, the Lithuanian brothers set up protests against such a radical attitude. As Grotius enjoyed great respect among the Arians, the opponents of

⁹ *Grotii Epistolae*, p. 174.

¹⁰ *Ibid.*, p. 357.

¹¹ *Ibid.*, pp. 183, 187, 190, and 376.

¹² HUGO GROTIUS, *De jure belli ac pacis*, lib. I, III s. 16.

radical pacifism used to adduce Grotius' arguments for the permissibility of just wars. Eventually Grotius was approached directly with a proposal to state a discussion on "whether it is possible to avoid death penalty and what is meant by just causes of war".¹³ The impact of Grotius is said to be somehow responsible for the collective participation of the Arians in the campaign of 1633. One of the leaders of the Arians, Samuel Przykowski, who participated in this campaign, was under a strong influence of Grotius. Other leader, Martin Ruar from Raków, expressed the view that a Christian may hold office and repel invaders by using armed force if there is no other way to safeguard security. To strengthen his position, he quoted Grotius' arguments, stating at the same time that they were sometimes strong and sometimes extremely weak.¹⁴ It was said that Grotius polemizing in *De jure pacis ac belli* with the assertion that Christians were forbidden to wage any war had in mind mainly the Polish Arians. In any case, the Arians thought that Grotius polemized with them.¹⁵ In a later period, Grotius arguing in a similar case with a Dutch author, Nicolaus de Bye, advanced a contention which had been probably derived from the discussion with the Polish Arians: "Please, consider whether the Polish king is bound to put up with the Tatars who kill Polish children, to permit them to commit outrages against Polish women, worse than death, if he can prevent it by repelling predatory power with his royal power".¹⁶

Late in his life and even later, his ideas aimed at the reconciliation of warring Christian creeds, had a particular impact on the Polish religious and political life. As a result of the Council of Trent, which started the counteroffensive of Catholicism, the situation of Protestants in Poland worsened considerably; among other discriminations, they began to be removed from public offices. Some Arians left Poland and went to Holland. For many, however, who remained in Poland, Grotius' religious works, and especially *De veritate religionis christianae*, which defended principles common to all Christian creeds and suggested the secondariness of differences, constituted an incentive to return to the bosom of Catholic creed as embodied in the Universal Church.

Before his death, Grotius himself cherished the idea of reconciliation between Catholics and Protestants, but that was opposed by the Protestants

¹³ Grotii *Epistolae*, p. 280.

¹⁴ L. CHMAJ, *Przykowski a Grotius* [Przykowski and Grotius], in: *Księga pamiątkowa ku czci Prof. W. Heinricha* [Festschrift in Honour of Professor W. Heinrich], Kraków 1927, p. 57.

¹⁵ S. ESTREICHER, *Pacyfizm w Polsce XVI stulecia* [Pacifism in the 16th Century Poland], „Ruch Prawniczy, Ekonomiczny i Socjologiczny”, 1933, p. 22.

¹⁶ S. KOT, *op. cit.*, p. 13.

in Poland who did not believe in achieving an authentic compromise between the strong and the weak. In connection with the convocation of the *Colloquium Charitativum* in Toruń, Grotius wrote to his brother on May 28, 1644: "The Primate of Poland approached the Polish Protestants, not the alien ones, but the Reformed Protestants asked for advice their foreign coreligionists; I don't see any hope for a reconciliation with the Reformed, perhaps that would be easier with the followers of the Augsburg formula".¹⁷ Many saw in Grotius' religious development a permanent and continuous inclination towards recurrence to Catholicism; he was even called *advocatus Romae* among Protestants. No wonder that the Polish Protestants were ill-disposed toward Grotius' conceptions, and the protector of the Polish Calvinists, Janusz Radziwiłł, praised a Dutch theologian, André Rivet, for his defence of Calvinism "*contra magnum illum Grotium*".¹⁸ It is symptomatic that Grotius' *De veritate religionis christianae* was edited in the 18th century by the printing house of the Piarist Order in Warsaw, and that the translator and secretary of the Great Staff of the Crown, Adam Kempski, tried in a foreword to that work to hide Grotius' confession by stating that "there is nothing in Grotius' life-history to show what was his religion", but "his religion might be somehow guessed from the fact that he had been in service of the queen Christine who has been always a Catholic".

Grotian writings were known and read in the 17th and the 18th century Poland. Polish libraries contain many old editions of *De jure belli ac pacis*, his historical works, especially *Repubblica Batavorum*, and also theological works, were quoted in Polish literature. His polemical essay against Socinus, *De satisfactione*, had been — as Grotius himself admitted — edited by the Polish Calvinists.¹⁹ Grotius' views and his definition of the law of nations were introduced into the teachings of law at the Gdańsk Ateneum School by Christopher Riccius, shortly after the publication of *De jure belli ac pacis*.²⁰ After the death of Grotius, there appeared in Poland his *Letters to I. Jaski* (1670), and a tragedy of a religious character, *Christus patiens*, which had been previously staged at the Gimnasium in Toruń (1673). In the 18th century, the popularity of Grotius was enhanced by the Rev. Stanisław Konarski, an eminent Polish writer and teacher, who recommended the lecture of *De jure belli ac pacis* for the learning of rethoric and good Latin, as well as of politics and the law of nations, and who ordered that Holland's history be studied on Grotius' *Annales*.

¹⁷ *Grotii Epistolae*, p. 967.

¹⁸ S. KOT, *op. cit.*, p. 20.

¹⁹ *Grotii Epistolae*, p. 872.

²⁰ K. KOCOT, *Nauka prawa narodów w Ateneum gdańskim [Teachings the Law of Nations at the Gdańsk Ateneum]*, Wrocław 1965, p. 70.

In 1776, there appeared in Poland his *De veritate religionis christianae*. In the second part of the 18th century, Grotius — along with Emerich de Vattel — was often quoted in polemical political writings; Grotius was also frequently quoted by members of the Polish Sejm, who tried in this way to reinforce the impact of their speeches.²¹

The partitions of Poland were not favourable to the studies of international law. The translation of *De jure belli ac pacis* and *Mare liberum* appeared only after the Second World War.²²

What is the significance of Grotian ideas for our generation? At the Commemorative Colloquium held in April this year in The Hague on the occasion of the 400th anniversary of Grotius' birth, one paper stressed that "the real secret of the incomparable fate of Grotius' book *De jure belli ac pacis* lies in the fact that it has told and continues to tell something new and something different to each generation, that it carries a message so universal and generous that each generation finds new aspects therein".²³ In a discussion on the Grotian heritage pertinent to international law, the stress was laid on the topicality and permanent value of such Grotian ideas attracting the contemporary thought as a) universality of international order;²⁴ b) necessity of establishing the foundations of a new international legal order corresponding to the needs of the future, but based on inherited spiritual, moral and legal values;²⁵ c) subordination of all states to a law which would be a product of interaction between the law of nature and the law of nations, as well as interdependence of states in the realm of economy and security;²⁶ d) necessity of maintaining and developing economic ties between states, which leads to a close co-operation and unity;²⁷ e) pursuance of the strengthening and consolidating of the institutions of international law through stressing the importance of good faith, which should dominate among nations, and adherence to agreements concluded both with Christians and pagans;²⁸ f) explicit recognition of the

²¹ S. HUBERT, *Poglądy na prawo narodów w Polsce czasów Oświecenia* [Views on the Law of Nations at the Time of Enlightenment in Poland], Wrocław 1960, pp. 42 and 103.

²² H. GROTIUS, *O prawie wojny i pokoju* [*De jure belli ac pacis*], translated by R. Bierzanek, Warszawa 1957, and *Wolność mórz* [*Mare liberum*], translated by R. Bierzanek, Warszawa 1955.

²³ Jimenez de ARÉCHAGA, *The Grotian Heritage and the Concept of a Just World Order*, p. I.

²⁴ *Ibid.*, p. 3.

²⁵ *Ibid.*, pp. 3 and 15.

²⁶ M. C. W. PINTO, *The New Law of the Sea and the Grotian Heritage*, p. 13.

²⁷ M. LACHS, *The Grotian Heritage, the International Community and Changing Dimensions of International Law*, pp. 5 and 17.

²⁸ *Ibid.*, p. 3.

dignity of man which is the basis of Grotian philosophical thought;²⁹ g) necessity of an international law which must be universal, without being uniform.³⁰

It seems that in our considerations over Grotian heritage and its importance for our epoch we should pay more attention to the motives which prompted Grotius to many of his actions, to writing not only *De jure belli ac pacis*, but also other works, especially those of religious character. Basically, that what moved him was the idea of peace, the central idea to which many of his other ideas and conceptions were to a high degree instrumental. In his *Prolegomena* to *De jure belli ac pacis* we read:

"Fully convinced that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes" (*Prolegomena* 28).

We should not forget about the specificity of the epoch in which Grotius lived and acted. Grotius tried to unify the trend towards the restriction of the number of wars with that of the reconciliation of Christian creeds and the achievement of *pax ecclesiastica*. According to him, the concept of peace is wider than that of maintaining peace in relations between states. It also encompasses spiritual factors, that is those directed at the elimination from human thoughts of those inclinations that lead to war. In Grotius' epoch the source of wars lied mainly in antagonisms between Catholics and Protestants or, in any case, they constituted a pretext to wage wars. In his *De jure belli ac pacis* Grotius attempted to restrain the rulers from waging wars, condemned preventive wars ("in order to weaken a growing power which, if it become too great, may be a source of danger" — II, I, 17), and recommended the settlement of disputes through negotiations (*colloquium*) and arbitrations. In his other writings, especially in his later years, he took efforts to reconcile Christian creeds. So in his religious works, especially in *De veritate religionis christianae*, he defended only those principles that were common to all

²⁹ G. SPERDUTI, *The Heritage of Grotius and a Modern Concept of Law and State*, p. 1.

³⁰ R. Y. JENNINGS, *Universal International Law in a Multicultural World*, p. 1.

religious groups, and left out other — even the Holy Trinity dogma — to avoid the exclusion of Arians from the Christian community as a whole. Late in his life he became one of the leaders of a movement embracing members of various creeds, Catholics including, who acted for tolerance and reconciliation. As a result, his correlativeists accused him of being ready to sacrifice truth for peace.

In his recommendations for the preservation of peace in Europe Grotius goes much further than the requirements of the law of nature and the law of nations. Conceding the legality of war for the vindication of law (*Prolegomena* 20 ff), he says in the final chapter (III, XXV, 3) that “if, then, it is possible to have peace with sufficient safety, it is well established by condonation of offences, damages and expenses”, and ends his work with a “Conclusion with callings to keep faith and strive for peace”, in which he appeals to noble human values: “May God inscribe these teachings on the hearts of those who hold sway over Christian world. May He grant to them a mind possessing knowledge of divine and human law, and having ever before it the reflection that it hath been chosen as a servant for the rule of man, the living thing most dear to God”.

Undoubtedly, the Grotian doctrine of just war, and especially of the right to war, does not correspond any more to the needs of our epoch overclouded by the presence of massdestruction weapons and a modern, highly developed military technology. It should be remembered, however, that Grotius was not a dreamer as Sir Thomas More and Tommaso Campanella were; he was a lawyer and politician. He did not expect that a permanent peace could be safeguarded in the 17th century Europe. Although his aims were more restricted, they were more realistic; he wanted As Besdevant noted, “*Grotius prend la société internationale telle qu’elle existe* the number of wars to be restricted and a mitigation of warfare activities. [...] *il ne prétend pas imaginer une organisation qui fasse disparaître la guerre[...] il ne prétend pas supprimer la guerre, mais la régler*”.³¹ He appreciated good intentions of such irenists as Joannes Ferus and Erasmus of Rotterdam who forbade Christians the use of arms, but nevertheless considered their views extreme (“but their purpose, as I take it, is, when things have gone in one direction, to force them in the opposite direction, as we are accustomed to do, that they may come back to a true middle ground”). As a consequence, he spoke against both extremes “for both extremes therefore a remedy must be found, than men may not believe either that nothing is allowable, or that everything is” — *Prolegomena* (29). Hence the

³¹ J. BASDEVANT, in a collective work, *Les fondateurs du droit international*. Paris 1904, pp. 256—257.

Grotian doctrine of just war was a reaction against the views that the right to war cannot be limited and against those advocating radical pacifism. Grotius maintained that a war may be waged only to claim one's rights, which view is conformable to the law of nature and the law of nations; he argued at the same time that a nation which violates this right "cuts away the bulwarks which safeguard its own future peace".

We live today in a world considerably different than that of Grotius. All doctrines of just war as well as conceptions envisaging the inevitability of wars in specific economic and social conditions do not correspond to present needs and are thus immaterial. But, on the other hand, a lasting peace has not been yet achieved, and all efforts, similar to those of Grotius, they were in the 17th century. Grotius' strong arguments in favour of peace and directed towards this goal are in our epoch no less needed than and stability, based on the preservation of law ("all things are uncertain the moment men depart from law" — *Prolegomena* 22) are still valid. Grotius' view that the concept of peace embraces a wider range than that of official relations among States has not lost its significance. For peace requires necessarily a change in human views and beliefs; the defence of peace, as stated in the Preamble to the Unesco Constitution, should be significance of common values, tolerance and mutual understanding, based built in the mind of men. This concept of peace, which stresses the upon rationalism, is undoubtedly a part of the Grotian heritage, a heritage that has a special importance in our pluralistic, ideologically divided world. of his portraits: *hora ruit* (the time is pressing) seems to have a particular And, last but not least, Grotius' life motto which can be read on many topicality in relation to peace in this atomic era.

Delimitation of Maritime Areas between the States with Opposite or Adjacent Coasts

by JANUSZ SYMONIDES

Undoubtedly, the delimitation of maritime areas may be regarded as one of the most important problems of the law of the sea. Disputes over the extent of territorial sovereignty, over the spacial dimension of sovereign rights, belong inherently to the most bitter and protracted, since they directly involve vital interests of particular States. They may also, as for example the dispute between Greece and Turkey over the continental shelf in the Aegean Sea, develop into a serious conflict.

The difficulties connected with the delimitation of maritime areas have rapidly multiplied with the introduction of the notion of the continental shelf into international law, and then by the acceptance by the Conference on the Law of the Sea of the right to exclusive economic zones. When the continental shelf may be extended to 350 miles, and the exclusive economic zone to 200 miles, all these areas may, as it were, overlap very frequently, creating thus the need to delimit them. Whereas the historical disputes over the extension of the territorial sea concerned rather not too great areas, the disputes over the continental shelf and economic zone may involve very extensive areas and frequently — as with the small archipelagic States — more extended than the territory of the State concerned. We should add here that usually the substance of a dispute over the delimitation of a continental shelf or an exclusive economic zone does not involve exclusively the extension of the disputed area, but rather its natural resources, mainly hydrocarbons in the continental shelf and also, to a lesser degree, the living resources in the exclusive economic zone. This aspect endows the delimitation problems with specific importance.

The practical significance which the delimitation of maritime areas has in the law of the sea and, on a wider range, in modern international relations, has been best illustrated by the data presented by R. W. Smith

at the 4th Conference of the Law of the Sea Institute¹. He had established that out of 370 cases, which required delimitation of the continental shelf and of the economic zone, only 87 had been settled (23.5 per cent), with 68 delimited definitively through ratification (only 18.3 per cent) and 19 still awaiting the process of ratification to be terminated. In 1981, about 280 continental shelf and economic zone boundaries were still not subject to any negotiation. In some regions, as in the Pacific, out of 97 boundaries, only 18 had been negotiated and settled. In principle, there is no region of the world where the process of delimitation has been brought to an end.

The situation in the Baltic Sea, or in the North Sea, where the majority of boundaries have been settled, may be regarded as utterly exceptional.

The numbers adduced above show quite clearly how potentially dangerous for good-neighbourly relations and how conflict-fomenting are the delimitation problems facing the international community.² Moreover, the differing positions

¹ R. W. SMITH, *A Geographical Primer to Maritime Boundary Making, The Law of the Sea and Ocean Development Issues in the Pacific Basin, Proceedings*, Law of the Sea Institute, Fifteenth Annual Conference, October 5—8, 1981, Honolulu Hawaii, ed. by E. Miles, S. Allen, p. 526. A few years earlier, at a Session of the Institute in 1976, R. Hodgson and R. W. Smith submitted the data concerning the sea boundaries. In their opinion, there were then 300 potential boundaries of territorial seas and continental shelves, with only 21 per cent of them delimited. And on the African continent there were only three boundaries delimited at the same time. Cf. R. D. HODGSON, R. W. SMITH, *Boundaries of the Economic Zone*, in: *Law of the Sea: Conference Outcomes and Problems of Implementation, Proceedings*, Law of the Sea Institute, Tenth Annual Conference, June 22—25, 1976. University of Rhode Island, Kingston, Rhode Island, ed. by E. Miles, J. K. Gamble, Cambridge Mass. 1977, p. 189.

² Of course, not all potential situations, in which a delimitation is required, must be complicated. Notwithstanding that, a considerable number of protracted disputes remains still far from conclusion. We may quote here, for instance, apart from the dispute between Greece and Turkey, the dispute between Colombia and Venezuela over the delimitation of the continental shelf in the Venezuelan Bay, the dispute between Ireland and Denmark v. Great Britain over the continental shelf of Rockal Isle, and the disputes over the delimitation in the China, Mediterranean, Baltic or Caribbean Seas. In recent years, a few cases were dealt with by international arbitration or judiciary. The dispute over the delimitation of the continental shelf between Great Britain and France was settled in 1977 by an Arbitral Tribunal. Cf. *Reports of International Arbitral Awards*, vol. 18, p. 130 ff. In the same year, an arbitral award was delivered in a dispute between Argentina and Chile over the Beagle Channel, cf. *New Directions in the Law of the Sea*, ed. by M. Nordquist, S. H. Lay, K. R. Simmonds, vol. 2, London 1980. In 1982, the ICJ settled the issue concerning the delimitation of the continental shelf between Tunisia and Libya, cf. *ICJ Reports 1982*. The issue between Canada and the United States, concerning the delimitation of the sea boundary in the Gulf of Maine, cf. *ICJ Reports 1982*. In 1981, the Conciliation Commission set up by Iceland and Norway formulated its position in the issue of continental shelf between Iceland and the Jan Mayen Island. Cf. *Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen*, Washington, D.C., June 1981.

in matters concerning delimitation do not reflect the traditional lines of division. Disputes occur both between the developed and developing States, as well as within both these groups. Delimitation problems trouble not only small and medium range States, but also the permanent members of the UN Security Council.

Thus the question of the principles which were to be applied to the delimitation of maritime areas became one of the most important issues facing the Conference of the Law of the Sea. As the Geneva Conventions of 1958 — the 1st on the Territorial Sea and Contiguous Zone, and the 4th on the Continental Shelf — had laid down provisions for the delimitation of the territorial sea, contiguous zone and continental shelf, the question of whether these provisions should be reiterated in the new convention or whether new provisions should be worked out had to be solved from the very beginning of the Conference. And particularly so because treaty law did not stipulate how to delimit economic zones among States with opposite or adjacent coasts. Anticipating our further reasoning, it may be said that the new Convention — similarly to the Geneva Conventions of 1958 — does not, on the one hand, approach uniformly the question of the delimitation of the territorial sea, and, on the other, that of the delimitation of the economic zone and the continental shelf.

1. Delimitation of the Territorial Sea

The question of how to delimit the territorial seas among States with opposite or adjacent coasts provoked many controversions during the Conference on the Law of the Sea. Although a few proposals submitted to the Session in Caracas in 1974 contained suggestions that Article 12 of the 1st Geneva Convention on the delimitation of the territorial sea be changed, a quite adverse point of view prevailed, namely that the solution of this question in the new convention should be conformable to the existing one.

Among the few States, which from the very beginning and almost till the end of the Conference demanded that the provisions concerning the delimitation of the territorial sea be changed, there were first of all Turkey and Argentine, which considered that the new convention should adopt uniform rules of the delimitation of all maritime areas, that is, of the territorial sea, the economic zone and the continental shelf.

In a document submitted to the 2nd Committee, Turkey put forward the following proposal:

"Where there the coasts of two or more States are adjacent and/or opposite, the delimitation of the boundary lines of the respective territorial seas shall be determined by agreement among them in accordance with equitable principles".³

A similar viewpoint was also submitted by the Netherlands⁴ and Romania.⁵

However, the opposite opinion prevailed. A proposal had been submitted, i.a., by Bulgaria, the German Democratic Republic, Poland and the Soviet Union, explicitly stating that in questions related to the delimitation of the territorial sea the wording of Article 12 of the Geneva Convention should be reiterated.⁶

In view of this, the Informal Composite Negotiating Text, prepared by G. Pohl during the 3rd Session at Geneva in 1975,⁷ contained a wording strictly reiterating that of Article 12 of the 1st Geneva Convention:

"1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial sea of the two States in a way which is at variance with this provision".

This formula was later reiterated in all subsequent texts worked out by the Conference, and entered finally, with a small editorial change,⁸ into the Convention on the Law of the Sea as its Article 15.

Why did the same States which had been so utterly opposed to the application of the wording of Article 6 of the Convention on the Continental Shelf to the delimitation of the economic zone and the continental shelf, and which fought for equitable principles, agreed in regard of the territorial sea to a different solution?

There were several and quite obvious reasons thereof. First, and of paramount practical importance, was the fact that disputes over the delimitation of maritime areas involved mainly the continental shelf and the economic zone. Apart from a few States which are still interested in altering the hitherto

³ Doc. A/CONF. 62/C.2/L.9.

⁴ Doc. A/CONF.62/C.2/L.14.

⁵ Doc. A/CONF.62/C.2/L.18.

⁶ Doc. A/CONF.62/C.2/L.26.

⁷ Doc. A/CONF.62/WP.8, Art. 13.

⁸ The Chairman of the Negotiating Group 7 dealing with the delimitation problems, judge E. I. Manner (Finland), suggested that the beginning of the first clause: "Provisions of this article" be replaced by "The above provision", and the last words of this article: "with this provision" by "therefrom". The suggestion was approved.

rules of the delimitation of the territorial sea,⁹ the majority of States consider the matter to be only of a theoretical character. This also is true with regard to the States which emerged in recent years. Since the majority of these States are islandic in character, the questions of the delimitation of maritime areas, for example, in the Caribbean Sea or in the Pacific, affect, first of all, the economic zones and the continental shelves. That is so because their territories lack close contiguity which is so characteristic of the coastal continental States.

When the territorial seas are delimited, the subject of "special circumstances", which justifies forbearance of the median line, is relatively, in comparison with the delimitation of the economic zones and the continental shelves, less disputable. Article 12 of the Geneva Convention of 1958 did not determine with sufficient precision when a situation could be qualified as a special circumstance. Also the International Law Commission mentioned the question in a rather general commentary which pointed out that the circumstances in question involve an exceptional configuration of the coast, as well as the presence of islands and navigation canals.¹⁰ But in spite of this the question of "special circumstances" had not bred such difficulties and tensions that occur now in connection with the delimitation of the exclusive economic zones and the continental shelves. There are two reasons of that. The first is that the occurrence of special circumstances, as a result of the comparatively insignificant breadth of the territorial sea, has a rather small spacial consequence; they change the course of a boundary only insignificantly. However, when the exclusive economic zone or the continental shelf are delimited, even small deflections in the configuration of the coast have a spatial projection which increases the further we recede from it. The second is that many delimitations of the territorial

⁹ The fact that Turkey and Argentine fought so vigorously for the change of article dealing with the delimitation of the territorial sea was motivated by practical purposes. As to Turkey, it should be noted that she took considerable efforts aimed at the introduction of delimitation problems into Part IX of the Convention, dealing with enclosed and semi-enclosed seas. Attempts at stressing the role of equitable principles in delimiting maritime areas in enclosed and semi-enclosed seas, strongly supported by Algeria, Iraq and Libya, did not bring any result and the respective proposals failed to win approval.

¹⁰ Cf. Yearbook of International Law Commission 1956, vol. 2, p. 300. This commentary concerned both Article 12 on the territorial sea and Article 6 on the delimitation of the continental shelf. In an Arbitral Award concerning the Beagle Channel, the Tribunal took into consideration such factors as the configuration of the coast, convenience, navigability, the desire to assure that each party navigate, as far as possible, its own waters, and also the presence of sand- and mud-banks. *The Beagle Channel Affair*, A. F., AJIL 1977, p. 738.

seas are made without applying the median or equidistance line,¹¹ and also without taking into account the occurrence of islands.¹²

In Polish literature, R. Zaorski has rightly pointed out that it is difficult to define rigid rules of delimitation, which would be applicable to any situation, in view of the variety of geographical, hydrographical and other circumstances, as well as the impact of historical titles. This explains the fact that the delimitation of the territorial seas is made mainly by way of bilateral agreements.¹³ These agreements reflect various methods of proceeding. In a situation when the respective coasts are adjacent to each other, apart from the median line, also the method of the prolongation of the land frontier is applied, as well as that of establishing the perpendicular line to the point of junction of the land frontiers, the perpendicular line to the general direction of the coast, and even the gradient of the frontier line.¹⁴

The Convention on the Law of the Sea does not embody provisions concerning the delimitation of internal waters and contiguous zones. Thus the question arises what rules of delimitation are to be applied to these areas. As to internal waters, the application of the provisions of Article 15 on the delimitation of the territorial sea is obvious. More difficulties arise in connection with the delimitation of contiguous zones. Although they

¹¹ In its draft concerning the territorial sea and the adjacent zone, the International Law Commission inserted two articles, one related to the delimitation of the territorial sea with opposite State Coasts, envisaging the application of the median line as the boundary line, and another related to the delimitation of the territorial sea with adjacent State coasts, envisaging the application of the equidistance line. Cf. "Yearbook of International Law Commission", 1956, vol. 2, pp. 271—2. The Conference brought together the two articles, which blurred the difference between the median and equidistance line. However, the whole problem is immaterial since on the one hand, the median line is tantamount to the equidistance line, and on the other, the ascertainment whether the coasts are adjacent or opposite becomes relative with the presence of complicated coastal curvature or islands.

¹² D. E. KARL, *Islands and the Delimitation of the Continental Shelf—A Framework for Analysis*, AJIL, 1977, p. 652. As instances of this kinds, he quotes the delimitation of the territorial sea between Denmark and Sweden, Argentine and Uruguay, Federal Republic of Germany and German Democratic Republic, and Finland and Sweden.

¹³ R. ZAORSKI, *Konwencje genewskie o prawie morza* [Geneva Conventions on the Law of the Sea], Gdynia 1962, p. 55 f, W. GÓRALCZYK, *Szerokość morza terytorialnego i jego delimitacja* [The Breadth of the Territorial Sea and Its Delimitation], Warszawa 1964, pp. 374—376.

¹⁴ This method was applied by Poland and the GDR. Cf. The Act on the Demarcation of the State Frontier between Poland and Germany of January 27, 1951, "Dziennik Ustaw" [Journal of Laws], 1952, No. 53, item 346. In a Protocol on the Delimitation of the Polish and Soviet Territorial Waters in the Gulf of Gdańsk of March 18, 1958, PLG 1958, No. 76, item 386, the boundary is established by the line perpendicular to the coastal line beginning at the terminal point of the Polish-Soviet State frontier.

are and will be established not too frequently, situations may occur in practice when the delimitation of contiguous zones is required, or of a contiguous zone, on the one hand, and an economic zone on the other. These difficulties are complicated by the fact that, on the one hand, the provisions on the contiguous zone are to be found in Part Two of the Convention jointly with those on the territorial sea (moreover, it may be also argued that the provisions on the delimitation of the territorial sea and the contiguous zone are identical with those in the 1st Geneva Convention of 1958), and, on the other, the legal status of the contiguous zone is — *mutatis mutandis* — closer to the status of the economic zone than to that of the territorial sea. Specifically, in a situation when the economic zone and the contiguous zone are to be delimited, the application of the provisions of Article 74 on the delimitation of the economic zone would be probably more justified. These difficulties would have been eliminated if a clear-cut provision on the delimitation of the contiguous zone had been introduced into the Convention.

2. Delimitation of the Exclusive Economic Zone and of the Continental Shelf

2.1. The Dispute over the Criteria of Delimitation

Since the session in Caracas the postulate that the wording of the future convention on the law of the sea should be identical in respect of both these maritime areas had not aroused any doubt.¹⁵ However many States, though agreeing with the necessity of adopting identical solutions for the delimitation of the economic zone as well as of the continental shelf, had resisted from the very beginning the possibility of mechanical repetition of Article 6 of the 1958 Geneva Convention. This Article stipulated:

“1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

“2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them.

¹⁵ The delimitation of the economic zone and the continental shelf was dealt with jointly in a series of documents submitted to the Session in Caracas, i.a., in a proposal of the Netherlands — A/CONF.62/C.2/L.14; Kenya and Tunisia — A/CONF.62/C.2/L.28; France — A/CONF.62/C.2/L.74.

In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured".

The opposition to the mechanical introduction of Article 6 into the new convention was substantiated by the assertion that the solution adopted at the Geneva Conference of 1958 had not been consistent with the practice of States and universal international law which requires that delimitation should be based on the principle of equity. It was also indicated that the exclusive economic zone constituted a new institution of the law of the sea, and thus required new solutions also in the matter of delimitation.

It had been already stressed in the Declaration of President Truman of 1945, the statement of Saudi Arabia of 1945, or in the Iranian Law of 1949¹⁶ that in cases when the continental shelf extended to the coasts of other State or was shared with an adjacent State, its boundary should be determined by the parties interested in accordance with equitable principles.

It was the judgement delivered in 1969 by the International Court of Justice on the Delimitation of the North Sea Continental Shelf that has basically influenced the definition of the delimitation principles of the continental shelf.¹⁷ In its judgement, the ICJ stated, i.a., by 11 votes against 6, that:

a) the use of the equidistance method of delimitation is not as between the Parties obligatory;

b) there is no other single method of delimitation, the use of which is in all circumstances obligatory;

c) delimitation should be effected by agreement in accordance with equitable principles, while all relevant circumstances should be taken into consideration;

d) in the course of negotiations the following factors should be taken into consideration: 1) the general configuration of the coast, as well as the presence of any special or unusual features; 2) the physical and geological structure and the natural resources of the continental shelf; 3) the element of a reasonable degree of proportionality.

The position of the ICJ had not failed to influence the texts formulated at the Conference. For as early as May 7, 1975, the then Chairman of the 2nd Committee, R. G. Pohl, proposed the following wording of Article 61 of the Informal Composite Negotiating Text:

¹⁶ Cf. *International Court of Justice, Pleadings, North Sea Continental Shelf 1968*, p. 31 ff.

¹⁷ Cf. *ICJ, North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark); (Federal Republic of Germany/Netherlands), Judgement of February 20, 1969.

"1. The delimitation of the exclusive economic zone between adjacent or opposite States shall be effected by agreement, in accordance with equitable principles, employing, where appropriate the median or equidistance line, and taking account of all the relevant circumstances".¹⁸

Almost from the very beginning of the 3rd Conference on the Law of the Sea there emerged two distinct groups of interests, which had expressed opposing points of view on the delimitation of the exclusive economic zone and the continental shelf. One of them favoured the median line, while the other stressed that delimitation should be based on equitable principles.

The position of the first group (22 States) was exposed in Document NG 7/2 which played the part of a programme manifesto. In it, the signatories stated:

"1. The delimitation of the exclusive economic zone (continental shelf) between adjacent or opposite States shall be effected by agreement employing, as a general principle, the median or equidistance line, taking into account any special circumstances where this is justified."¹⁹

The second group (29 States) submitted its point of view in Document NG 7/10 which stated:

"1. The delimitation of the exclusive economic zone or continental shelf between adjacent and/or opposite States shall be effected by agreement, in accordance with equitable principles, taking into account all relevant circumstances and employing any methods, where appropriate, to lead to an equitable solution".²⁰

What were the essential differences between both these groups of States? The signatories of Document NG 7/2 stressed that the median line is not only the basic method of delimitation, but also a binding principle of international law. They questioned the role of equitable principles, qualifying them as ambiguous. In their opinion, the problem which could arise in connection with the delimitation of the continental shelf or the economic zone may be solved through applying the concept of "special circumstances".

However, the group of 29 States argued that the median line (or the equidistance line) constitutes only one of the methods of delimitation, which may be applied only when it leads to equitable solutions. Each delimitation should be based on equitable principles, as recognized in international practice and defined by international courts. The concept of "special circumstances" is ambiguous, since even the presence of islands is considered by the adherents of the median line not to be such a circumstance. Thus

¹⁸ Article 70 on the delimitation of the continental shelf has been formulated identically, Cf. Doc. A/CONF.62/WP.8/Part II.

¹⁹ Spain held the chairmanship of the Group 22 which comprised, i.a., Canada, Denmark, Japan, Yugoslavia, Sweden, Great Britain, Italy.

²⁰ The chairmanship of the Group 29 was held by Ireland, and it comprised, i.a., Algeria, Argentina, France, Iraq, Kenya, Poland, Romania, Turkey and Venezuela.

instead of "special" circumstances the term of "relevant" circumstances should be used.

The adherents of the equidistance line also tried to put through the viewpoint that the matters of delimitation involve a specific "mini-package", that is, that the criteria of delimitation should be tied to the obligatory solution of disputes and interim measures.

In view of the fact that the subsequent negotiating texts, namely, the Informal Single Negotiating Text, its revised version, the Informal Composite Negotiating Text, and its first revised version, had mentioned equitable principles as the basic of delimitation, they were regarded as unsuitable for acceptance by the group of 22 States pronouncing themselves in favour of the median line.

In 1978, the Conference recognized the question of delimitation as one of the seven most important matters of substance, on the solution of which the fate of the future convention on the law of the sea was dependent. Negotiations were started in a special, designated by the Plenary Session, Negotiating Group 7, presided by judge E. I. Manner from Finland.

In the period of two years, the Group was unable to hammer out a compromise agreement on the delimitation criteria for the economic zone and the continental shelf.

Approval was lacking not only for formulae submitted by both groups of interests, but also for those submitted by the so-called neutral States, that is, those having no direct interest in settling the question of delimitation.

One of such formulae was submitted by Peru:

"1. The delimitation of the Exclusive Economic Zone (Continental Shelf) between adjacent or opposite States shall be effected by agreement and in a manner consonant with the principle of equity. To this end, the general method employed shall be the median or equidistance line, and where there are special circumstances, such circumstances shall be taken into account to ensure that the principle of equity is applied".

Also Mexico proposed that agreement between the States concerned should lead in all cases to a solution consonant with equitable principles.²¹

All these proposals were rejected by the adherents of the median line.

Several variants of a compromise formula were also submitted by the Chairman of the Group. He rightly stressed that there exists a widely shared conviction that four factors should be embodied in paragraph 1 of Articles on the delimitation of the economic zone and the continental shelf (74 and 83), namely, that 1) delimitation should be effected on the basis

²¹ Cf. Doc. NG 7/29/Rev. 1.

of agreement; 2) all relevant or special circumstances should be taken into consideration; 3) equitable principles as well as 4) the equidistance line should be invoked.²² But all attempts failed to reformulate paragraph 1, of Articles 74 and 83 in a way enabling all these factors to be included therein without classification or internal hierarchization.

In one of his subsequent formulae, judge E. I. Manner proposed in April 1978 that:

"1. The delimitation of the exclusive economic zone/continental shelf between adjacent or opposite States shall be effected by agreement with a view of reaching an equitable solution, taking account of all the relevant circumstances, and employing, where local conditions do not make it unjustified, the method of equidistance".²³

This formula was decidedly rejected by Group 29, since it had not mentioned explicitly equitable principles.

Then, in his proposal of May 2, 1978, the Chairman mentioned not only equitable principles, but — to keep balance — also the principle of equidistance.²⁴ Also this proposal was rejected — by both Groups.

In attempting to find a solution, judge E. I. Manner suggested at the 8th Session in August 1979 the introduction of a new formula into the concept of delimitation, namely, that of "the equality of States in their geographical relations".²⁵ The proposal failed to gain approval, since — as it had been indicated — being ambiguous and settling practically nothing, it might lead only to further unnecessary complications.

During the first part of the 9th Session, the Chairman of Negotiating Group 7 submitted in his review of March 1980 a successive wording of paragraph 1 of Articles 74 and 83, mentioning at the same time that it did not constitute a final compromise.²⁶ Some delegations, among them those belonging to Group 22, regarded it as better than that contained in the Informal Composite Negotiating Text. Group 29 was against, but the text was introduced into the second revised version of the ICNT.

The text proposed by E. I. Manner stated:

"1. The delimitation of the exclusive economic zone/continental shelf between the States whose coasts are opposite or adjacent to each other shall be effected by agreement in ac-

²² Cf. The Declaration of the Chairman of the Negotiating Group 7 of March 26, 1979, Doc. NG 7/26.

²³ Doc. NG 7/9.

²⁴ Doc. NG 7/11.

²⁵ The English text of Articles 74 and 83 states: "1. The delimitation of the exclusive economic zone (the continental shelf) between States with opposite or adjacent coasts shall be effected by agreement in accordance with equitable principles, taking into account the equality of States in their geographical relations to the areas to be delimited, and employing, consistent with the above criteria and subject to the special circumstances in any particular case, the rule of equidistance".

²⁶ Doc. A/CONF.62/L.47, Annex, p. 1.

cordance with international law. This agreement shall be consistent with equitable principles, employing the median or equidistance line where this is appropriate, and taking into account all the circumstances prevailing in a given area".²⁷

During the plenary discussion at the first part of the 9th Session, the States belonging to Group 29 (also Poland) criticized the text, arguing that the new formula did not indicate whether the consistence of an agreement with international law means that there are no grounds for its invalidity. Also the ambiguousness of the definition "circumstances prevailing" was exposed.²⁸

The introduction of the wording submitted by judge E. I. Manner into the second revised version of paragraph 1 of Articles 74 and 83 of the ICNT was decidedly rejected by the Group 29.

In a letter of May 30, 1980 to Chairman of the Conference, H. S. Amerasinghe, the Group 29 indicated that it could not accept changes in paragraph 1 of Articles 74/83, since these changes had been made in contravention of the procedure adopted by the Conference, as set forth in Document A/CONF. 62/62 of April 14, 1978, according to which any modification of the ICNT should be a result of negotiations and could not be introduced on the initiative of any particular person, be it the Chairman of the Conference or of any of the Committees. The changes of the ICNT may be introduced by a plenary session of the Conference, and on the assumption that they offer a perspective for consensus. The signatories of Document NG 7/10 declared that the introduction of these amendments had been tantamount to the violation of the said rules of procedure, since paragraph 1 of Articles 74 and 83 had not received necessary support and had not resulted from negotiations.

In this situation, the Conference came to the conclusion during the second part of its 9th Session that the negotiations on the delimitation problems had not been yet finished and should be continued with the view of achieving a final compromise. Attempts at establishing a new negotiating forum, since it had been recognized that the continuation of work in the negotiating group offered no great hope of progress, lasted a rather long time. There were attempts to create a new negotiating group with a new

²⁷ Doc. A/CONF.62/WP.10/Rev. 2, Articles 74/83 (1). Incidentally, it should be noted that this proposal, as the previous one, introduces an editorial correction: instead of mentioning opposite States, it mentions States whose coast are opposite. This correction was introduced into subsequent texts, and finally entered into the text of the Convention.

²⁸ The delegations belonging to the Group 22 gave support to that text, hinting at the same time that the mention about the consistency with international law gave a chance of invoking Article 6 of the 4th Geneva Convention. In this context, it should be said that Article 311 of the draft Convention stipulates explicitly that the new Convention will, in relations between the parties, prevail over the 1958 Geneva Conventions.

chairman. Finally, it was agreed that the negotiations should be continued first by 6 and then 10 delegations from each group of interests²⁹ under the co-chairmanship of Ireland and Spain. The next six meetings brought about a further clarification of the positions of both groups. In particular, States favouring the median line stressed that they attached great importance to inserting a mention of international law into the text, whereas Group 29 indicated that such a mention would add nothing to the previous wordings and was superfluous. Also the traditional viewpoints on qualifying the circumstances as "special" or "relevant" were reiterated. Although the second part of the 9th Session failed to reach compromise formulations, the positions of the parties became significantly closer.

Negotiations to find definite criteria of delimitation continued during both parts of the 10th Session of 1981. They had been joined by Chairman of the Conference, T. Kooh, who during the first New York part of the Session had a series of meetings with the representatives of both groups of interests. Since the States pronouncing themselves in favour of equitable principles still opposed I. Manner's formula, the whole question could not be settled, though the group of the States favouring the median line had considered that the formula embodied in the informal project of the convention constituted a solid basis for a final agreement.

At the second, Geneves part of the 10th Session, direct negotiations took place between the chairmans of both groups of interests, who transmitted the results to the delegations concerned. Difficulties in finding a compromise in direct negotiations prompted T. Kooh to take initiative in his own hands and submit a compromise formula. He proposed a formula for Articles 74 and 83, different from those submitted before. It stated:

"1. The delimitation of the exclusive economic zone/continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of International Court of Justice, in order to achieve an equitable solution".³⁰

In principle, this text gained support of both groups of interest, since, on the one hand, it referred to international law, and thus fulfilled the demand of the group favouring the median line, and on the other, it could be approved by the group favouring equitable principles, since it put the stress on the necessity of an equitable solution, eliminating thus the need of defining it in the convention. The text also gained support of the

²⁹ The Group of the signatories of Document NG 7/2 was represented by Chile, Denmark, Greece, Spain, Japan, Yugoslavia, Colombia, Malta, Nigeria and Great Britain, and the Group 29 by Algeria, Argentine, France, Ireland, Libya, Madagascar, Morocco, Pakistan, Turkey and Venezuela.

³⁰ The text was presented in Doc. A/CONF.62/WP.11 of August 27, 1981.

Soviet Union, while the USA rejected it, and a number of other States reserved for themselves the right to define their attitude in a later date. Having gained a significant support, the proposal was finally entered into the Convention on the Law of the Sea the Conference.

2.2. Interim Measures

Since the delimitation of the economic zones or continental shelves by agreement had been frequently, as the practice had clearly demonstrated, a long-lasting and strenuous process, the somehow natural question arose whether articles on delimitation should entail a provision referring to the interim period. Although there were opinions that this was entirely superfluous, a different opinion prevailed, and already the first Informal Single Negotiating Text, prepared by the Chairman of the 2nd Committee, contained the following provision:³¹

"3. Pending agreement, no State is entitled to extend its exclusive economic zone continental shelf beyond the median or equidistance line".

This formula was strongly criticized especially the group of States pronouncing themselves in favour of equitable principles. It was indicated that the formula considered the equidistance line to be the fundamental principle of delimitation, which was inconsistent with the practice and international law, and that it settled in this way indirectly the question of delimitation criteria, and finally that, on the one hand, it gave no indication what the States concerned should do in the interim period and, on the other, it might lead in practice to the lessening of interest in a final solution by the State which had been satisfied by such an "interim solution". In view of this, the Chairman of the 2nd Committee changed the above formula and introduced its new variant:

"3. Pending agreement, the States concerned shall enter into provisional arrangements, taking into consideration the provisions of paragraph 1".³²

During the discussion which followed, the group of States favouring the equidistance line stressed that this formula was unacceptable to them, since it might lead to the exercise of jurisdiction beyond the median line. Moreover, though the formula visualized provisional arrangements, they would be as difficult to reach as the final ones, since they would have to be consistent with the delimitation criteria.

When, during the Session of 1978, the negotiations had been started in Group 7, the tasks of the Group consisted not only in reaching a compro-

³¹ Doc. A/CONF.62/WP.8, Article 61 (3) and Article 70 (3). Incidentally, it may be noted that Article 6 of the 4th Geneva Convention on the Continental Shelf of 1958 does not contain a formulation referring to the transitory period.

³² Doc. A/CONF.62/WP.9 Article 62 (3) and Article 71 (3).

mise on delimitation criteria, but also on interim measures and peaceful settlement of disputes.

The position of both groups of interest on interim measures had been presented in their program documents.³³ States pronouncing themselves for the median line suggested that pending settlement of a dispute in accordance with paragraphs 1 and 2 of articles on delimitation, the parties should refrain from exercising jurisdiction beyond the median or equidistance line, unless they had agreed on alternative interim measures of mutual restraint. But the group of States favouring equitable principles supported the wording of the revised ICNT which had envisaged provisional arrangements in accordance with the provisions of paragraph 1. Also Chairman of Group 7, judge E. I. Manner, suggested in a few proposals to reiterate the wording embodied in the ICNT.³⁴

The road towards a compromise had been in fact opened by the proposal of Morocco,³⁵ which postulated that the States concerned abstain from any measure that could prejudice a final solution or lead to aggravating of their conflict, and that they also endeavour to reach mutually acceptable provisional arrangements regarding the activities within the disputed area.

The discussion within the Negotiating Group concerned considerably the question of whether States should refrain from whatever activities in the disputed area, or whether they should regulate them through interim arrangements. The proposal of Papua New Guinea envisaged a moratorium against economic activities in the disputed area,³⁶ and an informal paper submitted by Norway referred to the limitation on the exercise of jurisdiction.³⁷ Whereas the majority of delegations regarded the conception of moratorium as ambiguous and unacceptable, the demand that provisional arrangements should not prejudice the final delimitation won general support. Also during the discussion there emerged the idea that paragraph 3 should contain the obligation or encouragement to concluding interim arrangements which would subsequently envisage the establishment of a "white" or "gray" zone.

At the 8th Session, India, Iraq and Morocco submitted a formulation which envisaged conclusion of provisional arrangements in a spirit of co-operation, restraint from activities or measures which might aggravate the situation, and stressed that such arrangements should be without prejudice to the final delimitation.³⁸

³³ Cf. respectively D. NG 7/2 of April 20, 1978 and D. NG 7/4 and NG 7/10.

³⁴ Cf. D. NG 7/9 of April 27, 1978, DOC. NG 7/11 of May 2, 1978.

³⁵ Doc. NG 7/3 of April 21, 1978.

³⁶ Doc. NG 7/15 of May 9, 1978.

³⁷ Doc. NG 7/16 of May 9, 1978.

³⁸ Doc. NG 7/32 of April 5, 1979. According to the proposal, provisional arrangements may concern both mutual restraint and mutual adaptation.

As this proposal had gained some support, the Chairman of the Negotiating Group arranged consultations involving, apart from the three sponsors, the Soviet Union and the Ukraine, and thereafter submitted a new version. However, it did not gain enough support to justify its inclusion in the revised Informal Composite Negotiating Text.

Finally, during the second part of the Session of 1979, judge E. I. Manner, having undertaken intensive consultations in two small groups, proposed the following formula:

"Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not in any way to hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation."³⁹

This formula gained general support and was included in the Convention. It imposes on the parties to a delimitation dispute first of all the duty to make every effort towards concluding a provisional arrangement of a practical character (that is, referring to the exploitation of the disputed area), and also of restraint from activities which could hamper the reaching of the final delimitation. In practice, these obligations, though important and useful, do not guarantee that such arrangements will be entered into on any contentious matter. But undoubtedly, this provision is useful, and its implementation may markedly contribute to the lessening of tension in many situations, which could arise in disputes over the delimitation of the economic zone and the continental shelf, and thus facilitate the reaching of the final agreement.

3. Principles of the Delimitation of the Exclusive Economic Zone and the Continental Shelf in Judicature and International Practice

The provisions of paragraph 1 of Articles 74 and 83 on the delimitation of the economic zone and the continental shelf between States with opposite or adjacent coasts consist of three elements indicating that delimitation should be effected a) by agreement; b) in accordance with international law; c) with the aim of achieving an equitable solution. In other words, the Convention determines the basis, criterion and aim of delimitation, approaching them as a *sui generis* dialectical unity. Thus the process of delimitation is based on three principles: agreement, consistency with international law, and equitable solution. The interpretation of these principles may be done not only by reference to the negotiating process at the

³⁹ D. NG 7/43 of August 17, 1979.

3rd Conference, but also to international judgments and international practice.

3.1. The Principle of Agreement

According to common international practice, the delimitation of maritime areas is effected by agreement in which the parties concerned determine the course of the boundary, taking into consideration various legal and extralegal (political, economic, geographical, etc.) factors, as well as security reasons and good-neighbourly relations.⁴⁰ Agreement between the parties is a basis and main element of delimitation also in another sense: if it has been concluded in conformance with the requirements of treaty law, in a way not resulting in its invalidity, and specifically without coercion and infringement of the rights of third States, then it fulfils *ipso facto* the terms formulated in Articles on delimitation, since it is consistent with international law and equitable. Also the International Court of Justice found in its judgement on the Delimitation of the North Sea Continental Shelf that according to basic tenets of law, and of *opinio iuris*, delimitation is to be effected by agreement between the parties concerned.⁴¹

In comparison with Article 6 of the Convention on the Continental Shelf of 1958, the provisions of the new Convention on the delimitation of the exclusive economic zone and the continental shelf enhance the importance of agreement, and they do it for two reasons. First, they do not entail the stipulation envisaging that "in the absence of agreement; and unless another boundary line is justified by special circumstances, the boundary is the median line", eliminating thus the possibility of a non-contracted, unilateral establishment of the boundary. Second, not only paragraph 1 envisages agreement between the parties, but also paragraph 3 does it by imposing on the parties the obligation to enter into provisional agreements for the transitory period, and paragraph 4 by stipulating that

"where there is agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone/continental shelf shall be determined in accordance with the provisions of that agreement".

The importance of agreement, as a basis of delimitation, is also not lessened by paragraph 2 of Articles 74 and 83, providing for the possibility of resorting by the parties to the provisions of Part XV of the Convention on the Settlement of Disputes. For States, according to Article 298, may exclude from under the binding procedures disputes relating to the interpretation and application of Articles 15, 74 and 83, which arose after

⁴⁰ Cf. Dissenting opinion V. KORETSKY, *North Sea Continental Shelf Cases*, Reports ICJ, 1969, p. 156.

⁴¹ ICJ Reports, 19..., p. 47.

the Convention had come into force; in that case only conciliatory procedure is possible. According to the adopted procedure, the Conciliation Commission submits only a non-binding report with appropriate conclusions, which may serve the parties as a basis for negotiating an agreement.⁴²

The conclusion of an agreement is always a result of negotiations between the parties, and though the provisions on delimitation do not define either the manner of conducting negotiations or their duration, these questions are rather undisputed. Negotiations must be conducted in accordance with the principle of sovereign equality, and the parties shall participate in them in a spirit of good faith, that is, with a view of achieving an agreement,⁴³ which in turn is not infrequently dependent on hammering out a compromise reflecting the reasons of the States concerned.

As to the duration of negotiations, this question is set out in paragraph 2 of Articles 74 and 83, which envisages that if no agreement is reached in a "reasonable period of time", the parties shall have recourse to the procedures provided for in Part XV. The appraisal whether this "reasonable period of time" has already lapsed belongs to the participants in negotiations, and is dependent not only on their duration but also on their course, results and outlook. The parties should resort to the peaceful means of settling disputes when all possibilities of direct negotiations have been exhausted, since also they are the first and basic means of the peaceful settlement of disputes.

In a situation when the parties cannot reach understanding, when there arises a dispute transforming itself not infrequently into a conflict, when a third party is to take a stand or find a solution, the basic issue consists in finding such a solution that could be recognized as equitable and consistent with international law.

3.2. The Principle of Consistency with International Law

The provisions contained in Articles on the delimitation of the economic zone and the continental shelf stipulate that agreement shall be concluded

⁴² If the parties submit their dispute to the International Court of Justice or to international arbitration, the necessity of concluding the final agreement is not excluded thereby. For a binding settlement may confine itself to indicating the principles according to which the delimitation should take place, leaving aside the question of implementation, and thus also the necessity of an appropriate agreement to be concluded by the States concerned.

⁴³ In Document NG 7/3 of 21 April, 1979, submitted by the Negotiating Group 7. Morocco had explained that the parties should not regard formal negotiations as a *sui generis* prerequisite of the automatic application of a specific method, resulting from the impossibility to reach an agreement. No sensible negotiations can be conducted if one party sticks to its viewpoint without considering any modification.

"on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice". The Convention does not indicate explicitly which norms or principles should be taken into consideration by the parties in the process of delimitation, and also the reference to Article 38 of the ICJ is not very helpful, since this Article indicates only the basic tenets of the Court's judgments, in stating that it will decide in accordance with international conventions, international custom and the general principles of law.⁴⁴

The reference to judicature and international practice, and also to the general trend which had manifested itself in the work of the 3rd Conference on the Law of the Sea, and which was reflected in the final wording of Articles 74 and 83, permits us, however, to find an answer for the question what are the principles that are to be applied by the States to the delimitation of maritime areas.

As we have already noted, the International Court of Justice unequivocally stated in its judgement on the Delimitation of the North Sea Continental Shelf that the delimitation should be effected by agreement, in accordance with equitable principles.⁴⁵

The ICJ position was reiterated in an Arbitration Award of June 30, 1977 on the Delimitation of the Continental Shelf between Great Britain and France. The Arbitral Tribunal, having analyzed the provisions of Article 6 of the Geneva Convention and the rules of customary law, decided that their aim was common, that is, the carrying out of the delimitation in accordance with equitable principles; this requirement was qualified by the Arbitral Tribunal as a fundamental norm.⁴⁶

Also in its judgement of February 1, 1982 in the Case of the Delimitation of the Continental Shelf between Tunisia and Libya, the International Court of Justice stated that it is bound to settle the case in accordance with equitable principles.⁴⁷ After all, also the position of the parties was unequivocal in that matter. Entrusting the ICJ with the solution of the

⁴⁴ The viewpoint expressed by the group of States favouring the median line principle, invoking explicitly international law as implied by Article 38 of the Statute of the ICJ, was explained by their assumption that the significance of Article 6 of the Geneva Convention on the Continental Shelf had been stressed by the said Article 38, since it had first mentioned conventional norms. This assumption was based on false premises. Article 38 did not establish the precedence of customary norms by the conventional ones. General custom has priority over particular conventional norms. Moreover, Article 311 explicitly implies that, in relations between parties, the new Convention has priority over the Geneva Conventions of 1958.

⁴⁵ *ICJ Reports* 1969, p. 54.

⁴⁶ *Reports of International Arbitral Awards*, vol. 18, pp. 47—48, and also p. 57.

⁴⁷ *ICJ Reports* 1982, p. 45.

dispute over the delimitation of their continental shelf, Tunisia and Libya asked that in delivering its judgement the Court take into consideration equitable principles and circumstances characteristic of that area, as well as the recent trends that had come to the force at the 3rd Conference on the Law of the Sea.⁴⁸

Instituting a Conciliation Commission in the matter of the continental shelf between Iceland and the Jan Mayen Island, Iceland and Norway, while defining its tasks, indicated that it should suggest measures for a practical and equitable solution of the relevant questions.⁴⁹

Also the analysis of the recently concluded international agreements shows that they have favoured the concept of equitable principles, while abandoning that of the median line. As examples, we may refer to the agreements between Japan and South Korea of 1975, Venezuela and the Netherlands of 1978, Venezuela and the United States of 1978, Australia and Papua New Guinea of 1978, Mexico and the United States of 1978, Malaysia and Thailand of 1979, the United States and Cook Islands of 1980, and New Zealand and the United States of 1980.

Moreover, the present wording of the delimitation provisions in the Convention on the Law of the Sea shows indirectly which principles of international law should be applied by the parties to delimitation. First, the fact that Article 6 of the Geneva Convention had been left out was a clear indication that a considerable number of States had been doubtful about the importance of the median or equidistance line. Second, the requirement that the solution be equitable implies the application of equitable principles, since it is only they that may guarantee such a result.⁵⁰

The notion of justice is not alien to international law. Suffice to say that the UN Charter, in its Article 1, lies down—as one of the UN aims—that international disputes or situations which might lead to a breach of the peace should be settled by peaceful means, and in conformity

⁴⁸ Cf. Special Agreement of June 10, 1977, Article 1. *Reports ICJ 1982*, p. 7. Although the Court stated that no specific criterion ensues from Article 83 (1), which could give an indication to the States interested in their efforts towards reaching an equitable solution, it nevertheless had no doubts about accepting this Article as the basis of its judgement.

⁴⁹ *Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area Between Iceland and Jan Mayen*, Washington, D.C., June 1981.

⁵⁰ Those who criticize equitable principles indicate that the new Convention on the Law of the Sea has not yet come into force. This is true, but it does not undermine the fact that the very course of the 3rd Conference and the eventually adopted text supply ample evidence.

with the principles of justice and international law.⁵¹

According to S. B. Molodcov, justice understood objectively is not only to be found within the realm of international law, but also is a necessary prerequisite of its creation and application.⁵²

Justice is a legal notion with a differentiated meaning.⁵³ In its judgement in the Case of the Delimitation of the Continental Shelf between Tunisia and Libya, the ICJ stated that in the sphere of international law justice was a general principle applied directly as law. It is in this sense that it should be distinguished from the power of the Court to decide in accordance with the principle *ex aequo et bono*. Such a possibility had been stipulated in paragraph 2 of Article 38 of the Statute of the ICJ, which envisaged that, if the parties agreed thereto, the Court might refrain from the strict application of law to reach an appropriate solution. In the case of the continental shelf, the Court's task was not to decide *ex aequo et bono*, but to apply equitable principles as a part of international law with the aim of reaching an equitable result.⁵⁴ A similar point of view was expressed by the Court earlier in the case of the Delimitation of the North Sea Continental Shelf.⁵⁵ Also the Arbitral Tribunal in the case of the Delimitation of the Continental Shelf between the United Kingdom and France explicitly stressed in its Award that it was not its task to decide *ex aequo et bono*.⁵⁶

It is significant that international judicature does not enumerate equitable principles. That is so not without reason. Considering the question, the ICJ stressed that the equitableness of a principle should be appraised in the light of its utility for reaching an equitable result. There is no principle which is equitable in itself. It assumes this character only in the light of the results to which it leads. Thus the term "equitable principles"

⁵¹ Also the Declaration on the Principles of International Relations of the ECSC speaks in its Rule V about the settling of disputes, so as to avoid the danger to international peace, security and equity. Further it states that the parties should strive towards equitable settlement of disputes, based on international law.

⁵² S. B. MOLODCOV, *Rasgraničenie morskikh prostranstv mezhdugosudarstvami*, in: *Aktualnye problemy sovremenovo mezhdunarodnovo prava. Mezhdunarodno-pravovye problemy territorii*, Moskva 1980, p. 28 ff. Also R. F. SOROKIN and W. P. CAREW (*Problem delimitacii morskikh prostranstv v svete rezultatov tretej konferenciji OON po morskomu pravu*, in: *Dejatelnost' gosudarstv v mirovom okeane*, Moskva 1983, p. 25), consider that the principle of equity appears in inter-State relations not only as a philosophical concept, expressing the human and democratic gist of equity, but also as a category corresponding to the basic principles and rules of contemporary international law.

⁵³ Some systems of law set the concept of equity against the rigid positive law, entrusting it with the task of mitigating the severity of legal norms.

⁵⁴ *ICJ Reports* 1982, p. 60.

⁵⁵ *ICJ Reports* 1969, p. 48.

⁵⁶ *Reports of International Arbitral Awards*, vol. 18, p. 114.

cannot be interpreted *in abstracto*.⁵⁷ The ICJ also stressed that it was impossible to reach an equitable solution for the delimitation of an area without taking into consideration the specific, relevant circumstances related to that area.⁵⁸ It was also in this spirit that the Arbitral Tribunal recognized that the righteousness of the application of any principle to reach an equitable delimitation is a function or reflection of geographical or other relevant circumstances in any particular case.⁵⁹

Thus international courts are uniform in their opinion that the affirmation of equitable principles means that there is no principle or method whose application could in each case lead to an equitable solution, since such a solution is dependent on all relevant circumstances related to a given situation, and thus, in consequence, it follows that there is no principle or method whose application would be obligatory in each case. It is in this context that we should appraise the place and role of the "equidistance line" (the median line) in delimiting maritime areas. This method was first proposed by S. W. Boggs in his article published in 1937,⁶⁰ which, after all, referred only to the application of the median line to the delimitation of rivers and lakes. The draft of the International Law Commission on the delimitation of the continental shelf of 1951 envisaged that in case when the continental shelf is adjacent to two or more States, they should determine its boundary by agreement. In the absence of agreement, the parties would be bound to determine the boundary by way of arbitration.⁶¹ This draft did not mention the median line. It was introduced into the draft article on delimitation in 1953 as a result of a suggestion of the Committee of Experts which had been consulted by the International Law Commission. But a commentary to this article explicitly stressed that the proposed method could not always lead to an equitable solution, hence such solution should be sought through negotiations.⁶²

Together with the introduction of the equidistance line into Article 12 and 24(3) of the Geneva Convention on the Territorial Sea and Contiguous Zone, and Article 6 of the Geneva Convention on the Continental Shelf, a discussion had been started, which found its distinct reflection in the work of the III Conference on the Law of the Sea. The discussion dealt with the legal character of the line, that is, with the question of whether it is not only a technical method but also a basic legal foundation of

⁵⁷ ICJ Reports 1982, p. 45; ICJ Reports 1969, p. 50.

⁵⁸ ICJ Reports 1982, p. 4.

⁵⁹ Reports of International Arbitral Awards, vol. 18, p. 57.

⁶⁰ Cf. S. W. BOGGS, *Problems of Water Boundary Definition: Median Lines and International Boundaries Through Territorial Waters*, "Geographical Review", 1937, vol. 27, p. 445 ff.

⁶¹ Doc. A/CN.4/SER.A/1951/Add. I, vol. 2, p. 141 ff.

⁶² Yearbook of International Law Commission 1953, vol. 2, p. 77—79.

delimitation, as well as with its relation to "special circumstances" envisaged by the Geneva Conventions.

These questions have been unequivocally settled by international courts. In its judgement in the case of the Delimitation of the North Sea Continental Shelf, the ICJ rejected the contention of Denmark and the Netherlands to the effect that the provisions of Article 6 of the 1958 Geneva Convention on Continental Shelf constituted a principle of general international law.⁶³ It also stated that in certain geographical circumstances, which anyway occurred rather frequently, the method of equidistance, notwithstanding its well-known advantages, led undoubtedly to iniquity as in the instance of the continental shelf where the smallest irregularities of the coastal line were automatically enlarged by this delimitation method. In the opinion of the Court, international law does not imply that some imperative principle be applied to the delimitation of the continental shelf, but permits the application of various principles and methods or their combinations.⁶⁴

The Arbitral Award in the dispute over the Delimitation of the Continental Shelf between Great Britain and France has provided important points for the discussion concerning mutual relations between the concept of equidistant line and that of special circumstances. The Tribunal concluded that Article 6 of the Convention on the Continental Shelf had not established two separate principles, those of equidistance line and of special circumstances, but only one joint principle of "equidistance line — special circumstances", integrating both these factors. The fact that Article 6 took into consideration "special circumstances" reflected the intention to secure equitable delimitation. In other words, the question of whether a boundary is justified by special circumstances forms an inseparable part of the principle envisaging the application of the equidistance principle.⁶⁵ This interpretation rejects the view, formulated now and then, that the median line is apparently the main and automatically applied principle of delimitation, and that a State claiming special circumstances is to prove that

⁶³ ICJ Reports, 1969, p. 29 ff.

⁶⁴ ICJ Reports, 1969, p. 50.

⁶⁵ Reports of International Arbitral Awards, vol. 8, p. 44 ff. This question is also dealt with by A. O. ADEDE, *Toward the Formulation of the Rule of Delimitation of Sea Boundaries Between States with Adjacent or Opposite Coasts*, "Virginia Journal of International Law 1979", vol. 19, p. 215; D. M. Mc RAE, *Delimitation of the Continental Shelf between the United Kingdom and France: The Channel Arbitration*, "The Canadian Yearbook of International Law", 1977, vol. 15, pp. 182—184; J. P. QUÉNEUDEC, *L'affaire de la délimitation du plateau continental entre la France et le Royaume-Uni*, RGDI 1979, pp. 77—82. If we assume that the equidistance line should be considered a general rule, and the clause of special circumstances in Article 6 is an exception to that rule, then *Exceptionis sunt strictissimae interpretationis*. The Arbitral Award, as L. D. M. NELSON states in his *Equity and the Delimitation of Maritime Boundaries* (in: "Iranian Review of International Relations", 1978, No. 11—12, pp. 214—215), has rejected this point of view.

they actually occur and are relevant to the case. But as the said Award shows, the question of special circumstances is solved automatically, and *onus probandi* is not incumbent on any party. The Tribunal also found that the principle of "equidistance line—special circumstances" is both a norm of treaty and customary law.

In its judgement in the case of the Delimitation of the Continental Shelf between Tunisia and Libya, the ICJ reiterated its previous opinion of 1969 and stressed that it might refer to the median line principle only on the basis of solutions ensuing from the appraisal, and in consideration of, all relevant circumstances, since in its opinion the equidistance line was neither an obligatory legal principle nor a method enjoying a privileged status in comparison with other methods.⁶⁶

The review of international practice shows clearly that States do not regard the application of the median line as obligatory, and that many treaties do not mention it at all.⁶⁷ At the same time one cannot disagree with the viewpoint that where the median or equidistance line gives equitable result, it is frequently applied also by the States which, in general, opt for delimitation in accordance with equitable principles.⁶⁸

The circumstances which determine whether the equidistance method should be applied in a given case, and whether its employment is to secure an equitable result, may be of a different nature. The science has not worked out a comprehensive enumeration of them, and that may be explained by the specificity of particular situations, hardly permitting generalization attempts.⁶⁹

⁶⁶ ICJ Reports 1982, p. 65.

⁶⁷ Cf. a list quoted by SANG-MYON CHEE in his *Equitable Solutions to the Maritime Boundary Dispute Between the United States and Canada in the Gulf of Maine*, AJIL, 1981, p. 606. The author stresses that many States, which are parties to the Geneva Convention on the Continental Shelf have in several instances desisted from invoking the median line principle. See also informations on that matter by K. G. NWEIHED, *EZ (Uneasy) Delimitation in the Semi-Enclosed Caribbean Sea. Recent Agreements Between Venezuela and Her Neighbours*, "Ocean Development and International Law", vol. 8, 1980, p. 8 ff.

⁶⁸ M. F. FELDMAN, D. COLSON (*The Maritime Boundaries of the United States*, AJIL, 1981, p. 749) state that though the American position on maritime boundaries is based on the conception of "equitable principles", the hitherto boundaries have been negotiated and delimited, to a considerable degree, in accordance with the median line principle.

⁶⁹ For instance, the appraisal of the consequences of a special circumstance depends on many additional factors. As a rule, an island of one State situated in the vicinity of another State's coast in a circumstance which should be taken into consideration. But how it will influence the process of delimitation depends on many factors, such as the class of the island (whether inhabited or not), size, relation to the coast, configuration of the sea-bed, historical titles, etc.

It seems, however, that a few categories of relevant circumstances may be enumerated. They may be connected with:

- a) geography — a specific configuration of the coast, the presence of islands, rocks, etc.;
- b) geology or geomorphology — configuration of the sea-bed (normal prolongation or disconnection of the continental shelf;
- c) natural resources — their kind, apportionment, rules of their exploitation;
- d) navigation — the presence of canals, navigation security problems;
- e) fishing — conservation problems, breeding grounds, fishing problems;
- f) conservation of the natural environment;
- g) historical titles and the position of the parties with regard to the disputed areas;
- h) security problems.

It is evident that the cases examined by the ICJ and the Arbitral Tribunal involved a specific set of relevant circumstances. In the dispute over the Delimitation of the North Sea Continental Shelf, considering the specific geographical configuration of the coast lines (depressed or protuberant) of the parties concerned, it frequently turned up that the claims of several States overlapped, met and crossed in places where, irrespectively of their distance from the coast, the sea-bed was undoubtedly still a continental shelf. The analysis of these situations according to the respective charts had demonstrated how inequitable would have been an obvious simplification ensuing from a delimitation exclusively based on the equidistance method, but ignoring the said geographical circumstances.⁷⁰

In the dispute between Tunisia and Libya, the ICJ indicated five relevant circumstances which should be taken into consideration with the view of achieving an equitable solution. They encompassed, i. a., the general configuration of the coasts, the presence and location of the islands, the course of the land boundary, and the conduct of the parties.⁷¹

In a dispute over the Delimitation of the continental shelf of 1977, the Arbitral Tribunal recognized as a relevant circumstance in relation to the Atlantic region, the location of the British islands (Scilly Isles), south-west of the Cornwall peninsula, which had justified the application of a different boundary than that ensuing from the strict median line method, and in the English Channel the nearness of the islands to the French coast.⁷²

Thus international judicature confirms the view that all relevant circum-

⁷⁰ *ICJ Reports 1969*, pp. 49 and 52.

⁷¹ *ICJ Reports 1982*, p. 79.

⁷² *Reports of International Arbitral Awards*, vol. 18. The Tribunal also enumerated the geographical, political and legal circumstances as being important for the delimitations of the Channel Islands continental shelf.

stances should be taken into consideration as a prerequisite for an equitable solution of the delimitation of the economic zone and the continental shelf.⁷³ Incidentally, it may be noted that this method may sometimes produce boundaries of the continental shelf differing from those of the economic zone: for instance, the agreement between Denmark and the Federal Republic of Germany of 1971 concerning the delimitation of the continental shelf established a boundary that differed from the geographical line, since the FRG had consented to leave Denmark hold of some areas for which the Danish Government had granted a concession to a Danish company before the ICJ judgement of 1969. But in the event of the delimitation of the economic zone between these two States, the boundary line may disregard that fact.⁷⁴

3.3. The Principle of Equitable Solution

Undoubtedly, the ascertainment of all relevant circumstances which should be taken into consideration in delimiting the continental shelf or the economic zone is the starting point of achieving an equitable result. But that does not answer *ipso facto* the very essential question of how to delimit a disputed area. E. I. Manner rightly points out that, for obvious reasons, it is frequently easier to reach the conclusion that a certain method of delimitation would produce, in specific circumstances, inequitable results than to decide how an equitable delimitation should be carried out.⁷⁵ As it seems, the requirement or criterion of proportionality may be useful in finding an equitable solution.

In its judgement of 1969, the ICJ stressed that equity did not necessarily imply equality. Thus it was out of the question to "improve" nature to the effect that an inland State would acquire a continental shelf identical to that of a State with a very short coastal line.⁷⁶ Having in mind that the land dominates the sea, the ICJ considered that the relation between

⁷³ Incidentally, it may be noted that international judicature is not entirely consistent as to the accepted terminology. The ICJ Judgements use invariably the term "relevant circumstances", while the Arbitral Tribunal, following Article 6 of the Geneva Convention on the Continental Shelf, uses the term "special circumstances". It seems that the term "relevant circumstances" is more accurate and conformable to the general trend, since the term "special circumstances" is sometimes interpreted restrictively.

⁷⁴ Cf. a commentary which was submitted by R. LAGONI to the 13th Conference of the Institute of the Law of the Sea, *Law of the Sea: State Practice in Zones of Special Jurisdiction*, ed. by T. A. Clingen, Honolulu 1982, p. 334.

⁷⁵ E. I. MANNER, *Some Basic Viewpoints on Delimitation of Marine Areas Between Neighboring States*, in: *The Frontier of the Seas, The Problems of Delimitation Proceedings of 5th International Ocean Symposium, November 26—27, 1980, Tokyo 1981*, p. 13.

⁷⁶ ICJ Reports 1969, pp. 49—50.

the areas subject to delimitation and the coasts of the parties should be taken into consideration. In its judgement concerning the Delimitation of the continental shelf between Tunisia and Libya, the Court stated that for the purpose of achieving an equitable solution, there had been necessary to take into account the factor of a reasonable degree of proportionality between the extent of the continental shelf apportioned to the coastal State and the length of the respective part of its coast, measured in the general direction of the coastal line.⁷⁷

The criterion of proportionality has been adopted by the doctrine,⁷⁸ though it cannot be applied to each delimitation of a maritime area.⁷⁹ Its application "objectifies" to a considerable degree the final result of delimitation. This has its importance in view of the criticism in the doctrine directed against the concept of delimitation based on equitable principles, but defending the specific significance of the equidistance line.⁸⁰

An equitable settlement may be achieved not only through the delimitation of disputed areas, but also — and that may seem a paradox — through desisting from delimitation and creating either areas of common use or specific legal solutions. Such a situation may arise with the discovery of oil or gas resources. In such a case, the delimitation of the disputed

⁷⁷ *ICJ Reports 1982*, p. 77. Following appropriate calculations, the ICJ recognized that the proportions of coastal lines are as 40 (Libya) to 60 (Tunisia), and delimited the disputed area respectively, declaring that such a result, accounting for all relevant circumstances, fulfills the requirements of the proportionality and equitableness tests.

⁷⁸ Cf. M. D. BLECHER, *Equitable Delimitation of Continental Shelf*, AJIL 1979, p. 73; M. B. FELDMAN, *The Tunisia-Libya Continental Shelf Case: Geographic Justice or Judicial Compromise?*, AJIL 1983, p. 232; SANG-MYON RHEE, *Equitable Solutions to the Maritime Boundary Dispute Between the United States and Canada in the Gulf of Maine*, AJIL 1981, p. 617 ff.

⁷⁹ It is doubtful whether this criterion could be fully applied, for instance, if an island situated in the vicinity of the coast of an alien State is to be regarded as a relevant circumstance. In that case, the conception of "natural prolongation" of the land may have greater importance, that is, the ascertainment whether we are not faced by an intrusion into the continental shelf of another State. However, also in this case we may invoke proportionality but from the negative angle, since we have to find out whether we will not obtain disproportionate and at the same time inequitable results if the location of the island is taken account of.

⁸⁰ Such is the viewpoint of D. M. RAE (in his *Delimitation of the Continental Shelf Between United Kingdom and France: The Channel Arbitration*, "The Canadian Yearbook of International Law", vol. 15, 1977, p. 195) who considers that the question of equity may induce any tribunal to issue a judgement without taking into consideration objective indications. Referring himself to the ICJ judgement of 1969, E. D. Brown (in his *Legal Regime of Hydrospace*, London 1971, p. 70) stated that the interpretation of equity by the Court deprived law of reasonable degree of certainty. Similarly, P. ALLOT, *Power-Sharing in the Law of the Sea*, AJIL 1983, p. 21 ff. This, of course, is a criticism from the position of defence, which recognizes the equidistance line not only as a method, but also as the main principle of delimitation.

area without settling the question of the exploitation of the resources may, in connection with the extraction activities of one of the parties, lead to further disputes or even conflicts.

To avoid problems of this kind, the States may establish, by agreement, a zone or area in which both parties have equal rights. Such a solution has been adopted in 1969 by Abu Dabi and Quatar. The agreements of 1974 provide for common zones between Sudan and Saudi Arabia as well as between Japan and South Korea. Also the Conciliation Commission set up by Iceland and Norway to work out an equitable solution of the problems concerning the delimitation of the continental shelf between Iceland and the Jan Mayen Island, proposed in its report of 1981 a common zone.

The fact that such solutions have been achieved without the participation of third parties, and without resorting to international adjudication, shows that agreement between the parties is and will remain the basic device for the equitable settlement of the questions concerning the delimitation of economic zones and continental shelves.

The adoption by the Convention on the Law of the Sea, in accordance with international practice and judgements, of the principle stressing the necessity of achieving equitable settlements by agreement, that is, through negotiations, endows international law of the sea with the indispensable element of flexibility and reality, becoming thus an important factor in the solution of the existent and potential territorial disputes.

L'Etat dans le système de l'organisation internationale

par WOJCIECH MORAWIECKI

1. La façon d'approcher les problèmes.

Une organisation internationale¹ peut être définie comme un système de coopération des Etats membres, dont la caractéristique fondamentale est l'existence d'organes permanents exprimant par leurs décisions la volonté de l'organisation entière et appelés à accomplir les tâches communes correspondant aux intérêts concordants de ces Etats.

L'application à l'étude d'une organisation internationale des principes de la théorie générale des systèmes semble très utile pour une nette distinction et mise en ordre des notions ainsi que pour révéler la dynamique du fonctionnement d'une telle organisation.

Un des faits essentiels à faire remarquer à l'occasion de l'application de l'analyse systémique à une organisation internationale c'est le double rôle des Etats². D'un côté, ils apparaissent comme des éléments fondamentaux du système de l'organisation, en tant que ses membres participant au processus d'interaction dans le cadre de sa structure et en accord avec ses règles de fonctionnement. De l'autre côté, par le fait de leur comportement dans une sphère donnée de relations internationales, mais en dehors du système de l'organisation internationale, les Etats en constituent l'entourage ou le milieu, dont viennent les impulsions (*input*) traitées au sein du système de l'organisation, et sur lequel l'organisation exerce ensuite une

¹ Par organisation internationale nous entendons ici seulement les organisations qui ont pour membres des Etats. On les appelle aussi organisations intergouvernementales à la différence des organisations qui ont pour membres des personnes physiques ou morales.

² Ce fait a notamment été relevé par l'éminent théoricien du droit international, G. SCHELLE (v. son *Précis de droit des gens*, Paris 1932, p. 43 et ailleurs) en utilisant la notion de dédoublement fonctionnel.

influence par son activité orientée vers l'extérieur (*output*)³. Avec cette approche, l'organisation internationale apparaît dans le système global des relations internationales comme un secteur fonctionnel de ce système (section étant faite d'après la sphère de fonctionnement de l'organisation). Le double rôle des Etats résulte de ce qu'ils sont des éléments fondamentaux du système global des relations internationales ainsi que du système de l'organisation internationale qui joue un rôle de sous-système fonctionnel vis-à-vis du premier.

Le trait caractéristique fondamental de toute organisation est l'existence d'organes permanents appelés à exprimer la volonté de l'organisation dans son ensemble. Cela est lié à la question de la position autonome de l'organisation par rapport à ses membres — pris tous ensemble et chacun séparément — à sa personnalité distincte (entre autres juridique). Cela est lié également à la séparation de l'organisation de son entourage. Le degré d'autonomie de l'organisation peut varier en fonction de son degré d'intégration. Dans le cas de l'organisation internationale, ce degré est nécessairement relativement peu élevé, puisque ce sont des Etats souverains qui en font partie.

Lorsqu'on analyse et l'on apprécie une organisation internationale, il faut se rendre compte de ce qu'à vrai dire presque toutes ses activités se laissent ramener à la prise de décisions⁴. En distinguant trois types principaux des fonctions de l'organisation internationale⁵, on peut constater que les fonctions régulatrices ont pour effet les décisions fixant les modèles de conduite des Etats, les fonctions de contrôle — les décisions appréciatives de la conduite des Etats, tandis que les fonctions opérationnelles — les décisions allouant des ressources matérielles et humaines dont dispose une organisation internationale⁶.

Les décisions traduisant la volonté de l'organisation sont prises par les organes principaux créés à cet effet en vertu des statuts de l'organisation

³ L'activité d'une organisation se divise en activité extérieure, lorsque ses effets sont dirigés vers son entourage, et activité intérieure, lorsqu'elle concerne le fonctionnement du mécanisme de l'organisation (p. ex. les conditions d'admission, le budget et les cotisations, les règlements intérieurs de ses organes, la création d'organes auxiliaires). L'activité intérieure de l'organisation internationale ne sera pas au centre de notre intérêt.

⁴ C'est la raison pour laquelle on critique parfois telle ou telle organisation internationale pour ce qu'elle se borne à une « production verbale ».

⁵ V. W. MORAWIECKI, *Funkcje organizacji międzynarodowej* [Les fonctions de l'organisation internationale], Warszawa 1981, pp. 97—105 et ailleurs.

⁶ Certaines ressources matérielles prévues dans le budget administratif sont indispensables pour assurer le fonctionnement du mécanisme intérieur de l'organisation. A notre époque cependant se développent certaines fonctions opérationnelles extérieures des organisations internationales, principalement en ce qui concerne l'assistance aux pays moins développés.

qui fixent également les principaux paramètres du processus décisionnel en déterminant notamment la composition de ces organes, leurs compétences, les modalités de fonctionnement et la valeur juridique des décisions. Les décisions les plus importantes revêtent la forme de résolutions adoptées par des organes collégiaux composés d'Etats membres représentés par leurs gouvernements (organes intergouvernementaux)⁷.

Les organes intergouvernementaux jouent le rôle de canal principal de l'interaction entre les Etats membres, matière essentielle du processus décisionnel. C'est précisément dans ce type d'organes de l'organisation internationale que l'on voit pleinement l'importance des paramètres structurels du processus décisionnel tels que la composition de l'organe et la procédure de vote. L'importance juridique des décisions d'une organisation internationale se ramène en principe, étant donné le caractère souverain des Etats membres, à des recommandations non obligatoires formellement, à moins que les statuts n'en disposent autrement⁸. Cependant, les recommandations adoptées par les organes de l'organisation, traduisant la position et la volonté de celle-ci, représentent un important moyen d'influence sur la conduite des Etats.

Le rôle de l'un des principaux organes de l'organisation internationale est joué également par son secrétariat composé de fonctionnaires internationaux et dirigé par un secrétaire ou directeur général⁹. Le secrétariat remplit des fonctions de service vis-à-vis des organes intergouvernementaux, ce qui lui permet d'exercer une certaine influence sur leurs décisions. Il accomplit des fonctions opérationnelles, la plupart du temps dans la sphère intérieure, mais aussi à l'extérieur de l'organisation vis-à-vis des Etats.

Le contenu politique du processus décisionnel dans les organes intergouvernementaux consiste avant tout dans les consultations mutuelles des Etats membres de l'organe sur les matières débattues. Au cours de consultations, les différents Etats membres articulent leurs intérêts et ajustent leurs

⁷ Les principaux organes intergouvernementaux peuvent créer des organes auxiliaires qu'ils jugeront utiles. Les décisions prises par des organes auxiliaires servent seulement à préparer les décisions des organes principaux. Cependant, les organes auxiliaires constituent souvent un cadre institutionnel très essentiel du processus politique d'élaboration des décisions. Dans la pratique, les recommandations des organes auxiliaires ne sont la plupart du temps que formellement approuvées par les décisions d'organes principaux, adoptées sur leur base.

⁸ La question de la valeur juridique des décisions concernant la sphère du fonctionnement intérieur de l'organisation se présente autrement. Afin d'assurer un bon fonctionnement des mécanismes de l'organisation, on présume qu'elles sont adoptées à la majorité des voix et qu'elles sont obligatoires.

⁹ Ont également un caractère de fonctionnaires internationaux les membres des organes judiciaires, en règle générale collégiaux. Mais ces organes jouent un rôle marginal dans les organisations internationales universelles.

positions, ce qui permet de déceler les points convergents et divergents. Déjà ce processus donne, en résultat, une certaine adaptation mutuelle de la conduite des Etats membres cherchant à coopérer entre eux, car, connaissant mieux leurs intérêts et positions respectifs, les différents Etats pourront mieux en tenir compte en arrêtant leur politique dans une matière donnée. Ainsi ce processus des consultations mutuelles, même si — dans l'hypothèse extrême — les négociations multilatérales n'aboutissent pas à un accord sur le contenu d'une décision susceptible d'être adoptée sous forme de résolution, joue-t-il un rôle important dans l'organisation internationale.

Le processus décisionnel, s'ouvre avec le fait de soumettre aux débats de l'organe par un ou plusieurs Etats une affaire déterminée qui, en règle générale, concerne les intérêts de cet Etat ou groupe d'Etats. Il prend fin formellement par une résolution lorsque le contenu de celle-ci a fait l'objet d'une concertation suffisante pour remplir les conditions procédurales de la validité de la résolution. Le processus décisionnel se termine par un échec lorsque ces conditions ne peuvent pas être remplies.

La prise de décision est une manifestation de la concordance d'intérêts dans une matière donnée, sinon de tous les membres de l'organe concerné — ce qui se produit en cas d'unanimité — au moins de leur majorité déterminée par la procédure de vote. Cependant, en se servant de la notion de concordance d'intérêts des pays membres, il faut se rendre compte de ce que même un vote formel positif en faveur de la prise d'une décision ne signifie pas que les Etats qui le font y soient intéressés et en soient satisfaits à un même degré. Car le contenu de la décision correspond à un compromis atteint à l'issue de consultations et de négociations ayant un caractère de marchandage, et se situe au niveau du plus grand dénominateur commun des intérêts des Etats qui sont d'accord¹⁰. Toujours donc il ne correspondra que plus ou moins à ce que les Etats particuliers pourraient considérer comme une solution optimale pour eux, c'est-à-dire la meilleure pour leurs intérêts.

La notion d'intérêt de l'Etat, autrement dit l'intérêt national, est l'une des catégories fondamentales de la science des relations internationales et, en particulier, de la science des organisations internationales.

La formation même d'une telle organisation dépend d'une relativement

¹⁰ Outre les Etats votant pour une décision, il peut y avoir des Etats qui s'abstiennent, ce qui peut traduire leur indifférence voire la tolérance d'une décision discordante du point de vue de leurs intérêts, mais pas au point qu'ils jugent nécessaire de s'y opposer formellement en votant contre. La corrélation entre les intérêts de l'Etat et sa façon de voter est encore plus compliquée. Le vote positif en faveur d'une résolution peut en effet camoufler l'attitude réelle de l'Etat dès qu'elle ne sera pas accompagnée de la volonté politique de mise en oeuvre de cette résolution.

haute concordance d'intérêts des Etats qui en vont devenir les membres, et la condition de son succès est, ensuite, un caractère relativement durable d'une telle concordance. La concordance d'intérêts dans la sphère relevant de la compétence d'une organisation internationale permet en effet de coopérer en faveur de l'accomplissement des tâches communes, ce pour quoi les membres d'une organisation ont besoin de celle-ci.

La concordance d'intérêts des Etats dans le cadre d'une organisation internationale ne consiste cependant pas en identité d'intérêts de ses membres. En réalité ces intérêts sont toujours plus ou moins différenciés. Aussi, à côté des processus de coopération apparaissent-ils entre les membres d'une organisation internationale des processus de rivalité liés aux différences d'intérêts. On peut dire que les processus de coopération sont dialectiquement mêlés à ceux de rivalité entre les Etats dont chacun est engagé dans cette rivalité pour donner à l'activité de l'organisation, donc à ses décisions, le contenu le plus conforme à ses propres intérêts. Comme certains membres trouveront davantage leur intérêt dans certains secteurs d'activité de l'organisation et moins, sinon aucun dans d'autres, comme par ailleurs certains d'entre eux peuvent exercer une plus grande influence sur cette activité et d'autres moindre, l'organisation concernée peut apporter plus d'avantages à tels membres et moins à tels autres. L'équilibre politique, largement et dynamiquement entendu, d'une organisation internationale peut être considéré comme étant acquis dès que l'activité de celle-ci ne nuit aux intérêts d'aucun de ses membres.

Qui plus est, le dynamisme politique de l'activité d'une organisation internationale peut enfreindre cet état d'équilibre et ses décisions risquent même d'être plus ou moins préjudiciables à ses membres qui alors voteront contre ces décisions, sans toutefois être à même de s'opposer efficacement à leur adoption, par exemple dans le cas où les résolutions sont adoptées à la majorité des voix. Cependant, lorsque de tels écarts concernent une fois certains et une autre fois d'autres membres de l'organisation, en offrant à chacun un bilan positif d'avantages et de désavantages du point de vue de leurs intérêts nationaux à long terme, on pourra considérer ces écarts comme restant dans les limites d'une oscillation normale de l'organisation autour de l'état d'équilibre.

La situation serait anormale lorsque de tels écarts se produiraient toujours dans un même sens et signifieraient la méconnaissance des intérêts du l'un des membres de l'organisation ou, qui pis est, de tout un groupe de membres, en provoquant ainsi pendant longtemps un bilan sensiblement négatif de leur participation à l'organisation. Une telle situation conduirait inévitablement, dans les cas extrêmes, à la sortie des membres lésés, de l'organisation, ce qui aurait pour effet la désintégration de l'organisation.

Le point critique après le dépassement duquel l'écart de l'état d'équilibre dans l'activité de l'organisation serait tellement sensible qu'il en provoquerait la désintégration, peut être appelé limite de résistance de l'organisation internationale.

Entre l'état d'équilibre et la limite de résistance d'une organisation, de nombreux états intermédiaires peuvent se manifester. Lorsque dans la sphère d'oscillation normale autour de l'équilibre politique les intérêts des membres particuliers de l'organisation ou de leurs groupes subissent quelques dommages résultant de l'activité de l'organisation, ces dommages toutefois étant moindres que les avantages, leur participation à l'organisation restera dans les limites d'une rentabilité générale. Le dépassement de cette sphère d'activité de l'organisation risque de procurer à certains de ses membres plus de dommages que d'avantages. Mais la plupart du temps, ils ne se décideront pas encore à se retirer tant que, du point de vue de leurs intérêts à long terme, le bilan négatif de leur appartenance n'ira pas au-delà des conséquences négatives d'une telle décision. Dans ces situations, il s'agira donc de choisir le moindre mal, fait assez typique dans la politique¹¹.

L'analyse qui précède montre que, vue de la perspective des Etats

¹¹ Les cas de retrait d'un Etat d'une organisation internationale sont donc relativement rares. A la différence par exemple de la Société des Nations dont s'étaient retirés plusieurs Etats, entre autres l'Allemagne, l'Italie et quelques pays d'Amérique Latine, il n'y eut pas un seul cas de retrait de l'O.N.U. Toutefois pendant la « guerre froide » dans les années 1950—1952, les Etats socialistes dont la Pologne s'étaient vus contraints à quitter quelques organisations spécialisées des Nations Unies qui dans le rapport des forces alors existant étaient devenues un instrument de politique hostile envers ces Etats. C'étaient l'OAA, l'OMS et l'UNESCO. En 1950, la Pologne a quitté également le Fonds Monétaire International et la Banque Mondiale car dans les conditions en vigueur à l'époque elle ne voyait pas la possibilité de bénéficier de leur assistance. Dès que la situation a changé, la Pologne et les autres pays socialistes sont rentrés dans l'OAA, l'OMS et l'UNESCO au cours des années 1954—1957. En 1981, la Pologne a demandé son admission au FMI. Mais à la suite d'une grave tension survenue en 1982 dans les relations entre les Etats-Unis et d'autres puissances occidentales d'un côté et la Pologne de l'autre, les conditions n'étaient pas favorables à ce que cette demande fût satisfaite. En revanche, à l'issue de l'attaque lancée au sein de l'Organisation Internationale du Travail contre la Pologne sous le prétexte du manque de liberté syndicale, le gouvernement polonais s'est vu contraint, en 1984, à notifier son retrait de l'O.I.T.

La menace de retrait d'une organisation internationale peut constituer un moyen de pression utilisé par un Etat en vue de faire respecter davantage ses intérêts ; ce moyen peut s'avérer particulièrement efficace entre les mains d'une grande puissance. L'exemple en est le retrait des Etats-Unis de l'O.I.T., notifié le 6 novembre 1977. Jugeant que la majorité des membres de l'O.I.T. en avait tiré des enseignements, les Etats-Unis ont déclaré leur nouvelle adhésion à l'O.I.T. le 18 février 1980. Le même motif semble être à l'origine de la notification par les Etats-Unis, à la fin de 1983, de leur retrait de l'UNESCO.

membres particuliers, l'organisation internationale est par la nature des choses envisagée comme une institution appelée à servir les intérêts de chacun d'eux et que, par la nature des choses, chacun d'eux cherche à faire en sorte que l'activité de l'organisation soit la plus avantageuse pour lui.

Si l'on reconnaît que c'est dans cette perspective seulement, la seule opérationnellement réelle, on peut examiner une organisation internationale, on arrive à la conclusion que dans une investigation ayant pour but l'évaluation du rôle, de l'activité ou des décisions concrètes d'une organisation internationale, et qui présenterait à la fois un intérêt pratique et un sens scientifique, il faut adopter comme système de référence l'intérêt national concret des différents Etats membres plutôt qu'intérêt abstrait et insaisissable de ces Etats dans leur ensemble.

Ce critère d'appréciation est évidemment toujours relatif et subjectif. Il est relatif car, faites de la position des intérêts nationaux des autres Etats, les appréciations des mêmes décisions de la même organisation seront différentes comme différents sont leurs intérêts. Ce critère est subjectif car l'intérêt national d'un Etat a un caractère subjectif. En effet, il est déterminé à partir d'une position de classe, de groupe ou individuelle donnée.

Dans le contexte des relations internationales c'est le gouvernement de l'Etat donné qui est appelé à dire de façon valable officielle quel est l'intérêt national de cet Etat, c'est-à-dire ce qui — et dans quelle mesure — est avantageux ou non pour cet Etat. En catégories de droit international, sont généralement autorisés à représenter l'Etat dans les relations internationales des organes centraux tels que le chef d'Etat, le chef du gouvernement et le ministre des Affaires étrangères. Toute déclaration officielle de l'un d'eux est considérée comme une expression de la volonté de l'Etat. D'autres organes ou personnes également peuvent exprimer la volonté de l'Etat dans les relations internationales, à condition qu'ils aient pleins pouvoirs présumés — dans le cadre de leurs compétences officielles — ou formels d'agir ainsi, qui leur ont été donnés par l'un des principaux organes susmentionnés de la représentation à l'extérieur. Le mode de désignation de ces organes et la formation de la conception de l'intérêt national dont ils se servent sont considérés dans le système des relations internationales comme des questions intérieures de l'Etat, une sorte de « boîte noire » dont l'intérieur n'est pas à être regardé.

Toutefois, l'on ne peut pas ne pas remarquer que les conceptions de l'intérêt national exprimées par les différents gouvernements d'un même Etat peuvent accuser des différences plus ou moins poussées et changent avec les gouvernements. Elles ont certainement un caractère de classe. Une tendance générale se fait voir à identifier avec l'intérêt national non seulement ses propres intérêts de classe, mais aussi ceux de groupe, voire

individuels. C'est pourquoi les conceptions de l'intérêt national peuvent ne pas être les mêmes dans l'optique des représentants d'un seul et même gouvernement, ce qui fait que dans les différentes ou dans les mêmes organisations internationales des opinions contradictoires sur les mêmes questions (des cas flagrants ont eu lieu à l'O.N.U.) sont exprimées par les représentants du même gouvernement avec le manque assez fréquent de coordination suffisante de l'activité internationale de l'Etat.

Posée cette façon d'approcher le problème de l'évaluation des activités d'une organisation internationale, on peut dire d'une façon générale que ces activités seront d'autant plus avantageuses du point de vue des intérêts de l'Etat, que l'influence de cet Etat sur les décisions de l'organisation internationale sera plus grande et que l'influence exercée par ses décisions sur son entourage sera plus forte. La condition d'une action rationnelle de l'Etat dans le souci de servir ses intérêts consiste pour lui à dresser un bilan des coûts et des avantages de sa participation à l'organisation et, en vue d'en accroître la rentabilité, à adopter une bonne stratégie à l'égard de l'organisation internationale.

Les points qui suivent sont consacrés à ces questions.

2. L'influence de l'Etat sur les décisions d'une organisation internationale

La question de savoir si et dans quelle mesure les décisions d'une organisation internationale sont avantageuses pour les intérêts d'un Etat membre dépend de l'influence de cet Etat sur le processus décisionnel.

Dès prime abord, il faut faire remarquer que, dans une organisation internationale, il est inconcevable qu'un Etat agisse isolément. Bien qu'une telle action — si elle était réalisable — ne soit pas, elle non plus, sans effet, seule une action collective du plus grand nombre possible de membres de l'organisation peut exercer une influence efficace sur le processus décisionnel.

En cas d'action offensive de l'Etat, en particulier lorsqu'il prend l'initiative d'une question au sein de l'organisation ou lorsque la décision concernée est dans son intérêt national d'importance primordiale, la condition d'une influence efficace consistera à obtenir pour cette décision un soutien assez vaste pour que les conditions procédurales de la validité de la résolution soient remplies. Dans la procédure la plus libérale, il faudra une majorité simple des voix, et lorsque c'est l'unanimité qui est requise — le consentement de tous les membres de l'organe donné¹².

¹² Il convient de faire remarquer qu'à notre époque la condition de l'unanimité a été conservée en règle générale en ce qui concerne les décisions les plus importantes prises dans des organisations régionales où, grâce à un degré relativement élevé de la concordance d'intérêts des Etats membres, cette condition ne risque pas de paralyser l'activité de ces

En cas d'action défensive, dans les conditions de la procédure du vote unanime, même un seul Etat membre dont les intérêts seraient menacés par la décision à prendre, peut empêcher l'adoption de cette décision. Dans cette procédure en effet chaque membre de l'organe compétent a le droit de veto¹³. Dans les conditions de la procédure majoritaire il faudra cependant le vote négatif collectif au moins d'un tel nombre de membres de l'organe qui empêche les conditions procédurales de la validité de la décision de se réaliser, c'est-à-dire qui ne permette pas que les partisans de la décision défavorable à l'opposition obtiennent la majorité requise des voix¹⁴. Etant donné qu'en règle générale les décisions sur les questions importantes pour les intérêts des Etats membres exigent, dans les organisations internationales, une majorité qualifiée (par exemple deux tiers ou trois quarts), la nécessité de s'assurer une minorité suffisante pour bloquer une décision (par exemple le tiers, le quart des voix, ou même moins en prenant en considération qu'une partie des membres s'abstiendront ou ne participeront pas au vote), détermine dans la pratique des organisations de caractère universel la tendance des Etats à se grouper en s'appuyant sur une concordance d'intérêts plus solide et plus durable. De tels groupements appelés régionaux constituent l'un des éléments essentiels de la structure et du mécanisme de fonctionnement des organisations internationales que nous avons mentionnées.

Quant à la tendance à s'assurer les prémisses politiques d'une influence offensive efficace, plus difficiles à réunir dans le rapport des forces au sein des organisations universelles, elle est à l'origine de coalitions plus conjoncturelles et mouvantes.

Le degré d'influence des Etats sur une organisation internationale dépend de plusieurs facteurs.

C'est indubitablement le nombre des voix dont l'Etat dispose de façon relativement durable avec les autres Etats du groupement dont il fait partie.

C'est ensuite la capacité de se gagner, par marchandages et pressions, organisations. Par ailleurs, les conditions formelles de la procédure du vote sont adoucies par le fait que dans les organisations internationales contemporaines seule une majorité ou l'unanimité relatives sont requises. Cela signifie que l'on compte seulement les voix exprimées pour ou contre, tandis que l'on ne tient pas compte des abstentions et des non-participations. L'adoucissement des conditions de procédure consiste également dans la pratique répandue de prendre des décisions sur la base de consensus, lorsqu'en renonçant au vote formel, le président de l'organe donné déclare la décision adoptée à défaut d'une opposition formelle.

¹³ Le droit de veto peut appartenir aussi à certains membres seulement de l'organe, par exemple à cinq grandes puissances, membres permanents du Conseil de Sécurité.

¹⁴ Une condition de la validité d'une décision peut consister en un quorum pour le calcul duquel on tient compte uniquement des membres votants. Le quorum peut ne pas être atteint par suite non seulement de la non-participation au vote mais aussi de l'abstention d'un nombre considérable de membres de l'organe.

les voix d'autres membres pour le soutien de sa position ou pour neutraliser ainsi les membres non favorables à la décision que l'on veut voir adopter.

Enfin, c'est la capacité de faire dépendre la réussite des activités d'une organisation internationale de l'attitude qu'adoptent à son égard un Etat ou les Etats du groupement donné.

Il ne s'agit pas seulement de la dépendance financière de l'organisation de la participation des Etats au financement de ses activités sous forme de cotisations au budget administratif ou de dotations bénévoles au profit de programmes d'opérations extérieures.

Il s'agit avant tout du rôle réel d'un Etat et des autres Etats du groupement donné dans les matières faisant l'objet de décisions d'une organisation internationale. C'est ce rôle réel des Etats qui détermine leur poids dans la discussion et le degré auquel les Etats membres et leurs groupements doivent tenir compte des réactions positives et négatives à leur comportement. Le rôle réel des Etats détermine également l'importance que la participation active ou la non-participation de ces Etats à la mise en oeuvre des décisions présente pour le succès de ces dernières.

Aussi les indices du rôle effectif des Etats et de leurs groupements dans les relations internationales ont-ils une haute importance dans l'appréciation du rapport des forces qui règne dans l'organisation internationale et de l'influence des Etats sur ses décisions, donc sur l'orientation politique de l'organisation. Ces indices méritent l'attention pour cette raison également que beaucoup d'entre eux sont mesurables et comparables, ce qui facilite sensiblement toute analyse.

Parmi ces indices, il faut évidemment tenir compte d'un indice général tel que le produit national brut qui témoigne de la puissance économique en particulier conjointement avec d'autres indices économiques, par exemple le montant de ce produit calculé par tête d'habitant, qui témoigne du degré d'avancement technologique et du développement économique de l'Etat. La production industrielle est, elle aussi, un indice éloquent du potentiel économique de l'Etat.

Un indice général important est la population de l'Etat, en particulier la population employée dans la production et la population ayant une formation supérieure.

Les indices de la dynamique de la croissance économique et démographique ont eux aussi une importance essentielle.

Etant donné le rôle général de la force militaire dans les relations internationales contemporaines, l'indice des effectifs, de l'armement et de l'équipement technique des forces armées de l'Etat est, lui aussi, important.

Des indices plus concrets du rôle réel des Etats dans une organisation internationale sont ceux concernant des domaines spéciaux dont relèvent

les matières faisant l'objet de ses décisions. Ce seront: la part dans le commerce international d'une marchandise donnée, les ressources naturelles et la production de matières premières, la part dans les services internationaux de tourisme, de navigation maritime, aérienne, etc., le rôle joué dans le domaine de l'énergie atomique, le rôle joué sur le marché international des capitaux, etc.

A côté des indices économiques, démographiques et militaires relativement mesurables, une haute importance revient aux facteurs politiques moins mesurables. Ce sont entre autres: la cohérence idéologique et de classe de l'Etat donné, la stabilité de son système politique, l'efficacité de son appareil administratif, sa capacité de mobiliser les réserves, etc.

En cas de groupement d'Etats, l'indice politique déterminant le degré de son influence sur le processus décisionnel dans une organisation internationale c'est la cohérence interne et la capacité de coopération disciplinée de tout un ensemble de pays. Les facteurs de ce genre dépendent avant tout de la concordance d'intérêts dont le degré peut varier en fonction des problèmes et des situations.

En fixant le degré d'influence des Etats et de leurs groupements sur l'activité d'une organisation internationale, il convient également d'attirer l'attention sur son secrétariat dont le rôle dans le processus décisionnel, quoique secondaire, est essentiel et augmente notamment en ce qui concerne les fonctions opérationnelles. On peut considérer comme indices relativement mesurables quoique très simplifiés de l'influence des Etats sur cet organe, le nombre de places et le rang des postes occupés par leurs ressortissants dans l'appareil administratif de l'organisation. On peut présupposer en effet que malgré leur indépendance formelle, les fonctionnaires internationaux sont loyaux envers leur pays¹⁵.

En ce qui concerne les représentants des gouvernements ou les fonctionnaires internationaux, il ne faut pas sous-estimer l'influence qu'ils peuvent exercer sur le déroulement du processus décisionnel grâce à leurs valeurs personnelles, telles que la haute compétence, l'activité, l'art de convaincre et de se gagner la sympathie et l'estime des collaborateurs. Dans les organisations internationales apparaissent aussi d'éminents animateurs et des personnages charismatiques dont l'influence personnelle contribue à faire

¹⁵ Mais parfois il en est autrement. Par exemple, certains fonctionnaires des secrétariats des organisations internationales qui sont des citoyens des pays peu développés, subissent par l'éducation et le séjour dans les pays capitalistes les influences de la civilisation dite occidentale. Il arrive donc que leur attitude idéologique et leurs réactions politiques soient moins liées à leur patrie et ressemblent davantage aux attitudes et aux réactions de ceux qui font preuve de loyalisme envers les pays occidentaux.

prendre les décisions en faveur des buts politiques et des intérêts d'Etats déterminées.

3. La force d'action exercée par les décisions d'une organisation internationale

Une importance capitale pour l'appréciation du rôle d'une organisation internationale présente l'examen de la force d'action exercée par ses décisions sur l'entourage (le milieu) de l'organisation, c'est-à-dire leur influence sur le comportement des Etats dans les matières faisant l'objet de décisions.

La notion de force d'action d'une organisation internationale sur son entourage se rapproche de celle de pouvoir d'une telle organisation.

Toutefois en usant de cette dernière notion, il faut préciser expressément qu'il n'y a pas d'analogie entre cette notion et celle du pouvoir d'Etat. En particulier, même lorsque le degré du pouvoir est le plus élevé, comme c'est le cas des Communautés européennes, l'organisation internationale ne dispose pas de son propre appareil de contrainte qui est caractéristique du pouvoir d'Etat, tandis que les décisions les plus importantes sont exécutées non pas par son appareil administratif, mais par les Etats membres.

Par pouvoir d'une organisation internationale il faut entendre la capacité largement entendue d'exercer une influence active sur le comportement des membres conforme à la volonté de l'organisation exprimée dans ses décisions.

On peut affirmer que l'organisation internationale exerce une telle influence principalement à l'aide de différentes formes de pression politique, en arrêtant dans ses décisions des modèles de comportement (fonction régulatrice) et des appréciations du comportement (fonction de contrôle) de ses membres. Malgré les ressources actuellement restreintes dont disposent les organisations internationales, même l'octroi ou le refus d'une assistance matérielle (fonction opérationnelle) est un moyen d'exercer une influence indirecte sur l'orientation de la politique sociale et économique et souvent aussi étrangère du pays intéressé plutôt qu'une influence directe sur les dimensions de son développement économique.

On peut facilement constater que le degré du pouvoir d'une organisation internationale à l'égard de ses membres est formellement déterminé par un ensemble des normes statutaires fixant les paramètres institutionnels du processus décisionnel tels que la nature juridique de la décision, la procédure de vote, la composition et le caractère des organes.

Le degré du pouvoir formel d'une organisation internationale s'accroît à une échelle appropriée en fonction des solutions adoptées par les statuts pour ces paramètres, par exemple:

— lorsque la signification juridique des décisions est portée du rang de vœux et de recommandations à celui de normes obligatoires ou d'arrêtés ;

— lorsque la procédure de la prise de décisions s'écarte de l'unanimité à travers divers degrés de la majorité qualifiée, jusqu'à la majorité simple ;

— lorsque la principale responsabilité des activités de l'organisation passe des organes pléniers à ceux dont la composition est restreinte ;

— lorsque s'élargissent les compétences des organes administratifs composés de fonctionnaires internationaux ;

— lorsque augmente la liberté des organes de déterminer leurs compétences du fait que l'on passe d'une définition exhaustive de ces compétences dans les statuts de l'organisation à une définition générale, laissant la voie libre à une interprétation extensive.

Les solutions qui s'approchent de la basse extrémité de l'échelle des solutions possibles concernant les paramètres institutionnels de la prise de décisions, tendent à réduire le risque consistant en ce que les décisions d'une organisation internationale peuvent ne pas tenir compte des intérêts des Etats dont l'influence peut s'avérer insuffisante à les prévenir. Mais en même temps diminuera le pouvoir de l'organisation internationale, donc sa capacité d'agir sur son entourage ou la force avec laquelle ses décisions peuvent influencer sur le comportement des Etats membres. Et inversement, les solutions qui s'approchent de la haute extrémité de l'échelle tendent à augmenter à la fois le risque en question et le pouvoir formel de l'organisation sur ses membres.

Cependant une influence prépondérante sur le pouvoir réel d'une organisation internationale ou sur la force d'action de ses décisions est exercée par d'autres facteurs qui, à la différence de paramètres institutionnels, peuvent être considérés comme variables politiques du processus décisionnel. De nouveau, ce sont des facteurs directement liés à l'intérêt de l'Etat, tels que l'importance des intérêts nationaux concernés par une décision donnée, le degré de la conformité d'intérêts des Etats quant au contenu de cette décision, le soutien donné à la décision par les Etats jouant un rôle important dans l'organisation, la volonté politique des Etats d'appliquer la décision adoptée, etc.

Par exemple, malgré la fixation des paramètres institutionnels près de la haute extrémité de l'échelle, le pouvoir de l'organisation internationale restera modeste si ses décisions sont limitées aux matières présentant peu d'importance politique, ne concernant pas les intérêts vitaux des Etats¹⁶. Et inversement,

¹⁶ C'est pourquoi, en ce qui concerne par exemple les questions du fonctionnement intérieur considérées comme moins importantes, on peut admettre la compétence implicite de l'organisation internationale, ainsi que la présomption que les décisions sont prises à la majorité des suffrages exprimés et possèdent la force obligatoire, ce qui confère à l'organisation internationale un degré formel très élevé du pouvoir dans ce domaine.

dans les matières concernant les intérêts politiques importants des Etats, lors même que les paramètres du processus décisionnel seront proches de la basse extrémité de l'échelle de solutions possibles, le pouvoir de l'organisation internationale sera ressenti comme relativement puissant.

Les décisions obligatoires adoptées à la majorité des voix, ce qui doit témoigner d'un degré formel élevé du pouvoir de l'organisation, peuvent n'avoir qu'une force d'influence modeste, si les Etats jouant un rôle considérable dans l'organisation ont voté contre ces décisions. Et inversement, des recommandations ordinaires adoptées à une faible majorité des voix auront une grande force d'influence si les grandes puissances leur donnent un soutien concordant.

Les résultats d'un vote à eux seuls peuvent ne pas témoigner de l'intérêt réel des Etats, et ne signifient pas forcément que les décisions adoptées correspondent réellement aux intérêts concordants des Etats ayant voté « pour ». La motivation des gouvernements de ces Etats peut en effet consister en ce qu'ils ne veulent pas s'aliéner la bonne disposition d'autres Etats ou l'opinion publique de leur propre pays. Alors il n'y aura pas chez les Etats votant pour la décision donnée de volonté politique sincère d'appliquer cette décision dont la force d'action s'affaiblira en conséquence.

L'absence d'une concordance authentique d'intérêts des Etats trouvera aussi son expression dans une formulation générale et souple du contenu de la décision, ce qui laisse une grande latitude de son interprétation. Et inversement, une formulation précise, catégorique et impérative traduira la vraie concordance et un puissant engagement des intérêts des Etats, en faisant accroître la force d'action d'une telle décision.

En cherchant à optimiser les décisions d'une organisation internationale au point de vue de leurs intérêts nationaux, les Etats devront trancher la question générale de savoir quel degré du pouvoir formel général de l'organisation leur conviendra le mieux. Prenant en considération leurs intérêts concrets dans les différentes matières, les Etats peuvent en outre faire montre des aspirations diverses à l'affaiblissement ou au renforcement de la force d'action des décisions concrètes de l'organisation internationale.

La solution de ces questions générales et concrètes ne peut être rationnellement accomplie que sur la base de l'appréciation : de la concordance d'intérêts des Etats membres dans leur ensemble ; de l'importance des intérêts nationaux que doivent concerner les décisions de l'organisation ; de l'analyse du rapport des forces dans l'organisation internationale ; de l'appréciation de l'influence de l'Etat donné et du groupement dont il fait partie en ce qui concerne les matières relevant de la compétence de l'organisation ; du degré du risque de se trouver dans la situation d'une minorité attaquée et d'autres considérations dont peut dépendre le contenu

d'une décision de l'organisation considéré sous l'angle des intérêts nationaux de l'Etat donné.

On peut affirmer généralement qu'en partant du principe de la souveraineté des Etats, toujours si chère aux gouvernements, domine la tendance à maintenir le degré du pouvoir formel d'une organisation internationale à un niveau relativement bas. On peut aussi faire remarquer de façon générale que les Etats qui constituent une organisation internationale et en font partie cherchent normalement à en régler les paramètres décisionnels et à les ajuster avec les moyens politiques dont ils disposent de la façon qui favorise le maintien du contenu politique des décisions prises par les organes dans le cadre des intérêts de ces Etats et qu'au moins le risque d'écart de l'activité de l'organisation de l'état d'équilibre soit maintenu dans les limites acceptables.

Aussi lorsqu'on accorde à l'organisation le pouvoir de prendre des décisions obligatoires pour tous les membres sur les matières importantes, on réduit simultanément en règle générale ce pouvoir en prévoyant pour la validité de telles décisions une forte majorité qualifiée voire l'unanimité des voix et en réservant ces décisions aux organes pléniers.

En même temps, la façon d'approcher par les Etats la question du degré du pouvoir de l'organisation et de la force d'action de ses décisions sous l'angle de l'optimalisation, dépendra par la nature des choses de l'appréciation de l'influence dont on dispose sur son activité dans le rapport des forces existant. Si cette influence est jugée suffisante pour utiliser efficacement et de façon offensive l'activité de l'organisation dans l'intérêt des Etats, ils seront enclins à lui conférer un degré plus élevé du pouvoir afin d'accroître la force d'action de ses décisions en faveur de leurs intérêts. Et inversement, si les Etats jugent leur influence insuffisante, dans le rapport des forces donné, pour une action offensive, ils chercheront à s'assurer les possibilités d'une défense efficace contre le risque de transformation de l'organisation en instrument d'une politique contraire à leurs intérêts, tâcheront de maintenir le pouvoir de l'organisation à un niveau suffisamment bas et d'abaisser la force d'action de ses décisions.

Les solutions statutaires des paramètres décisionnels sont en règle générale le résultat d'un compromis entre les différentes tendances ainsi déterminées des Etats et de l'établissement d'un degré du pouvoir de l'organisation qui soit admissible pour tous les Etats dont la participation dans l'organisation internationale est nécessaire pour qu'elle puisse remplir ses tâches.

Le degré du pouvoir de l'organisation internationale ne doit ni ne peut être abaissé au point de faire complètement éliminer le risque d'un tel écart de l'activité de l'organisation internationale de l'état d'équilibre qui commencerait à nuire nettement aux intérêts de certains pays membres. Cela affaiblirait excessivement sa capacité d'action donc son rôle dans la formation des

rapports entre les Etats, rôle auquel elle est appelée et dont l'accomplissement justifie sa création et son existence.

La garantie ultime des Etats membres contre ce risque est le droit présumé de chacun de ces Etats de se retirer de l'organisation.

En même temps joue un frein politique. Les Etats et leurs groupements qui dans les conditions particulières d'aggravation des contradictions entre les membres d'une organisation internationale peuvent avoir la possibilité d'en faire un instrument de leur politique dirigée contre les intérêts d'une minorité presque désarmée, doivent se rendre compte de ce qu'en suscitant le départ de cette minorité de l'organisation, ils provoqueront indubitablement un affaiblissement voire la désintégration de cette organisation laquelle cependant a assez bien servi leurs intérêts. Les décisions majoritaires conduisant à une telle situation dramatique ne pourraient nullement être jugées optimales du point de vue des intérêts des Etats membres qui en seraient auteurs.

4. La rentabilité de l'appartenance des Etats à une organisation internationale

La politique courante du gouvernement d'un Etat à l'égard d'une organisation internationale peut en principe être ramenée à la volonté de rendre rentable la participation de cet Etat à l'organisation du point de vue des intérêts de l'Etat. La rentabilité peut être jugée dans ce cas à la base du calcul des coûts et des avantages de la participation évalués en catégories d'intérêts nationaux de l'Etat. Si l'on prend en considération le caractère des activités des organisation internationales contemporaines et le fait que leurs fonctions consistent principalement à exercer une pression politique, et beaucoup moins en prestation de services directs ou en allocation de ressources matérielles, il ne faut pas s'étonner de ce que nombre de composants des coûts, et en particulier les avantages de la participation de l'Etat se laissent difficilement quantifier. Qui plus est, les plus difficiles à être quantifiés et comparativement évalués seront précisément la plupart du temps les composants de valeur politique donc les plus importants pour les intérêts des Etats.

Aussi faut-il se résigner à ce que dans l'examen de la rentabilité de la participation de l'Etat à une organisation internationale on ne puisse pas aller loin au-delà des évaluations intuitives.

Cependant il ne faut pas mésestimer le rôle de l'intuition dans la science en général et dans les sciences socio-politiques — dont fait partie la science des organisation internationales — en particulier. Et cela non seulement parce que ces sciences n'offrent pas, du moins provisoirement, d'autres possibilités sérieuses. Il s'agit de ce que les évaluations intuitives formulées par des

hommes politiques expérimentés et par de sérieux théoriciens possèdent des valeurs cognitives considérables. Si de telles évaluations sont relativement concordantes, et en particulier lorsqu'elles sont l'oeuvre d'équipes de praticiens et théoriciens qualifiés, elles donnent, malgré leur caractère intuitif, de plus fortes garanties de pertinence et d'approximation de la réalité. C'est dans ce sens que peuvent également aller les techniques modernes de recherche empirique ainsi que de collecte et de traitement des données à l'aide d'ordinateurs. Mais ces techniques également ne peuvent jouer qu'un rôle auxiliaire, sans pouvoir se substituer à des hypothèses intuitives qui avec l'application de telles techniques dans les sciences politiques ne peuvent que d'être affaiblies ou rendues plus vraisemblables plutôt que d'être renversées ou confirmées.

Pour ce qui est des processus politiques d'action d'une organisation internationale, les perceptions subjectives et les évaluations intuitives — individuelles ou collectives — sont polarisées par des intérêts individuels et collectifs de classe. Aussi vaut-il mieux de s'en rendre compte, en définissant les positions à partir desquelles interviennent ces perceptions et évaluations. C'est particulièrement évident et nécessaire quand on adopte le principe que les coûts et les avantages de la participation de l'Etat à une organisation internationale sont rapportés aux intérêts nationaux dont la conception même a un caractère de classe, relatif et subjectif. Les perceptions et les évaluations faites à partir de la position des intérêts des classes et des groupes sociaux progressistes offrent, par la nature des choses, la garantie de mieux refléter la réalité et sont plus objectives.

Pour ces raisons, les coûts, les avantages et la rentabilité de la participation de l'Etat à une organisation internationale deviennent plus perceptibles quand les évaluations y relatives sont effectuées pour le pays que l'on représente, en considération de son système et du caractère du pouvoir d'Etat. Ainsi pour un chercheur polonais, la tâche scientifique qui lui sera la plus proche et la plus agréable consistera à trouver une réponse à la question suivante : les avantages que procure à la République Populaire de Pologne l'appartenance à une organisation internationale sont-ils supérieurs aux coûts qu'implique cette appartenance ?

Bien que l'on ne puisse pas s'attendre à un calcul et un bilan précis des coûts et des avantages de la participation de l'Etat à une organisation internationale, étant donné que nombre de leurs composants — et des plus importants — ne sont pas mesurables, le fait à lui seul de poser cette question est important car il contraint à repenser le problème et à mieux voir quelle est la situation de l'Etat au sein de l'organisation internationale donnée.

Il est donc particulièrement opportun de dresser un bilan où d'un côté figureraient des principaux composants des coûts, et de l'autre côté —

des avantages de la participation de l'Etat à une organisation internationale, avec l'indication, éventuellement, de l'importance relative de ces composants et de leur interdépendence. Un tel tableau, que l'on peut chercher ensuite à rendre plus précis, peut permettre de mieux se rendre compte de la rentabilité de la participation de l'Etat dans les différentes organisations internationales.

Du côté des coûts de la participation, il faut prendre en considération les composants financiers mesurables tels que les cotisations au budget administratif ; les apports et les dotations bénévoles aux capitaux et fonds alimentant les programmes opérationnels ; le coût d'entretien d'une mission permanente auprès de l'organisation ; le coût de la participation des délégations de l'Etat aux sessions de différents organes de l'organisation ; les coûts d'entretien des unités de l'administration nationale coopérant avec l'organisation internationale ; les coûts de la formation du personnel pour ces services ; la participation aux coûts de réalisation des programmes de l'organisation sur le territoire de son propre pays, etc.

Il faut aussi tenir compte d'un composant aussi difficilement mesurable que la mise à la disposition de l'organisation des cadres hautement qualifiés. C'est notamment un dilemme des pays en voie de développement.

Du côté des coûts, il faut enfin tenir compte d'un très important composant politique non mesurable qui consiste à soutenir l'autorité d'une organisation internationale en devenant son membre et par cela même à accroître l'efficacité politique de son activité lors même qu'elle peut ne pas servir les intérêts de notre pays.

Mais ce qui compte le plus, ce sont les coûts qui ont un caractère de dommages politiques causés aux intérêts de l'Etat par une activité contraire à ces intérêts voire dirigée contre ces derniers.

Du côté des avantages de la participation à l'organisation, il y aurait lieu de tenir compte des catégories semblables de composants.

Ce seront donc des composants financiers mesurables tels que la valeur des services directs prêtés par l'organisation à l'Etat donné, par exemple sous forme d'assistance technique ; les profits découlant des conditions spéciales des crédits octroyés ou de la faculté de réduire à un minimum les réserves en or et devises grâce à l'appartenance à des banques et fonds monétaires internationaux ; la participation financière de l'organisation aux activités se déroulant sous ses auspices sur le territoire de l'Etat donné ; les devises versées par les participants à de telles activités ; la rémunération des fonctionnaires internationaux qui sont des citoyens de l'Etat donné, etc.

On peut mentionner des avantages concernant les personnels, p.ex. l'élévation des qualifications des personnes desservant l'organisation et ses programmes. C'est, entre autres, une bonne école de négociations bi- et

multilatérales ainsi que de jeu politique pour les membres des délégations et de connaissances spéciales pour les fonctionnaires internationaux.

Aux membres d'une organisation internationale s'ouvre l'accès à la coopération dans le domaine concerné par ses compétences et à de nombreuses informations autrement inaccessibles ou plus difficilement accessibles pour un Etat non membre.

Il faut, enfin, se rendre compte des avantages politiques de la participation à une organisation internationale. C'est une position importante au bilan des avantages.

L'appartenance à une organisation internationale peut renforcer l'autorité politique de l'Etat. Rien que la participation aux processus politiques se déroulant dans le cadre de l'organisation apporte des avantages ou du moins crée des chances d'exercer une influence sur ces processus et les décisions prises.

L'appartenance permet aussi de nouer et de développer la coopération avec les autres membres de l'organisation et d'exercer sur eux une influence directe. Enfin elle permet de populariser sa propre ligne politique et de faire rayonner son propre modèle idéologique, et ce qui est le plus important — elle permet, quand les circonstances sont favorables, d'utiliser l'organisation comme instrument de sa propre politique, et dans les conditions défavorables — de défendre activement ses intérêts.

L'actif et le passif du bilan général de l'appartenance à une organisation internationale ont, pour une grande part, un caractère dynamique difficilement saisissable.

En tentant de faire un bilan des coûts et des avantages de la participation à une organisation internationale, il faut prendre en considération les avantages et les coûts directs aussi bien qu'indirects, immédiats et prospectifs.

Enfin, en tentant de le faire notamment pour la Pologne, il faut rapporter les coûts et les avantages non seulement à ses propres intérêts, mais aussi à ceux des Etats avec lesquels elle est liée par une alliance durable.

Quand on essaie d'évaluer la rentabilité de l'appartenance à une organisation internationale, il faut tenir compte du fait qu'il ne s'agit pas ici seulement d'évaluer une transaction unique — à quoi on pourrait ramener, en simplifiant les choses, une convention internationale ordinaire — ou d'accomplir une opération de courte durée, mais plutôt de se prononcer sur la participation au processus de jeu politique de longue durée.

La participation à un tel jeu est toujours liée à l'incertitude quant à ses conditions, à l'impossibilité de prévoir avec précision ses résultats, et aussi au risque de perdre. Mais dans les conditions normales les résultats de jeu politique qu'est la participation à une organisation internationale

et qui, la plupart du temps, n'est pas un jeu où la somme de résultats est égale à zéro, doivent, à des intervalles assez longs, être avantageux pour tous les partenaires, Etats membres. Cela résulte entre autre du fait qu'une prémisses de la création d'une organisation internationale, permettant à celle-ci d'exister, est un degré suffisant de concordance ou de complémentarité d'intérêts de ses membres. Par ailleurs, il faut considérer que la participation aux grandes organisation universelles comme l'O.N.U. et plusieurs institutions spécialisées des Nations Unies, ou régionales comme le Conseil d'Assistance Economique Mutuelle et le Pacte de Varsovie, est décidée d'avance pour un pays dont la place et le rang dans le monde sont ceux de la Pologne. C'est seulement dans des situations très dramatiques qu'un tel Etat pourrait par exemple se retirer de la participation aux processus de coopération et de rivalité pour lesquels l'O.N.U. ou les autres organisations universelles importantes des Nations Unies sont devenues des conduits fort importants. Si l'évaluation embrasse un horizon suffisamment vaste, les pertes qui pourraient résulter du retrait de ces processus seraient la plupart du temps plus grandes que les pertes résultant éventuellement d'un bilan négatif des coûts et des avantages de l'appartenance dans les situations, en règle générale temporaires, de grave tension avec la majorité des autres membres de l'organisation.

Cependant, il serait injuste d'exclure la faculté de retrait d'un Etat d'une organisation internationale si le bilan de son appartenance devenait nettement négatif. Laisser cette possibilité ouverte peut, dans le cas de la Pologne — un Etat qui compte non seulement en raison du montant de sa cotisation au budget de l'organisation —, constituer un moyen suffisant de pression exercée sur d'autres Etats membres et sur le secrétariat de l'organisation pour que les intérêts de la Pologne soient pris davantage en considération. Il serait injuste de renoncer à ce moyen de pression dont il faut user dans des cas justifiés.

Malgré les difficultés que l'on raconte en dressant un bilan des coûts et des avantages de la participation de l'Etat à une organisation internationale, il ne faut pas renoncer à cette tâche. Car une analyse de la situation à cet égard est la condition sine qua non d'une action rationnelle. Plus cette analyse sera perfectionnée, plus grandes seront les possibilités d'action rationnelle tendant à ce que la participation de l'Etat à une organisation internationale donnée soit plus rentable.

A cet effet on pourrait proposer de dresser un registre des organisations internationales dont l'Etat fait formellement partie, de celles avec lesquelles il coopère d'une autre façon ou de celles qui l'intéressent parce que leur activité présente une importance pour ses intérêts. Ce registre ne doit pas se borner à une brève information, mais être une banque de données utiles pour dresser un bilan des coûts et des avantages, dont il est

question plus haut, constamment mises à jour. Elles doivent être systématisées dans un questionnaire détaillé. Lors même que les réponses à certaines questions délicates seraient difficiles à formuler ou impossibles à donner, il semble que le fait même de poser certaines questions contribuerait au moins à faire prendre conscience de la nécessité de tenir compte de certains aspects en arrêtant la politique de l'Etat envers les différentes organisations internationales.

5. La stratégie de l'Etat envers une organisation internationale

Dans la pratique, une analyse systématique des coûts et des avantages ainsi que l'évaluation qui en résulte de la rentabilité de la participation de l'Etat à une organisation internationale tendront non pas tant à démontrer l'opportunité ou non de l'appartenance — bien que cette possibilité ne doive pas être exclue — qu'à indiquer de quelle manière on pourrait améliorer le bilan en diminuant ou limitant les coûts et en augmentant les avantages.

Les résultats des considérations ramenées à ce niveau de concrétisation acquièrent aussi la valeur de recommandations opérationnelles pour les milieux gouvernementaux responsables de la fixation et de la mise en oeuvre de la politique de l'Etat envers une organisation internationale.

En arrêtant et en mettant en oeuvre une telle politique, il faut suivre une stratégie déterminée.

En s'appuyant sur une évaluation systématique et sur les bilans dressés des coûts et des avantages de la participation de l'Etat à une organisation internationale, son gouvernement devrait tirer des enseignements tendant à accroître la rentabilité de cette participation par une réduction relative des coûts mais principalement par une maximalisation des avantages.

La stratégie d'un gouvernement à l'égard d'une organisation internationale devrait indubitablement consister à concentrer les efforts en vue de la meilleure utilisation possible des facteurs disponibles d'influence de son Etat et de ceux faisant partie du même groupement. Une stratégie offensive devrait consister à chercher à accroître la force d'action de l'organisation sur les matières où cette influence est suffisante afin d'assurer la prise de décisions conformes aux intérêts de l'Etat.

En même temps une stratégie défensive devrait tendre à réduire la force d'action de l'organisation sur les matières où il est probable que par suite des influences d'un groupement ou d'une coalition concurrentiels peuvent être prises des décisions contraires aux intérêts de l'Etat donné.

Le principe fondamental de la stratégie de l'Etat à l'égard d'une organisation internationale doit être une concentration sélective de moyens et d'efforts sur les secteurs d'action et les matières choisis.

Ce choix, il faut l'effectuer aussi bien dans le cas de stratégie offensive que dans celui de stratégie défensive, suivant la hiérarchie de ces secteurs et de ces matières du point de vue des intérêts de l'Etat. Sans un tel choix et sans une concentration suffisante des moyens les efforts sont dispersés et gaspillés. Une définition précise de la stratégie de l'Etat à l'égard d'une organisation internationale est une condition de l'action rationnelle dans le sens de l'optimisation des décisions de l'organisation de façon qu'elles correspondent le mieux possible aux intérêts de l'Etat.

A cet effet, il faut :

1° connaître la situation et les tendances d'évolution dans le milieu (l'entourage) de l'organisation ;

2° définir et arrêter la hiérarchie des intérêts de l'Etat dans la sphère des compétences de l'organisation ;

3° connaître le degré de concordance de ces intérêts avec les intérêts des autres Etats membres en vue de l'identification des partenaires avec lesquels l'Etat donné est uni par des intérêts durables et puissants ainsi que des partenaires ayant des intérêts divergents ;

4° se rendre bien compte du rapport des forces entre les Etats membres, compte tenu notamment des grandes puissances et des grands groupements d'Etats ;

5° évaluer le rang de son Etat dans le milieu de l'organisation et de son influence possible sur cette organisation ;

6° évaluer l'influence sur l'organisation du groupement aux intérêts particulièrement concordants dont l'Etat intéressé fait partie ;

7° connaître les possibilités de former des coalitions plus ou moins conjoncturelles avec d'autres Etats aux intérêts actuellement convergents ou complémentaires ;

8° bien connaître le fonctionnement de l'organisation ;

9° choisir les principales sphères et orientations de l'action offensive ou défensive de l'Etat au sein de l'organisation ;

10° affecter les ressources indispensables, financières et humaines, pour leur usage concentré sur les terrains et orientations choisis par l'Etat au sein de l'organisation.

Malgré les erreurs inévitables et le caractère intuitif de beaucoup d'analyses et évaluations susmentionnées, elles seules peuvent servir au gouvernement de l'Etat intéressé de base d'une stratégie rationnelle et de contrôle du processus de la participation de l'Etat à une organisation internationale.

Réflexions sur le principe de l'intérêt dans les Statuts du Conseil d'Assistance Economique Mutuelle (C.A.E.M.)

par HENRYK DE FIUMEL

La coopération économique des pays socialistes dans le cadre du C.A.E.M. et la réalisation par ceux-ci du processus d'intégration économique s'effectuent entre les Etats disposant d'un potentiel économique différent et à différent degré de développement économique¹. Ce fait a trouvé son reflet dans le mécanisme approprié de prise de décisions par les organes du C.A.E.M. ainsi que par d'autres organisations économiques internationales des Etats socialistes. Nous avons à l'esprit le principe dit de l'intérêt qui se trouve à l'origine de la formation de la volonté de ces organisations internationales².

Nous considérons que dans ce cas nous pouvons parler de « principe » bien que formellement, en tant que tel, il ne figure pas parmi les principes régissant la coopération économique des Etats membres du C.A.E.M., cités dans l'art. 1^{er} des Statuts du C.A.E.M. On peut dire cependant que nous avons affaire ici avec un principe de procédure, car il est lié à la prise de décisions par les organes du C.A.E.M. Il faut cependant souligner que le principe de l'intérêt, même si nous le définissons en tant que principe de procédure, est lié étroitement au fond du problème, car il concerne la position des Etats membres du C.A.E.M. dans la formation de la volonté de l'organisation.

Le principe de l'intérêt résultant des Statuts du Conseil témoigne d'une absence d'analyse dans les opinions exprimées dans la doctrine occidentale, selon laquelle les Statuts du C.A.E.M. prévoient simplement le principe de l'unanimité dans la prise de décision, donc de recommandations et de décisions proprement dites³. En réalité, il s'agit non pas de l'unanimité

¹ A. WASILKOWSKI, *Zalecenia Rady Wzajemnej Pomocy Gospodarczej [Recommandations du Conseil d'Assistance Economique Mutuelle]*, Warszawa 1969, pp. 213—226. *Soviet Ékonomičeskoj. Vzaïmopošči. Osnovnye problemy*, Moskva 1975, p. 210.

² A. WASILKOWSKI, *op. cit.*, p. 237; L. RÜSTER, *Internationale ökonomische Organisation der RGW-Länder. Rechtsfragen*, Berlin 1980, p. 27.

³ *Soviet...*, p. 382, où l'on cite des opinions de différents auteurs.

(de tous les membres de l'organisation), mais plutôt d'un processus de concertation des volontés des membres « intéressés ».

Nous utilisons exprès le terme de concertation des volontés des Etats membres, car en réalité on ne procède pas, dans les organes du C.A.E.M., au vote formel lors de la prise de décision et l'unanimité ne s'effectue pas nécessairement entre tous les Etats membres du C.A.E.M., mais uniquement entre ceux qui sont intéressés au problème donné. C'est pourquoi, vu les raisons susmentionnées, il ne semble pas justifié de parler du principe de l'unanimité au sein du C.A.E.M.

Dans la littérature, on attire à juste titre l'attention sur le fait que les dispositions respectives des Statuts du C.A.E.M. concernant la prise de décisions par les organes du Conseil (art. IV pt 3) sont formulées trop laconiquement, ce qui suscite certains doutes qui exigent des explications⁴. Il est vrai que dernièrement (en 1979) la disposition mentionnée fut complétée, mais la nouvelle version de l'article IV pt 3 ne dissipe pas tous les doutes.

Une importance essentielle pour notre analyse possède l'alinéa 1 du point 3 de l'art. IV des Statuts du C.A.E.M., qui est conçu en ces termes : « Toutes les recommandations et décisions du Conseil ne sont adoptées que par consentement des pays membres du Conseil qui y sont intéressés, chaque pays étant en droit de se déclarer intéressé à toute question dont le Conseil est saisi »⁵.

Dans la littérature, on souligne que les Statuts ne contiennent aucun critère permettant de définir la notion d'intérêt⁶. Cela peut conduire à des difficultés dans le cas où la question de savoir si un Etat est actuellement intéressé ou non, suscite des doutes chez les autres Etats membres et peut faire l'objet d'un litige. L'absence de critères d'intérêt dans les Statuts ne peut mener à la conclusion que le droit d'un Etat de se déclarer intéressé a un caractère purement formel, détaché des éléments réels déterminés⁷. Une telle déduction ne serait pas fondée à la lumière des autres dispositions des Statuts, en particulier — de l'ensemble des principes fondamentaux régissant la coopération dans le cadre du C.A.E.M.

Le fait qu'un Etat se déclare intéressé (ce qui n'exige nullement de

⁴ A. WASILKOWSKI, *op. cit.*, p. 250.

⁵ Texte dans: *Osnovnye dokumenty Soveta Ekonomičeskoj vzaimopomošči*, Vol. 1, Moskva 1981, pp. 9—21 (éd. du Secrétariat du C.A.E.M.).

⁶ H. de FIUMEL, *Rada Wzajemnej Pomocy Gospodarczej. Studium prawnomiedzynarodowe [Conseil d'Assistance Economique Mutuelle. Etude de droit international]*, Warszawa 1967, p. 41; A. WASILKOWSKI, *op. cit.*, p. 234; E. USTOR, *Decision-making in the Council for Mutual Economic Assistance*, in: *Recueil des Cours*, Académie de Droit International, 1971/III, pp. 210—211.

⁷ *Sovet...*, p. 216; E. USTOR, *op. cit.*, p. 211.

déclaration officielle, mais peut s'accomplir par une action effective) ne constitue pas seulement son affaire individuelle, car il devient le coparticipant de la formation de la volonté de l'organisation en tant que telle ; par conséquent son attitude n'est pas indifférente aux autres Etats membres qui, eux aussi, se déclarent intéressés. Il faut en effet prendre en considération que le consentement de tous les Etats intéressés est indispensable à la prise de décision. Autrement dit, l'Etat se déclarant intéressé peut finalement rendre impossible l'adoption d'une décision par un organe du C.A.E.M.⁸.

Et c'est précisément parce que le fait de se déclarer intéressé entraîne des effets juridiques aussi importants, qu'il semble pleinement justifié, dans la situation précitée, (c'est-à-dire lorsque l'Etat qui se déclare intéressé rend ensuite impossible l'adoption d'une décision) que les autres Etats intéressés puissent exiger de cet Etat une justification de son intérêt réel.

Les difficultés mentionnées devraient être surmontées par des moyens visant à trouver une solution acceptable pour tous les Etats intéressés, ce qui, en respectant les principes fondamentaux des Statuts du C.A.E.M., est réalisable.

Cependant, à la lumière des Statuts du C.A.E.M., le problème de l'interprétation formelle de la notion d'intérêt reste ouvert. Dans la littérature, on démontre que « l'on peut écarter l'examen de ce problème, car il n'a aucune signification pratique, vu l'absence dans le C.A.E.M., d'un organe qui serait compétent à examiner le litige » dans la situation mentionnée⁹.

On exprime aussi l'opinion que l'organe compétent pour interpréter les Statuts du C.A.E.M. est son organe suprême — la Session, et que c'est elle qui doit préciser la notion d'intérêt¹⁰.

A ce propos, il convient de remarquer que l'Etat, dont l'attitude ferait l'objet d'un litige, participe également à la Session du Conseil. C'est pourquoi il est difficile d'imaginer que la Session puisse, dans une telle situation, interpréter convenablement les dispositions des Statuts¹¹. En ce qui concerne l'absence, dans la structure institutionnelle du C.A.E.M., d'un organe judiciaire international, il faut rappeler que l'auteur du présent article, déjà en 1962, indiquait cette lacune et la nécessité de créer un organe qui serait autorisé à interpréter les Statuts et trancher les litiges entre les Etats membres¹². Les problèmes liés à la notion d'intérêt constituent un argument supplémentaire confirmant l'utilité d'instituer un tel organe.

⁸ *Sovet...*, p. 211; *Pravovye voprosy dejatel'nosti SEV*, Moskva 1977, p. 96; J. SANDORSKI, *RWPG — forma prawna integracji gospodarczej państw socjalistycznych [C.A.E.M. — forme juridique d'intégration économique des Etats socialistes]*, Poznań 1977, p. 63.

⁹ *Sovet...*, p. 216.

¹⁰ L. RÜSTER, *op. cit.*, p. 83.

¹¹ Cf. aussi J. SANDORSKI, *op. cit.*, p. 67.

¹² H. de FIUMEL, *op. cit.*, p. 118.

Dans la littérature, on discute largement le problème de l'intérêt dit « positif » et « négatif » lors de la prise de décisions au sein du C.A.E.M.¹³. En principe, tous les auteurs affirment que l'intérêt dont il est question dans les Statuts du C.A.E.M. doit être compris comme intérêt « positif »¹⁴. En raison de cet aspect du problème, il convient de faire les remarques suivantes.

En examinant le problème de l'intérêt d'un Etat, il est nécessaire de distinguer l'intérêt de cet Etat à la question examinée par un organe du C.A.E.M. (comme le disent les Statuts) et l'intérêt de ce même Etat dans l'adoption d'une décision concrète (recommandation ou décision proprement dite). A notre avis, seule une telle distinction permet d'aboutir à résoudre convenablement le problème examiné.

C'est pourquoi, il est difficile d'admettre que « l'intérêt à la question donnée signifie la même chose que l'intérêt dans l'adoption d'une recommandation ou d'une décision concrète »¹⁵. Cette affirmation ne semble pas pertinente, car, premièrement, l'examen d'une question par un organe du C.A.E.M. n'aboutit pas toujours à l'adoption d'une décision (au sens général) et pourtant, l'examen même d'une question admet l'existence de l'intérêt de l'Etat membre. Et précisément, dans cette phase de l'examen de la question, lorsque l'on ne peut pas encore prévoir le résultat final d'un tel examen, l'exigence de l'intérêt positif peut être pleinement justifiée. Sans nul doute, les Etats membres sont en principe intéressés au développement et à l'approfondissement de leur coopération dans le cadre du C.A.E.M., ainsi qu'aux manifestations concrètes d'une telle coopération dans différents domaines.

Deuxièmement, l'attitude positive d'un Etat à l'égard de l'examen d'une question, ne peut préjuger automatiquement de son attitude positive également à l'égard du contenu définitif d'une recommandation ou d'une décision proprement dite, que l'on propose d'adopter¹⁶. En effet, une recommandation peut déjà concerner directement les intérêts de l'Etat donné. C'est pourquoi, il est possible qu'un Etat membre, tout en étant entièrement intéressé (au sens positif) à la participation à l'examen d'une question, s'oppose (attitude négative) à l'adoption d'une recommandation d'un contenu déterminé.

Dans ce cas, le processus de prise de décision ne peut pas aboutir, faute de consentement de tous les Etats intéressés (art. IV. pt 3, al. 1 des Statuts). Reste alors la recherche de la concertation.

Mais, une autre évolution de la situation est également possible. L'Etat

¹³ *Sovet...*, pp. 217—218; *Pravovye voprosy...*, pp. 96—97; *Soveščanie predstavitelej stran-členov SEV po pravovym voprosam 10 let*, Budapest 1980, p. 46; J. SANDORSKI, *op. cit.*, p. 64; A. WASILKOWSKI, *op. cit.*, p. 144.

¹⁴ *Ibid.*

¹⁵ A. WASILKOWSKI, *op. cit.*, p. 237.

¹⁶ *Sovet...*, p. 218.

intéressé à la participation à l'examen d'une question peut arriver à la conclusion que malgré ses réserves à l'égard de la décision débattue, il n'a pas l'intention de s'opposer à l'adoption de cette décision par les autres Etats intéressés et se borne à déclarer qu'il ne participera pas à l'adoption de cette décision. Dans ce cas, l'Etat donné renonce consciemment à son droit de participer à la formation de la volonté de l'organisation.

Cette conclusion résulte, à notre avis, de la teneur du pt 3 de l'art. IV des Statuts du C.A.E.M. dans sa version actuelle. Il s'agit en particulier de l'al. 3, où il est dit que : « Les recommandations et les décisions ne s'appliquent pas aux pays qui ont déclaré leur volonté de ne pas participer à leur adoption ou de n'être pas intéressés à la question donnée... » (souligné par moi — H. F.)¹⁷. On distingue ici strictement la situation où l'Etat intéressé déclare qu'il ne participera pas à l'adoption d'une décision, ce qui n'empêche pas l'adoption de cette décision, et la situation où l'Etat n'est pas intéressé par une question examinée par un organe du C.A.E.M.

En examinant le cas de l'attitude négative d'un Etat intéressé à l'adoption d'une décision par un organe du Conseil, certains auteurs indiquent que les autres Etats intéressés « positivement » ont alors la possibilité de se concerter à propos du même projet en dehors du cadre du C.A.E.M. sur la base d'un accord convenu entre eux, « ce que les Statuts, en aucune mesure, n'empêchent pas »¹⁸.

Une telle possibilité existe en effet, mais il faut tenir compte que sa réalisation dans la situation, où l'Etat intéressé s'opposait à l'adoption d'une recommandation, car elle portait atteinte à ses intérêts, peut réellement porter préjudice à cet Etat indépendamment du fait qu'il se trouve formellement en dehors du cadre de l'accord mentionné (p. ex. d'un accord international conclu). C'est pourquoi la réalisation d'un tel projet en dehors du cadre du C.A.E.M. pourrait être en contradiction avec les principes des Statuts du Conseil, qui ne s'appliquent pas uniquement au cadre de l'organisation mais, comme le proclament les Statuts, concernent toute la coopération économique entre les Etats membres. C'est pourquoi, dans la situation indiquée, il faut rechercher une solution acceptable pour tous les Etats intéressés, dans le cadre du C.A.E.M.

En ce qui concerne le principe de la prise de décisions dans les organes du C.A.E.M. avec la participation des Etats intéressés, la question se pose de savoir quel nombre d'Etats est exigé pour que l'on puisse parler d'une décision du C.A.E.M. Comme on le sait, les Statuts sont muets en la

¹⁷ *Osnovnyje dokumenty...*

¹⁸ *Sovet...*, p. 214; cf. aussi A. WASILKOWSKI, *op. cit.*, p. 247; E. USTOR, *op. cit.*, p. 212.

matière. Or, dans la littérature on peut rencontrer l'opinion que, dans ce cas, la participation d'au moins trois Etats intéressés est nécessaire¹⁹. On avance à ce propos que le C.A.E.M. s'occupe de la coopération multilatérale et celle-ci admet comme minimum trois Etats.

Une telle déduction semble au moins discutable. Il convient de prendre en considération que nous avons ici affaire non pas avec une coopération multilatérale quelconque, mais que cette coopération s'effectue dans le cadre d'une organisation internationale déterminée (le C.A.E.M.) et, de plus, cette organisation canalise en quelque sorte la coopération multilatérale des Etats par sa propre volonté, sous forme de recommandations ou de décisions proprement dites. Et, s'il en est ainsi, ou peut, avec justesse, se demander si réellement la volonté de trois Etats membres (seulement trois) peut être à la base de la formation de la volonté de l'organisation en tant que telle? Cela semble absolument insuffisant. C'est pourquoi il faudrait préconiser, dans ce cas, la participation au moins de la moitié des Etats membres pour que l'on puisse parler d'une décision du C.A.E.M. en tant qu'organisation internationale.

Pour terminer les remarques sur le principe de l'intérêt dans les Statuts du C.A.E.M., il convient d'aborder encore un autre problème. Dans la littérature, on établit parfois un lien entre l'analyse du principe de l'intérêt figurant aux Statuts du C.A.E.M. et les dispositions relatives à l'intérêt des Etats comprises dans le Programme complexe de l'intégration économique socialiste (Section 17 pt 3)²⁰. On souligne en même temps que ces dispositions du Programme complexe doivent être traitées comme un développement et une concrétisation des dispositions des Statuts du C.A.E.M.²¹.

Sans contester l'utilité d'une comparaison et la nécessité de lier les dispositions des deux documents, il faut, dans ce cas, prendre en considération les différences des situations visées, ceci en rapport avec la notion d'intérêt. Dans les Statuts du C.A.E.M. l'intérêt concerne la participation des Etats membres à la formation de la volonté de l'organisation en tant que telle ; il définit le droit de l'Etat membre à participer à la formation définitive du contenu de cette volonté. Ici, on peut effectivement parler du principe de l'intérêt en tant que principe de la formation par les Etats de la volonté de l'organisation.

Dans le Programme complexe l'intérêt apparaît dans un contexte tout à fait différent. On dit simplement que les objectifs du Programme complexe sont réalisés par les Etats membres du C.A.E.M. qui y sont intéressés. Mais ici on ne lie pas du tout la réalisation des objectifs ni au processus

¹⁹ *Sovet...*, p. 214.

²⁰ Texte dans: *Osnovnyje dokumenty...*, p. 31 et suiv.

²¹ *Pravovyye voprosy...*, p. 99; L. RÜSTER, *op. cit.*, pp. 31—32.

de prise de décisions par le C.A.E.M., ni à l'expression de la volonté du C.A.E.M. en tant que tel.

Il est vrai que selon le Programme complexe les Etats membres du C.A.E.M. « procèderont à l'organisation et à la coordination de leurs activités en accomplissement du Programme complexe en premier lieu au sein du Conseil d'Assistance Economique Mutuelle » (Section 16 pt 2)²². Mais on ne parle que de « l'organisation et de la coordination » de leurs activités. Ensuite, du fait que ces activités doivent se réaliser en premier lieu « au sein du Conseil », il ne résulte pas du tout qu'elles doivent être nécessairement exprimées sous forme de recommandations ou décisions proprement dites du C.A.E.M. On sait que dans la pratique, la réalisation du Programme complexe s'opère le plus souvent sous forme d'accords internationaux multilatéraux appropriés, ce qui a lieu, il est vrai, dans le cadre du C.A.E.M., mais pas du tout sous forme de décisions ou recommandations, mais à l'issue de négociations et de concertations entre les Etats membres intéressés.

D'autre part, il faut rappeler que selon le Programme complexe, les mesures en vue de réaliser ce Programme seront arrêtées par les pays intéressés, également dans le cadre des commissions intergouvernementales bilatérales pour la coopération économique, scientifique et technique (Section 17, pt 1, al. 2)²³. Dans ce cas, les activités des Etats ont lieu en dehors du cadre du C.A.E.M.

L'ensemble des remarques susmentionnées prouve qu'il n'existe pas de fondement pour concevoir les dispositions du Programme complexe relatives à l'intérêt des membres en tant que développement et interprétation des dispositions respectives des Statuts du C.A.E.M.

Les remarques présentées sur le principe de l'intérêt dans les Statuts du C.A.E.M. n'ont pas pour but de donner une analyse exhaustive de tous les aspects de ce problème. L'auteur désire uniquement attirer l'attention sur plusieurs problèmes juridiques essentiels et intéressants qui découlent des dispositions des Statuts du C.A.E.M. relatives à l'intérêt et sur le besoin d'une doctrine juridique socialiste en vue de l'étude de ce problème.

²² *Osnovnye dokumenty...*

²³ *Ibid.*

Problems of Methodology in International Economic Law

by JANUSZ GILAS

With the ever increasing efforts which can be observed in world legal doctrine in favour of the establishment of international economic law as a separate branch of legal science it may be in order for the Polish doctrine of international law to consider the motives behind this process. The question arises as to whether the newly emerging discipline reflects the establishment of international economic law as a branch of law, what are its sources (if any), its subject, whether the subject of regulation differs from the subjects of regulation of other branches of law, whether the newly emerging branch of law is sufficiently delimited and separated from other branches of international law and, finally, what distinguishes system and what constitutes its characteristic features. These problems encompass the specific methodology of international economic law and are the subject of this study.

1. The Reasons Behind the Emergence of International Economic Law

It was only when international economic relations became increasingly a matter of public law, when states began to intervene actively in the process of international trade and payments, that conditions were ripe for the emergence of international economic law.¹ Thus, on the one hand the emergence of international economic law can be viewed in connection with the breakdown of the doctrine of economic liberalism and with the rise of protectionism, and, on the other hand, in connection with the rise of international intervention on behalf of the international community, most frequently through the intermediary of international organisation, aimed at promoting

¹ D. CARREAU, F. JUILLARD, T. FLORY, *Droit international économique*, Paris 1978, p. 5.

the return to free trade on a global or regional scale. In fact, the emergence of international economic law can be traced back to the year 1944, with the signing of the Bretton Woods accords. Progress was considerable in the postwar period. It suffices to say, that at present from 50 to 75 percent of the workload of the ministries of foreign affairs is made up of economic matters.²

The first sign pointing to the creation of international economic law was the attempt at isolating the norms of international public law concerning international economic relations. This was reflected in the treatment of the norms of international economic law as a special branch of norms of international public law. For example, Ulrich Scheuner defined the economic law of nations or international economic law (*internationales Recht der Wirtschaft, wirtschaftliches Völkerrecht*) as a set of rules governing economic relations between states.³ The Soviet scholar V. I. Lisovskij defined this branch of law in the following terms: "International commercial law is composed of all historically changing rules of conduct (conventional or customary) regulating international trade relations".⁴ However, in fact, when enumerating the sources Lisovskij manifested his preference for the comprehensive nature of international economic law, since he included among them also trade customs (for example port usances), court precedences (including verdicts of internal courts) and internal laws.⁵ Another partisan of a public treatment of international economic law, G. Schwarzenberger, restricted its scope to marginal problems such as international traffic in slaves, women, arms and ammunition, pornographic publications, narcotics, or to passage of maritime channels and international rivers. In actual practice, such an approach would only make it possible to take into account such phenomena of international cooperation which are neglected in international public law.⁶

With the ever increasing public nature of international economic relations conditions were created for the establishment of international economic law; at the same time, this process was prompted, indirectly, by the narrowing of the scope of civil law regulation of economic relations in general and the expansion of public law rules regulating economic relations. This was reflected in the invasion of public law into the realm of private law,

² Opinion of G. de LACHARRIÈRE, voiced at a seminar organized by the Société française pour le droit international in 1972 in the city of Orléans. *Ibid.*, p. 6.

³ U. SCHEUNER, *Die völkerrechtliche Grundlagen der Weltwirtschaft in der Gegenwart*, Tübingen 1954, p. 21.

⁴ W. I. LIISOVSKIJ, *Meždunarodnoe targovoe i finansovoe pravo*, Moskva 1974, p. 3.

⁵ *Ibid.*, p. 8.

⁶ G. SCHWARZENBERGER, *Economic World Order? A Basic Problem of International Economic Law*. Manchester 1970. *passim*.

in the use of civil law institutions for the regulation of public law problems and, finally, in the emergence of mixed branches of law, such as, for example, economic law, called in some countries business law.⁷ Hence, even though the conditions presiding over the emergence of international economic law result, above all, from international relations themselves, and not from economic relations prevailing inside particular countries, the establishment within the internal legal systems of internal economic law (called sometimes business law) could serve as an additional argument in favour of a separate treatment of international economic law. On top of that, one must take into account its mixed nature as a branch of international law, for it includes norms of both civil and public law.⁸

That we are dealing here with a mixed system is borne out by the set of sources of law, which forms unified international rules. These sources are: international bilateral and multilateral conventions as well as decisions of international organisations, which must be counted among the sources of international public law.

International private law as a branch of legal science failed to adapt its system to the phenomenon of both public and private legal norms encroaching upon each other as regulators of international economic relations. The attempts to underpin the system by special annexes dealing with international trade could not offer a solution to the problem and undermined the system leading to conflicts of law. Thus, at first we assisted in the separation of international commercial law, international labour law (civil law), and, later, at the merger of these separated and internationally unified norms with the norms of international public law adopted by particular States, with their civil law and civil procedure under the form of a separate comprehensive branch of international economic law.⁹

In turn, international public law could not cope with the problems of international transactions carried out between states and private persons (concessions), between States and banks registered abroad, between States and international organisations (credits) and also between States not subject to international public law (e.g. barter trade agreements). The prevailing

⁷ Gy. EÖRSI, *Comparative Civil (Private) Law. Law Types, Law Groups, the Roads of Legal Development*, Budapest 1979, pp. 87—88.

⁸ An attempt at a systematic study of the problem will reveal that the points of departure are of a public law nature, while the principles bear the characteristic of internal norms which constitute the basis for commercial contracts. V. I. KUČAR, *Osobnosti pravovogo regulirovanija meždunarodnih ekonomičeskikh otnošenii*, „Vestnik Kievskogo Universiteta”, 1981. No. 13. pp. 125—127.

⁹ F. MADL, *The Law of International Economic Relations* “Annales Universitatis Scientiarum Budapestiensis de Rolando Eötvös Nominata”, Sectio Iuridica, Budapest 1978, vol. 20, p. 65.

tendency was to exclude these transactions from the internal jurisdiction of the contracting states ; on the other hand, when establishing rules governing them one referred most often to the general principles of law as understood by Article 38 of the Statute of the International Court of Justice. At the same time, conflicts arising from these transactions were subjected to the rules governing the settlement of disputes under international public law. Views were expressed on these occasions that these transactions are quasi-public international transactions and that the phenomenon itself constitutes an example of the broadening scope of international public law. However, as a result of the refusal to consider conflicts arising from such transactions by the International Court of Justice (Anglo-Iranian Oil Co), opinions were voiced favouring the separation of this set of norms under the name of international commercial law and international economic law.¹⁰

The tendency to treat international economic law as a mixed system was strengthened by the law of the European Economic Community which links elements of both public and private law and which dealing with international economic relations can be defined as international economic law.¹¹ As far as the law of the Council for Mutual Economic Assistance is concerned, it can be crammed neither into the system of international private law nor into the system of international public law. Any attempt to treat a problem of law of the CMEA from the point of view of a single branch of international law is doomed to failure, because of its many and extensive ramifications. When considering problems of socialist economic integration, many experts of international private law expressed their preference for the separation of international economic law into a special branch of law. Lately, the advocates of a new international economic order, when considering laws which ought to preside over international economic development made it very clear that they stand for the separation of the norms of public law from those of private law. Within the framework of the Charter of Economic Rights and Obligations of States as an example of a norm of public international law can be the norm contained in Article 1, which provides that each State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural system in accordance with the will of its people, without foreign interference, coercion or threat in whatever form. A situation involving a possible conflict of law is dealt with by Article 2, paragraph 2, c which states that the problem

¹⁰ W. FRIEDMANN, *The Changing Structure of International Law*, London 1964, pp. 170—181. Apart from international commercial law and international economic development law. Friedmann singled out also : international corporation law, international antitrust law and international tax law (*Ibid.*, pp. 181—196).

¹¹ F. MADL, *op. cit.*, pp. 66—67.

of compensation will be settled in accordance with the law of the nationalising State. The basis for the establishment of internal rules was provided by Article 19 of the Charter, according to which the developed countries were bound to ensure in their internal legislation general preferential treatment without reciprocity in the field of international economic cooperation. The new international economic order is therefore of interest to both specialists in the field of international public law and specialists of international private law, for it represents a normative entity testifying to the necessity of developing an international economic law.

2. International Economic Law as a Branch of Law

It is possible to speak about the existence of a legal system, or of a branch of law, when there is a separate object of regulation and a separate method of regulation as well as a definite structure of the system.¹² In this case the separate object of regulation are international economic relations. These relations are of an inter-State nature and cover also relations between legal persons of various internal legal systems, relations between States and legal persons under internal law of other states and, finally, relations between States and international organisations. Thus, even though the variety of subjects of that system affects the method of legal regulation, it is only the multitude of sources of the law regulating international economic relations which accounts for its separate structure. International sources supplement internal sources and the regulation of relations between legal persons of different nationality depends on inter-state regulation. This is how a new branch of an international character was born.

However, a distinction must be made between a branch of legal science and a branch of law. For it so happens that the two do not coincide and as a result, we are witnessing the emergence of a comprehensive discipline. Ferenc Madl, when considering the problem in the context of the Hungarian legal system expressed himself against the recognition of international economic law as a branch of law, as in his view a separate set of sources of law does not suffice; he claims that there must be specific method of regulation.¹³ Mark Boguslavskij considers that international economic law constitutes a comprehensive legal discipline covering the entire

¹² D. KERIMOW, *Filozoficzne zagadnienia prawa [Philosophical Problems of Law]*, Warszawa 1981, pp. 318—332. Kerimow defines a branch of law in the following terms: "A branch of law is an objectively shaped within a uniform system of law, as its separate part, group of institutions and legal norms regulating, on the basis of specific principles and specific method, qualitatively homogenous social relationships, and thus acquiring a relative independence, permanence and autonomy of functioning". *Ibid.*, pp. 328—329.

¹³ F. MADL, *op. cit.*, p. 84.

field of international economic relations, facilitating the analysis of international treaties with special reference to their impact on internal law.¹⁴ None the less, unlike Ferenc Madl, Boguslavskij maintains that international economic law is a branch of law, comprehensive in nature, composed of norms deriving from various branches of law. It must, however, be said that this view is not based on arguments reflecting the legal situation in force, but on a desire to see it happen. For, as he said: "The separation of an international economic law depends, above all, on a comprehensive regulation of international economic relations under conditions of a world socialist system".¹⁵

Lately the term "international economic law" is being universally used, although there is still much controversy as to whether it is a comprehensive branch in its own right or an element of international public law or international private law. In the past it competed with such terms as international law of trade among nations (*droit international du commerce entre les nations*)¹⁶ and international commercial and financial law.¹⁷ More recently the term most used in American doctrine was international business law. There are also proposals to adopt the term "international law of economic intercourse".¹⁸

Putting the emphasis on the comprehensive character of international economic law as a branch of law one could arrive at the following definition: international economic law is a branch of international law regulating, on the one hand, the establishment on the national territory of States of various elements of production (persons and capital) of foreign origin, and, on the other hand, international transactions concerning goods, services and capital.¹⁹

3. Sources of International Economic Law

The comprehensive character of international economic law derives from the joint sources of internal norms concerning international economic relations together with norms of international origin. These joint sources are:

¹⁴ M. M. BOGUSLAVSKIJ, *Pravovoe regulirovanije mezhdunarodnykh hozjaistvennykh otnošenii*, Moskva 1970, p. 77.

¹⁵ *Ibid.*, p. 70.

¹⁶ B. NOLDE, *Droit et technique des traités de commerce*, RCADI, 1924 (II), vol. 3, p. 296. In English the term commercial law of nations was used. F. A. MANN, *Reflections on a Commercial Law of Nations*, BYBIL, 1957, vol. 33, pp. 20—51.

¹⁷ W. I. LISOVSKIJ, *op. cit.*, p. 3n.

¹⁸ J. ŁOPUSKI, *Zarys prawa handlu międzynarodowego [Outline of an International Commercial Law]*, Toruń 1981, pp. 20—22.

¹⁹ D. CARREAU, P. JUILLARD, T. FLORY, *op. cit.*, p. 11.

customs, general principles of law and international conventions unifying economic law.

The general principles as a source of norms concerning international economic relations are, in the first place, contained in the internal systems of civil law.²⁰ To these principles refer: the Peruvian Civil Code of 1852, Albert's Sardinian Code of 1837, the Equadorian Civil Code of 1860, 1871, 1889, 1930 and 1950, the Italian Civil Code of 1865, the Argentinian Civil Code of 1879, the Columbian Civil Code of 1837, the Guatemalan Civil Code of 1877, the Mexican Civil Code of 1884, the Spanish Civil Code of 1888, the Cuban Civil Code of 1889, the Paraguayan Civil Code of 1889, the Urugayan Civil Code of 1893, the German Civil Code of 1896, the Brazilian Civil Code of 1916, and the amendment to it of 1916, the Venezuelan Civil Code of 1916, the Panamian Civil Code of 1917, the Thai Civil Code of 1925, the Mexican Civil Code of 1926, the Chinese Civil Code of 1940, the Italian Civil Code of 1942, the Venezuelan Civil Code of 1942, the Iraqi Civil Law no 40 of 1951.²¹

The problem of application of the general principles to international economic relations was considered in jurisprudence. One of the latest examples relevant to the subject is the verdict in the case *Lliamco v. Libya* of April 12, 1977. Dr Sobhi Mahmassani, as the sole arbitrator in the case stated that pursuant to clause 28, paragraph 7 of the concession granted to Lliamco, there are principles of Libyan law which coincide with the principles of law which can be applied. One of these principles is the norm described as universally accepted in both internal and international law that "the parties to a mixed public and private contract are free to select in their contract the law to govern their contractual relationship. The principle was endorsed in the clause 28, paragraph 7 of the concession".²² The arbitrator stated also: "These general principles are usually embodied in most recognized legal systems, and particularly in Libyan legislation, including its modern codes and Islamic law. They are applied by municipal courts and are mainly referred to in international and arbitral case-law. They, thus, form a compendium of legal precepts and maxims, universally accepted in theory and practice. Instances of such precepts are, *inter alia*, the principle of the sanctity of contracts, the respect of acquired (vested) rights, the prohibition of unjust enrichment, the obligation of compensation in cases of expropriation and wrongful damage, etc."²³

²⁰ G. RIPERT, *Les règles du droit civil applicables aux rapports internationaux*, RCADI, 1933 (II), vol. 44, p. 584.

²¹ B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, London 1953, pp. 400—408.

²² "Yearbook Commercial Arbitration", 1981, vol. 6, The Hague 1981, p. 92.

²³ *Ibid.*, p. 94.

In the doctrine, the general principles referred to as applying to international economic relations are: *pacta sunt servanda*, the autonomy of will, *impossibilia nulla obligatio*, good faith, responsibility for violation of obligations and damage.²⁴ J. Łopuski, on the other hand, lists only three principles: *pacta sunt servanda*, *bona fide* and *fraus omnia corrumpit*.²⁵

One of the general principles applying in international economic relations is the principle of abuse of a right.²⁶ It was referred to in the case of customs-free zones (1932) in the following terms:

"A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon".²⁷

In the context of nationalisation the general principle of the abuse of a right was invoked by the Permanent Court of International Justice in the case of German interests in Polish Upper Silesia (1926), in which the Court argued that:

"Only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty".²⁸

In conclusion the Court stated that it was not possible

"to justify the view that the alienation was contrary to the obligations arising under the Treaty of Versailles and that it was even null and void or contrary to the principles of good faith".²⁹

Another principle applying in international economic law is the principle of self-protection (*salus populi suprema lex esto*). The Arbitration Court set up to consider the disputes between Portugal and Germany stated in its decision in 1930 that the law of nations "*admet ainsi, en temps de paix, l'expropriation pour cause d'utilité publique ; en temps de guerre, la réquisition*".³⁰

It must, however, be borne in mind that it would be equally impossible to build international economic law on the foundation of the principles of international law as to seek its establishment on the sole basis of general principles of law. The latter leave too much room to the courts in the interpretation of obligations because of their general nature. Therefore, they

²⁴ G. RIPERT, *op. cit.*, pp. 579—627.

²⁵ J. ŁOPUSKI, *op. cit.*, pp. 70—71.

²⁶ A. Ch. KISS, *L'abus de droit en droit international*, Paris 1952. It was, however, pointed out, that the concept of abuse of law is not known in many legal systems. See, H. C. GUTTERIDGE, *The Technique of the Unification of Private Law*, BYBIL, vol. 20, 1939, p. 48.

²⁷ A/B 46, p. 167. Also Oscar Chinn Case (1934), A/B, 63, p. 86.

²⁸ A.7, p. 30.

²⁹ *Ibid.*, p. 39.

³⁰ UNRIIA, vol. 2, p. 1039.

cannot form the exclusive basis for international economic law without the application of customary norms, conventional norms and laws.³¹

Custom as a source of international economic law is yet another argument in favour of a comprehensive treatment of this branch of law. Customs were both of a private nature (e.g. commercial customs, portuary usances) and of an interstate nature. It may be added that inter-State customs were at their origin the offspring of commercial usances. In this of freedom of navigation, of minimum standard of treatment of foreign traders took shape; in this way the *ius naufragii* developed into the law of rescue.³² However, at present the demarcation line between the international custom as a norm of international public law and the custom of international commercial law is quite distinct. The latter is being shaped by the business community and the internal law of states determines its place in the legal system. It is subject to confirmation by the International Chamber of Commerce within the framework of INCOTERMS, of the codification of customs concerning letters of credit and documentary credit collection. But even without such codification these customs are binding.³³

International conventions which unify economic law are the most important sector of the international process of law unification. It includes the conventions unifying commercial law, the law of the sea, the law of air transportation, rail transport, the law of international financial settlements and the law of international civil procedure and the procedure dealing with international arbitration in commercial matters. Apart from conventions containing norms which, directly or indirectly, unify internationally the law through uniform or standard provisions, international economic law can be standardized also by the decisions of organs of international organisations and by the jurisprudence of general and arbitration courts.

International conventions unifying economic law, decisions of international organisations and court rulings of a precedential nature constitute a source of international law. Their specific nature stems from the fact that they regulate the relationships between physical and legal persons. At the same time, they are a source of internal law of states thanks to ratification, approval, acceptance or reception. Thus, they represent a set of legal norms

³¹ F. A. MANN, *op. cit.*, p. 38.

³² G. SCHWARZENBERGER, *The Principles and Standards of International Economic Law*, RCADI 1966 (I), vol. 117, p. 14. On the history of the law of salvage on the sea, see: W. ADAMCZAK, *Instytucja ratownictwa morskiego we współczesnych stosunkach żeglugowych* [The Institution of Salvage on the Sea in Modern Navigation Relations], Gdańsk 1981, pp. 22—43.

³³ J. JAKUBOWSKI, *Umowa sprzedaży w handlu zagranicznym* [The Contract of Sale in Foreign Trade], Warszawa 1966, pp. 103—127.

constituting an intermediate band between international law and internal law, called sometimes trans-national law.³⁴

4. The Subject of International Economic Law

The emergence of a new branch of law calls for a new look at the problems of subjectivity. The traditional point of view was based on a distinction of subjects of international public law and subjects of international transactions, i.e. subjects of international private law. The former included States and some international organisations, the latter legal and physical persons. This traditional approach was, however, lacking in precision as far as international organisations were concerned, since their statutes were not precise enough in conferring on them a legal personality, while not making them a subject of international law, thus leading to a rather arbitrary distinction of some, most important international organisations as subjects of international law. The symptom of the emergence of international economic law was the distinction, apart from the category of international organisations enjoying public law capacity and the category of legal persons under private international law, of an additional category of international corporations and, hence, of international corporation law. Such corporations come into being as a result of agreements among States, but they are also established on the basis of agreements concluded between legal persons and physical persons of various nationality. The distinction setting apart the international corporations involves the concentration of research into the problems of international private law around transactions in which these corporations participate, leaving to international public law the problem of their capacity to create law, including their capacity to create international law. The matter is complicated by the fact that some international corporations enjoy privileges and immunities. In the connection, it can be considered that there is no need for such privileges and immunities, and certainly not for a general immunity; it can also be said that the traditional rules upon which the doctrine of privileges and immunities are based cannot be applied in this case, because by adopting the rule *par in parem non habet jurisdictionem*

³⁴ J. BIAŁOCERKIEWICZ, *Wpływ Międzynarodowej Organizacji Pracy na ujednolicenie prawa pracy* [The Influence of the International Labour Organisation on the Unification of Labour Law], Toruń 1981; J. GILAS, *Systemy normatywne w stosunkach międzynarodowych* [Normative Systems in International Relations], Warszawa 1981, pp. 75—94; J. JAKUBOWSKI, *Prawo jednolite w międzynarodowym obrocie gospodarczym* [Unified Law in International Economic Intercourse], Warszawa 1972; H. C. GUTTERIDGE, *op. cit.*, pp. 37—51; H. C. GUTTERIDGE, *An International Code of the Law of Sale*, BYBIL, vol. 14, 1933, pp. 75—83.

one would have placed international corporations and States on an equal footing.³⁵

5. Competing Branches of International Law and International Economic Law

The question arises as to whether the separation of international economic law will act as a brake on the tendency to separate other, more fragmentary branches of international law and will lead to the absorption of the elements of systems of other branches. Thus, a tendency to emerge as a autonomous scientific discipline could be spotted in the field of international financial relations. The idea of an international financial law as a comprehensive discipline embracing also procedural rules can hardly be substantiated, because of the fact that international financial law could well be contained as one of the segments of international economic law. Equally, it is quite impossible to sustain the idea of an international financial law as a conflict law which is an offspring of international private law, because in the field of international financial relations the processes of international unification of law led to a substantial consolidation of substantive norms, whereas within the framework of the law dealing with foreign nationals we witnessed the emergence of important norms of public law, upon which depend the rules applying in the case of a conflict of law.³⁶ It can be said with certainty that no difficulty would arise in connection with the incorporation of international taxation law into the body of international economic law. What is important in this case, is the public law character of taxation rules on the one hand, and on the other hand, the merger within one whole of the norms of internal law of states with those of international origin.³⁷

Istvan Szaszy considered that it would be advisable to set apart the norms applying in the case of conflict of labour law in one system of international labour law.³⁸ It must, however, be pointed out that a set of norm applying in the case of a conflict of law depends on a regulation of a public law nature, hence a joint consideration of the norms of public law, the norms applying in the case of a conflict of law and the norms of internal law would be of greater importance. Furthermore, since the norms applying in the case of a conflict of law in the field of labour relations

³⁵ F. A. MANN, *International Corporations and National Law*, BYBIL, vol. 42, 1957, p. 173.

³⁶ I. SZASZY, *Collision of Legal Rules in the Sphere of International Financial Law*, in: *Questions of International Law*, edited by G. Haraszti, Leyden-Budapest 1977, pp. 193—196.

³⁷ T. NAGY, *The Socialist Variant of the Multinational Fiscal Law, The Hungarian Case*, in: *The Comparison of Law*, edited by L. Peteri, Budapest 1974, p. 235.

³⁸ I. SZASZY, *International Labour Law*, Budapest 1968, pp. 12—16.

are not so far removed from the norms of international private law it would not seem justified to set them apart as an autonomous entity. A review of the legislation of many States reveals that the connection of *lex loci laboris* has no such wide application as suggested by I. Szaszy, while the solutions in cases of conflict of law adopted for labour relationships resemble, after all, the solutions adopted in the case of obligations.

Equally, the problems of the law of foreign trade, most often referred to at present in the doctrine as the international commercial law, must also be treated as a constituent part of international economic law.³⁹ In Polish literature dealing with international private law, it was J. Jakubowski who first advocated the separation of international commercial law. He maintained that international commercial law is exclusively of a private nature. He pointed out that it is impossible to include into one branch of law inter-state agreements of an economic nature and international commercial transactions. What is of decisive importance in this respect, is the difference in subjects. The subject of international agreements is the State, whereas the subject of international commercial transactions is a physical or legal persons; a State enterprise when entering into a private law relationship must be treated in the same way as other subjects, for it does not enjoy immunity. Furthermore, as pointed out by Jakubowski, it is not possible to cover by one discipline considerations on the actions of civil law and administrative acts regulating problems of international economic relations. Finally, account must be taken of the different system of responsibility and of the settlement of disputes in the case of inter-State economic agreements and international commercial transactions.⁴⁰

A narrow perception of international commercial law as a civil law is, however, subject to reservation. First, a civil law regulation depends, because of State intervention, on a public law regulation.⁴¹ Second, because of the

³⁹ International commercial law was officially defined as "*l'ensemble des règles qui régissent les relations commerciales de droit privé mettant en cause plusieurs pays*". It covered international contracts of sale, means of payment, commercial banking credits, laws concerning international trade, insurance, transport, industrial property, copyrights, commercial arbitration, international treaties unifying commercial law. *Commission des Nations Unies pour le droit commercial international. Annuaire*, volume 1: 1968—1970, New York 1971, p. 22.

⁴⁰ J. JAKUBOWSKI, *Prawo jednolite w międzynarodowym obrocie gospodarczym* [Unified Law in International Economic Intercourse], Warszawa 1972, p. 30.

⁴¹ Even in the perspective of international private law it was possible to discern the breakdown of the principle of non-application of foreign public law. For, how are we to evaluate an international relation in the field of contractual obligations without taking into account foreign law dealing with import and export licences, foreign exchange control or competition. H. BATIFFOL, *L'avenir du droit international privé*, in: *Institut de Droit International. Livre du Centenaire 1873—1973. Evolution et perspectives du droit international*, Basel 1973, p. 164.

phenomenon of State trading, the State appears as a party to international commercial transactions, thus becoming a subject of international commercial law. Thirdly, there is growing unification of the principles of responsibility of the state and of physical and legal persons, because of their equal legal position in international economic intercourse, when the State is engaging in state trading. Fourthly, the public law system of settlement of international disputes, especially conciliation, is being increasingly applied in the settlement of disputes between physical persons and legal persons engaging in international economic intercourse.

The critical appraisal of the civil law approach to the problems of international commercial law led to the adoption of a broader view of this discipline as a set of rules covering relationships in international trade. The advocate of such a broader view, J. Łopuski, calls for the adoption of the concept of international commercial law (*droit du commerce international*) or of the concept of the law of international economic intercourse.⁴² However, if we were to accept as justification of this view the fact that it enables to better “understand the inter-action of legal instruments of a different character, belonging to the sphere of public law and private law, of international law and internal law”,⁴³ one would be entitled to consider a so conceived international commercial law as a part of international economic law. What would remain as a topic for discussion would be only the name — international commercial law or international economic law? This, however, is not of the greatest importance when considering the problem of separation of a branch of law and of the corresponding scientific disciplines. Legal doctrine includes increasingly international banking law as a part of so conceived international commercial law. Simultaneously, we are witnessing an increasing internationalization of banking law, which deals to an ever growing extent with international banking relations.⁴⁴

J. Kolasa represented similar views. He maintained that international commercial law is composed of elements of civil law, mainly law of obligations and commercial law, international private law, insurance law, transport law, law of the sea, while including also elements of internal law of financial and administrative nature, such as customs and taxation law as well as elements and specialized norms of international public law. These component parts of international commercial law correspond to various types of legal relationships between subjects of international commercial transactions: re-

⁴² J. ŁOPUSKI, *op. cit.*, pp. 22—22.

⁴³ *Ibid.*, p. 21.

⁴⁴ B. MAROIS, *Internationalisation des banques*, Paris 1979.

relationships between buyer and seller, between buyers and sellers and States, and between States.⁴⁵

If we see no sufficient reasons to single out as a separate branch of law international financial, commercial, communication, labour law, but prefer to treat them as elements of a system of international economic law, it is because their institutions are intertwined and only when considered as a whole form a separate entity. For example, the international financial institutions provided for in the Charter of the International Monetary Fund depend on the legal and economic institutions of the General Agreement on Tariffs and Trade and on the general principles of the new international economic order. Thus, in conformity with the principles of system analysis they form a sub-system of international economic law, whose designation embraces several institutions.

6. International Economic Law and Other Branches of Law

W. Röpke maintained that, in principle, the object of international law and economics is the same. While opposing an excessive overemphasis of economic motives of international conflicts and wars, which he considered to be the basic institutions of international law, he was aware of the existence of various degrees of interest and warned against, a legalistic approach which would perceive international relations exclusively in terms of legal institutions and concepts.⁴⁶ However, assuming that the era of the so-called natural international order characterized by a separation of economics from politics, i.e. by a neglect of international economic relations by international law has come to an end, the emergence of international economic law appears as an unavoidable necessity. Its subject is the entire spectrum of international economic relations, above all those regulated by sources of law, and also those which, while not regulated by international conventions or customs or internal legislation, can be treated as facts which are not neutral as regards international economic law. As to whether they are more or less important will be decided by their future regulation as well as by the subject of individual sanctions of States of an economic character which arise in their context.

International public law and international private law are the natural associates of international economic law. The importance of international public law for international economic law derives from the common sources,

⁴⁵ J. KOLASA, *GATT. Z zagadnień tworzenia i stosowania prawa handlu międzynarodowego* [*GATT. Problems of Creation and Application of International Commercial Law*], Wrocław 1979, pp. 8–9.

⁴⁶ W. RÖPKE, *Economic Order and International Law*, RCADI, 1934 (II), pp. 207–211.

such as treaties, customs, general principles of law. Furthermore, international public law provides the necessary information on international organisations, some of which are of an economic nature, on their structure, organs, voting systems, functions, legal character of their decisions, etc. Of importance for international economic law is also the analysis of the rights of the external organs of states, such as diplomatic and consular missions. In turn, international private law makes it possible to understand the essence of norms dealing with cases of conflict of law, of internationally unified norms, while sharing with international economic law a common interest for international transactions.

When considering the relation of international public law towards international economic law it has to be borne in mind that as a result of an increasingly intensive regulation by international law of international economic relations, we are witnessing not only the emergence of international economic law, but also a gradual transformation of the entire body of international public law. This tendency led to the latter being called international law of welfare, being viewed as a vertical system, as opposed to the horizontal system dealing traditionally with relations among States.⁴⁷ It is also being pointed out that with the development of norms regulating international economic relations it is becoming increasingly necessary to regulate such matters as sea pollution, repartition of the resources of the seas and oceans, protection of the human environment, human rights. Finally, if we were to take into consideration the fact that the subject of regulation are such institutions as trust funds, international organisations of public functions, corporations, we would arrive at the conclusion that the limits of international public law are less clear and the tendency to a broader treatment of the subjects of international law would be seen in a new light.⁴⁸ Under these circumstances it may appear that international economic law, while stimulating the development and transformations of international public law would itself become one of its components and not its autonomous part.

In a situation in which international commercial law does not constitute an autonomous branch, it is also commercial law which borders on international economic law. Thus, for example, Paul Didier, the author of the famous French text-book of commercial law, mentions international treaties among the sources of commercial law.⁴⁹

⁴⁷ W. FRIEDMANN, *Human Welfare and International Law. A Recording of Priorities*, in: *Transnational Law in a Changing Society. Essays in Honor of Philip C. Jessup*, New York—London 1972, pp. 113—134.

⁴⁸ C. W. JENKS, *Multinational Entities in the Law of Nations*, in: *Transnational Law in a Changing Society. Essays in Honor of Philip C. Jessup*, pp. 70—83.

⁴⁹ P. DIDIER, *Droit commercial*, Paris 1970, pp. 44—49.

7. The Structure and System of International Economic Law

When considering the methodological problems of international economic law it is necessary to study its structure and system. Mark Boguslavskij represented the view that international economic law can be divided into its general and particular parts. In the latter one may single out: 1) problems of production, including coordination, specialization and cooperation; 2) problems of technical cooperation in the field of investments; 3) problems of foreign trade; 4) problems of scientific and technical cooperation; 5) problems of patents, licences and know-how; 6) problems of communication and transport; 7) foreign exchange and financial problems; 8) problems of foreign labour; 9) settlement of international economic disputes, which the author placed under the heading of international civil procedure.⁵⁰ The main fault of such a division is that, on the one hand, it places its particular components under the umbrella of civil law and tends to ignore the problems of public law while, on the other hand, it subordinates them, to a very large extent, to the practical needs which arise from cooperation among socialist States, without adequately taking into account the economic relations between the socialist and capitalist States and the economic relations of these two groups of States with the developing States. V. Lisovskij divides international commercial law into: theory (concepts, scope and system), history, legal principles, organs of state foreign relations, international organs and organisations, international treaties, commercial transactions, the situation of ports and communication routes, settlement of commercial disputes.

Among Polish scholars, it was J. Hołowiński who showed great interest in the problem of the structure and system of international economic law. In his view, international economic law was meant to transform the system of international public law in such a way as to adapt it to the needs of international economic relations. Thus, when dealing with the problem of territory one would have to study the problems of the customs area, when dealing with international organisations — the international economic organisations, when dealing with the subjects of law — international companies, when dealing with the State — its organs which deal with international economic relations, such as offices of commercial counsellors (which perform specific functions in the structure of foreign trade of the socialist States). When considering particular problems one would have to study international transport law, international commercial law (covering commercial transactions, commercial treaties as well as legal means designed to restrict economic intercourse, for example, by embargo, blockade, international boycotts),

⁵⁰ M. M. BOGUSLAVSKIJ, *op. cit.*, pp. 78-79.

the law of protection of intellectual property, international law of protection of the environment, settlement of international economic disputes.⁵¹

According to G. Schwarzenberger international economic law would cover: problems of property and exploitation of natural resources, production and distribution of goods, invisible international transactions of an economic and financial nature, money and finances, services, the status of offices and organisations engaged in economic activity. Such a division could eventually be sustained, even though G. Schwarzenberger considered international economic law as a component part of international public law and not as a comprehensive branch of law.⁵²

The French text-book of international economic law proposes the following division: "*le droit d'établissement, le droit des investissements (privés et publics), le droit des relations économiques, le droit des institutions économiques et le droit des intégrations économiques régionales*".⁵³ Trade, money and investments were also singled out.

International law of economic development must also become an integral part of international economic law. Sometimes views are being expressed that international law of economic development is an autonomous branch of law composed of: the international law of economic assistance, international law of international investments, international law dealing with the exploitation of natural resources and the law of economic integration.⁵⁴ However, considering that the Charter of Economic Rights and Obligations of States of December 14, 1974 preserves the link with international public law and tries to regulate international economic relations among all States and not only the economic relations with the developing States, it is clear that international law of economic development must be treated as a component part of international economic law, as an element which tend to give a new imprint on international economic law.⁵⁵ Opinions are also expressed to the effect that international law of economic development is the basis of the entire body of international law, for its reconstruction, for the development of its new institutions (for example, for collective

⁵¹ J. HOŁOWIŃSKI, *Międzynarodowe prawo gospodarcze w uczelniach ekonomicznych* [International Economic Law in Economic Schools], "Życie Szkoły Wyższej", 1979, No. 6, pp. 55—63.

⁵² G. SCHWARZENBERGER, *The Principles and Standards of International Economic Law*, RCADI, 1966 (I), vol. 117, p. 7. Also G. SCHWARZENBERGER, *Economic...*, p. 4.

⁵³ D. CARREAU, P. JUILLARD, T. FLORY, *op. cit.*, p. 13.

⁵⁴ M. VIRALLY, *Où en est le droit international du développement*, "Revue juridique et politique. Indépendance et coopération", 1975, No. 3, pp. 279—290.

⁵⁵ J. GILAS, *Zasady nowego międzynarodowego ładu gospodarczego* [Principles of the New International Economic Order], "Przegląd Stosunków Międzynarodowych", 1981, No. 6, pp. 7—22.

human rights, for the right to economic development, for the new international order in the field of information).⁵⁶

8. Characteristic Features of International Economic Law

The following characteristic features of international economic law can be singled out:

1) in the sphere of institutions the departure from the principle of equal vote, in favour of diversification depending on the economic importance of the subject;

2) in the sphere of norms, the tendency to a rigorous definition of the legal rules by the inclusion of economic concepts and institutions, in such a way that international economic law becomes a formalized and regulated set of economic and political concepts which constitute the foundation of the international economic order;⁵⁷

3) in the sphere of settlement of disputes, the departure from the principle which gives preference to the judicial trial as the best method in favour of more informal methods such as conciliation;⁵⁸

4) in the sphere of basic principles international economic law tends to reconcile two mutually exclusive principles, on the one hand, declaring its attachment to the principle of sovereign equality of States and, on the other hand, emphasizing the economic interdependence of individuals, thus leading to the diversification of the entire system of norms;

5) the subjects of international economic law are both the recognized subjects of international public law, such as States and international organisations and subjects of internal law, such as legal persons, including international corporations and even physical persons;

6) international economic law stands apart, in the sense that its universal norms have not gained enough acceptance to make sure that they shape the character of polilateral, regional and bilateral norms. G. Schwarzenberger was aware of this and maintained that international economic law is relatively more removed from the centre of big power politics when compared with other branches of international law, even though he recognized that this may change;⁵⁹

7) in view of its early stage of development, international economic law is the object of competition between doctrines, one emphasizing an international public law approach and the other based on civil law concepts.

⁵⁶ M. SILAGI, *Entwicklungsvölkerrecht und neue Weltwirtschaftsordnung*, "Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht", vol. 32, 1982, no 2—4, pp. 177—208.

⁵⁷ D. CARREAU, P. JUILLARD, T. FLORY, *op. cit.*, pp. 14—22.

⁵⁸ *Ibid.*, p. 27.

⁵⁹ G. SCHWARZENBERGER, *Economic...*, pp. 1—2.

The Most Favoured Nation Clause in the Light of the Draft of the International Law Commission

by MARCIN NOWAKOWSKI

1. Introduction

The problems of the most favoured nation clause have been widely discussed in their manifold aspects in the world literature. For, the most favoured nation clause is an institution of international law the implications of which penetrate deeply into many sectors of international relations.

In Poland, the attention concentrated throughout the postwar period, in the first place, on the problems relating to the functioning of the clause in the General Agreement on Tariffs and Trade (GATT) and on its role as an instrument ensuring the practical implementation of the principle of non-discrimination.¹

The work of the International Law Commission on the clause throughout the 1970s constituted a vivid confirmation of the unvarying topicality of the problems of the favoured nation clause in international law and was noticed in Polish literature. The adoption by the Commission in 1976 of the draft articles concerning the most favoured nation clause, in the first reading, was signaled in 1977 together with an appraisal of the draft and a critical examination of some solutions advocated by the Commission.²

The conclusion by the Commission of the work on the most favoured nation clause coincided with a marked increase in interest in Poland in the problems involved at the turn of the last decade. This increase in interest can be explained by the deterioration of the external terms of trade experienced by Poland in its relations with the developed capitalist States.

¹ T. SZURSKI, *Zasada najwyższego uprzywilejowania w Układzie Ogólnym w Sprawie Tarw Celnyc i Handlu (GATT)* [The Principle of Most Favoured Nation Treatment in the General Agreement on Tariffs and Trade (GATT)], Warszawa 1970.

² W. GÓRALCZYK, *Klauzula największego uprzywilejowania w pracach Komisji Prawa Międzynarodowego ONZ* [The Most Favoured Nation Clause in the Work of the International Law Commission of the UN], "Studia Iuridica", 1977, No. 6.

The effects of the worsening situation were increasingly felt since the end of the 1970s, culminating with the invasion of politics into the field of economic relations and the withdrawal of the most favoured nation clause by the United States in its relations with Poland in 1982.³ In this context, the problems involved in Poland's participation in GATT and in the role of the clause in Poland's relations with the capitalist countries became obviously of major interest and importance.⁴

In order to introduce some more clarity into our further considerations concerning the solutions proposed by the International Law Commission we would like to make several preliminary remarks on the origin of the Commission's interest with the subject, which was of an auxiliary and derivative nature with regard to the general problem of the law of treaties and remained in the mainstream of the basic mandate of the Commission.⁵

The Commission turned its attention to the most favoured nation clause as a result of its work on the law of treaties. The first proposal submitted in 1964 at the XVI session of the Commission concerned the inclusion of provisions covering the most favoured nation clause into the draft articles concerning the law of treaties which were, at that time, on the Commission's agenda.⁶ The relevant provisions were to be included into the context of the articles concerning the rights and duties of states not parties to a given agreement. After discussion at the XVI session the Commission decided, however, against the inclusion of the most favoured nation clause into the general codification of the law of treaties. However, the problem itself raised in the course of the discussion on the principle of *pacta tertiis nec nocent nec prosunt* was of sufficient interest in its broader aspect, that at the XIX session in 1967 it was decided to include in the working plan of the Commission a separate item concerning the most favoured nation clause. The decision reflected the interest of the developing countries in the matter, principally because of its importance in the field of international trade.⁷

³ R. ŁAWNICZAK, *Wirtschaftliche Sanktionen der USA gegenüber Polen*, "Osteuropa Wirtschaft", Sept. 1982, pp. 183—193.

⁴ T. BARTOSZEWICZ, M. NOWAKOWSKI, *KNU w stosunkach Polski z krajami Zachodu — wybrane zagadnienia* [*The Most Favoured Nation Clause in Poland's Relations with the Western Countries — Selected Problems*], 1982, (Instytut Koniunktur i Cen Handlu Zagranicznego).

⁵ YB ILC [Yearbook of the International Law Commission] vol. 1, 1964, p. 249, statement by Commission member M. N. Singh.

⁶ Commission member J. de Arechaga proposed that the Article be given the title "The Most Favoured Nation Clause" and the number 62 C (YB ILC, 1964, vol. 1, p. 184).

⁷ *Sixth Committee. Legal Questions. Summary Records of Meeting 20 Sept.-14 Dec. 1966*, GAOR XXI Session, UN 1967 A/C/SR 899—955.

The International Law Commission discussed the draft articles concerning the most favoured nation clause from 1967 till 1978. Its work was based on nine reports of the Special Rapporteur and on the comments offered by states and international organisations. It was at its XXX session in 1978 that the Commission, pursuant to a resolution of the UN General Assembly requesting that the study of the problem of the most favoured nation clause be continued, adopted the final version of the articles, which were then submitted to the General Assembly with a recommendation that an international convention be signed on the subject.⁸

In its resolutions 33/139 and 35/161, the General Assembly requested all interested states and international organisations to offer their comments on the draft proposed by the Commission and accepted at its second reading as well as on the provisions on which the Commission was unable to reach a final conclusion.⁹ The General Assembly asked also for comments concerning the Commission's suggestion that an international convention be concluded on the most favoured nation clause. These comments are still coming in. The comments presented so far vary in their content. The socialist states gave the draft of the Commission their wholehearted support while expressing their agreement with the Commission's suggestion concerning the conclusion of an international convention. The tone of other comments was more reserved and there were opinions containing very critical observations.¹⁰ It can therefore be said that the draft is controversial and this, in turn, calls for an explanation.

As far as the construction of the draft proposed by the International Law Commission is concerned, no objection can be raised as to its clarity. It contains 30 articles, without formal division into chapters.¹¹ Articles 2,

⁸ *Report of the ILC on the Work of Its XXXth Session, General Assembly, 1978*, pp. 6—15.

⁹ *Resolutions and Decisions Adopted by the General Assembly during Its XXXIII Session. Supplement N 45/A/33/45*, N.Y. 1979; *IX Resolutions Adopted on the Reports of the Sixth Committee, ibid.*, p. 221.

¹⁰ Doc. A/CN.4/308, 1978. Of particular interest is the attitude of the European Economic Community and of Luxemburg.

¹¹ Below are the titles of the respective Articles: 1. Scope of the present Articles; 2. Use of terms; 3. Clauses not within the scope of the present Articles; 4. Most-favoured nation clause; 5. Most-favoured nation treatment; 6. Clauses in international agreements between States to which other subjects of international law are also parties; 7. Legal basis of most favoured nation treatment; 8. The source and scope of most favoured nation treatment; 9. Scope of rights under a most favoured nation clause; 10. Acquisition of rights under a most favoured nation clause; 11. Effect of a most favoured nation clause not made subject to compensation; 12. Effect of a most favoured nation clause made subject to compensation; 13. Effect of a most favoured nation clause made subject to reciprocal treatment; 14. Compliance with agreed terms and conditions; 15. Irrelevance of the fact that treatment is extended to a third State against compensation; 16. Irrelevance of

4 and 5 deal with definitions of fundamental importance for the draft. Articles 9 and 10 explain the action of the principle of *eiusdem generis*. Articles 11, 12, 13 and partly also Articles 15 and 16 cover provisions defining the unconditional character of the most favoured nation clause. Articles 18 and 19 deal with the relation between most favoured nation treatment and national treatment. Articles 20 and 21 contain provisions about the limitation in time of the rights resulting from the most favoured nation clause. Articles 23, 24, 25, 26 and 30 deal with exceptions from the clause and Articles 23, 24 and 30 specifically with the application of the clause in relation to developing countries.

In our subsequent consideration of the draft proposed by the International Law Commission we intend to examine closer some questions which may influence the final attitude of states on the matter. Seen from that angle, one can view as essential the proposals concerning the definition of basic concepts, the unconditional character of the most favoured nation clause, the application of the clause in relation to developing countries and the exception concerning customs unions. We would like also to offer some comments on the interdependence of the codification function and the function of the progressive development of international law as regards the principles concerning the most favoured nation clause.

2. Definition

In the course of its work on the most favoured nation clause, the Commission spent much time on the definition of basic concepts used in the draft, trying, however, to avoid involvement in the discussions arising from terminological ambiguities, considering quite rightly that in many cases this

limitations agreed between the granting State and a third State; 17. Irrelevance of the fact that treatment is extended to a third State under a bilateral or a multilateral agreement; 18. Irrelevance of the fact that treatment is extended to a third State as national treatment; 19. Most favoured nation treatment and national or other treatment with respect to the same subject-matter; 20. Arising of rights under a most favoured nation clause; 21. Termination or suspension of rights under a most favoured nation clause; 22. Compliance with the laws and regulations of the granting State; 23. The most favoured nation clause in relation to treatment under a generalized system of preferences; 24. The most favoured nation clause in relation to arrangements between developing States; 25. The most favoured nation clause in relation to treatment extended to facilitate frontier traffic; 26. The most favoured nation clause in relation to rights and facilities extended to a land-locked third State; 27. Cases of State succession. State responsibility and outbreak of hostilities; 28. Non-retroactivity of the present Articles; 29. Provisions otherwise agreed; 30. New rules of international law in favour of developing countries (*Report of the ILC on the Work of Its XXXth Session, 8 May-28 July 1978, General Assembly, N.Y. 1978*).

diminishes rather than increases the chances to reach a final solution on matters of substance. The causes of such a reasoning are manifold.

In the first place, the Commission observed that in international law there are many terms, including the very term of international law, which can be criticized for their lack of precision, but which remain in use because sanctioned by practice.¹² A definition requires the use of well defined and precise terms. Some definitions may even call for auxiliary definitions. For example, the Special Rapporteur pointed to such a need when trying to define the term "agreement".¹³ The Commission was confronted with a situation, in which a lack of a definition could affect the idea of adopting in the draft provisions regulating the problem of preferences in favour of developing countries. In the course of a very broad discussion on Article 23, the Commission pointed to the weakness of the general system of preferences and to the difficulty in defining the concepts of a developed state and developing State in the context of international economic relations.¹⁴ Accepting the fact that there is no agreement as to the definition of a developed state and a developing State, the Commission adopted the relevant provisions in the draft without definition.¹⁵

A similar problem arose with the definition of a customs union. The Special Rapporteur argued that a definition should be adopted.¹⁶ The Commission, however, ruled that the concept is enough and can be understood as a union of States whose purpose is to promote economic cooperation.¹⁷

At the same time, it must be pointed out that the term customs union discussed by the Commission covers in fact customs unions *sensu stricto*, free trade areas, economic communities and regional and sub-regional integration. Thus, its meaning is very broad and while its definition is not to be found in many agreements, this did not hamper their application or reduce their validity. On the other hand, it can hardly be denied that the problem is important enough to warrant an attempt at a definition. The fact that the Commission failed to do so when working on its draft proposals changes nothing in this assessment.

No objection can be raised as regards the definitions in Article 2 of the term "treaty", "granting state" and "third state". Doubts may, however, be expressed as to the advisability of including in Article 2 of a definition of "condition of compensation", since the Commission did not see it necessary to include, for example, a definition of the term "national

¹² Report ILC, XXVIII Session, 1976, p. 14.

¹³ YB ILC, 1978, vol. 1, p. 88.

¹⁴ Report ILC, XXVIII Session, 1976, p. 63.

¹⁵ YB ILC, 1978, vol. 1, p. 112 (R. Quentin-Baxter).

¹⁶ *Ibid.*, p. 128.

¹⁷ *Ibid.*, p. 130 (S. Sucharitkul).

treatment".¹⁸ The term "treaty" was defined along the lines adopted by the Vienna Convention on the Law of Treaties.¹⁹ Since the term "treaty" is being applied as synonymous with the term "agreement", doubts may arise as to whether the latter would need no further qualification within the framework of Article 2.²⁰ After discussion, the Commission decided against it, considering that an excessive elaboration of the definition of the term "treaty" could lead to misunderstandings, especially as pointed out by the Special Rapporteur, the Commission when discussing the problem of the most favoured nation clause was not dealing with the law of treaties as such and would therefore be ill advised to depart too much from the main subject of its interest.²¹

Articles 4 and 5 serve to provide a clearer understanding of the two basic terms, namely to the term "most favoured nation clause" and "most favoured nation treatment".

Thus, Articles 4 and 5 are also definitions, but of such fundamental importance for the draft proposals, that the Commission decided to accord them separate treatment.²² The Special Rapporteur called them "the cornerstone" of the entire draft.²³ The two Articles determine the scope of the draft proposal. The Commission decided to stick to the term "clause", irrespective of the fact as to whether the provisions concerning the most favoured nation clause are only part of an agreement or constitute the substance of the entire agreement. For the draft proposal worked out by the International Law Commission it is entirely irrelevant what is the formal construction of the clause, whether the construction is simple and concise, or elaborate and complex. A member of the Commission, R. Kearney considered that Articles 4 and 5 relate to the same subject and for the sake of greater clarity they ought to be merged into one.²⁴ It seems

¹⁸ YB ILC, 1978, vol. 1, p. 89, N. Ushakov. The reason given for the non-inclusion of this term was that the term and the problems involved appear only in Articles 16 and 17.

¹⁹ Art. 2 i/a/.

²⁰ YB ILC, 1978, vol. 1, p. 87 (S. Verosta). Discussion on Article 15.

²¹ *Ibid.*, p. 88.

²² Article 4: "A most favoured nation clause is a treaty provision whereby a State undertakes an obligation towards another State to accord most favoured nation treatment in an agreed sphere of relations".

Article 5: "Most favoured nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State". *Report ILC*, XXX Session, 1978, p. 33 and p. 41.

²³ YB ILC, 1978, vol. 1, p. 50.

²⁴ R. KEARNEY, *The Most Favoured Nation Clause, The XXV Session of the ILC*, AJIL, vol. 68, 1974, p. 468.

to us, that such a separation is justified because the two terms are being used separately in other Articles.

An essential novelty in the draft proposal is the extension of the scope of the Articles so as to cover the clauses concerning most favoured nation treatment, which is not exactly the same as the most favoured nation clause.²⁵ The commission considered it necessary to settle the matter, because the provisions concerning most favoured nation treatment are being included in international agreements, whose parties are subjects of international law other than States.

The fact, that the granting of most favoured nation treatment constituted the very sense and essence of the most favoured nation clause was always emphasized by Polish scholars and from this point of view the draft prepared by the International Law Commission confirms only the prevailing opinion.²⁶ Following the authors who can be considered as classics on matters of the most favoured nation clause, the commonly held view in this country is that the most favoured nation clause possesses no uniform content or form and is different in each specific agreement. Any attempt at explaining the term of most favoured nation clause in an abstract manner would necessitate a reference to a concept of a standard of most favoured treatment, understood as a treatment not worse when compared with the treatment of the most favoured nation.²⁷

Pursuant to the intention to concentrate on the legal aspects of the most favoured nation clause, the International Law Commission restricted its definition to a description of the clause as a legal institution without entering into its consideration as an instrument of commercial policy.²⁸

The just quoted examples illustrating the tactics adopted by the Commission when dealing with the problems of definition warrant the conclusion that

²⁵ See, Article 6 of the ILC draft.

²⁶ Cf. the following definitions: Most favoured nation clause. "This term covers treaty provisions whereby the signatories undertake to grant to each other, to their nationals and to their merchandise such rights, privileges and facilities enjoyed now and in the future by most favoured States, their nationals or merchandise". (J. GILAS, *Encyklopedia prawa międzynarodowego i stosunków międzynarodowych* [*Encyclopedia of International Law and International Relations*], Warszawa 1976 p. 122) and: "A most favoured nation clause provides that a state undertakes under condition of reciprocity, to grant its contracting party all those rights, privileges and facilities which it granted or will grant to a third State". (J. MAKOWSKI, *Organa państwa w stosunkach międzynarodowych — Zjazdy międzynarodowe — Umowa międzynarodowa* [*State Organs in International Relations — International Congresses — International Agreement*], Warszawa 1957, pp. 162—163).

²⁷ Cf. T. SZURSKI, *op. cit.*, p. 17.

²⁸ While treating the most favoured nation clause as a manifestation and formal guarantee of equal treatment, J. Wierzbowski stresses the dual nature of this guarantee, see J. WIERZBOŁOWSKI, *Knu istota działania i podłoże prawne* [*The Most Favoured Nation Clause — Its Action and Legal Basis*] "Handel Zagraniczny", 1961. No. 5, p. 221.

it would be difficult to interpret these tactics as demonstrating an unwillingness to solve in a discretionary way certain terminological doubts. In some cases the lack of clear definitions seems to create blanks in matters of substance. On the other hand, one could hardly neglect the obvious necessity to adopt many solutions not sufficiently defined as a fact able to promote the process of codification. Nonetheless, it must be conceded that the pragmatic approach taken by the Commission led ultimately to the successful conclusion of its work.

3. The Unconditional Character of the Most Favoured Nation Clause

The unconditional character of the most favoured nation clause was one of the most hotly debated issues, since it determines the very nature of the clause. The Special Rapporteur devoted to this problem great attention especially in the Second Report of 1969, Fourth Report of 1973, Fifth Report of 1974 and in the Report of the Commission to the General Assembly in 1975. The problems involved in the unconditional character of the most favoured nation clause were dealt with in the draft proposal in Articles 11, 12, 13 and to some extent also in Article 15. On the other hand, very few comments on the subject were presented by States.²⁹

The idea of the unconditional character of the most favoured nation clause is generally supported by legal doctrine. At present it is almost impossible to find an expert in international law who would question the correctness of this view. It was supported by such eminent scholars as P. Guggenheim, H. Hawkins, P. Level, D. Vignes, G. Schwarzenberger, R. Snyder, O. Gienkin, B. Nolde.³⁰ It was endorsed by the Economic Committee of the League of Nations,³¹ by the Institute of International Law which in its resolution of 1936 accepted the presumption of the unconditional character of the most favoured nation clause.³² The most favoured nation

²⁹ YB ILC, 1978, vol. 2, part 1, p. 16. Of essential importance were the comments of the EEC concerning the inclusion of a new article 10 bis, entitled: "Effect of a most favoured nation clause under special conditions of reciprocity on exchanges of goods and services between countries with different socio-economic systems".

³⁰ Cf. YB ILC, 1975, vol. 2, p. 125.

³¹ YB ILC, 1969, vol. 2, Annex I, p. 176. Excerpts from the conclusions of the Economic Committee of the League of Nations in regard to the most favoured nation clause: "We may therefore conclude that the first fundamental principle, implicit in the conception of most favoured nation treatment, is that this treatment must be unconditional.

³² "The effect of the most favoured nation clause in matters of commerce and navigation: 1. The most favoured nation clause is unconditional, unless there are express provisions to the contrary. Consequently, in matters of commerce and navigation, the clause confers upon the nationals, goods and ships of the contracting countries, as a matter of right and without compensation, the regime enjoyed by any third country". YB ILC, 1969, vol. 2, Annex II, p. 180.

clause which forms the very basic of GATT must also be treated as unconditional.³³ The International Court of Justice in its verdict in the case concerning the rights of nationals of the United States in Morocco (1952) reaffirmed clearly the unconditional character and automatic application of the most favoured nation clause.³⁴

In the reports of the Special Rapporteur and in the comments of the Commission members it was pointed out on several occasions that the socialist States have always interpreted the clause as unconditional. This was also reflected in the legal doctrine of these States.³⁵

The structure of Articles 11, 12 and 13 is meant to solve two situations, to determine the effects of the application of the most favoured nation clause granted unconditionally and the effects of the application of the most favoured nation clause granted conditionally. In its draft proposal the Commission ignored the concept of real reciprocity, while dealing in detail with the clause granted under conditions of mutual treatment.³⁶ In this way, the complex and controversial problem of the application of the most favoured nation clause in relations between States with different social and economic systems had no visible impact on the draft proposed by the Commission.³⁷

The fundamental achievement of the draft is the unequivocal acceptance of the presumption in favour of the unconditional form of the most favoured nation clause.

4. Exceptions from the Most Favoured Nation Clause

The scope of exceptions from the most favoured nation clause taken into account in the draft gives rise to many doubts, especially in the light

³³ Cf. K. RÓWNY, *Zasady negocjowania porozumień dwustronnych w ramach wielostronnej umowy handlowej (GATT)* [*The Principles of Negotiation of Bilateral Agreements Within the Framework of a Multilateral Trade Agreement (GATT)*], "Zeszyty Naukowe SGPiS", 1969, No. 49, p. 183.

³⁴ YB ILC, 1970, vol. 2, pp. 204—208.

³⁵ W. FOMIN, *OON i meždunarodnaja trgovla (pravovye voprosy)*, Moskva 1971, pp. 144—152.

³⁶ Cf. YB ILC, 1970, vol. 2, par. 14: *The Most Favoured Nation Clause in East-West Trade*, pp. 235—237 and Annex II, pp. 239—242.

³⁷ See R. VERNON, *The Fragile Foundation of East-West Trade* "The Foreign Affairs", Summer 1979, pp. 1038—1039; S. PISAR, *Coexistence and Commerce, Guidelines for Transactions between East and West*, New York 1970, pp. 196—197; M. M. KOSTECKI, *East-West Trade and the GATT System*, London 1978, pp. 35—64. For an extensive list of Polish publications on the subject, see article by M. NOWAKOWSKI, *Ekonomiczne aspekty KNU w pracach Komisji Prawa Międzynarodowego ONZ* [Economic Aspects of the Most Favoured Nation Clause in the work of the UN International Law Commission], "Sprawy Międzynarodowe", 1981, No. 7, pp. 129—133.

of the GATT provisions. Considering the material gathered by the Commission and the time spent on the discussion on the subject, the actual results of the Commission's work are rather modest. And this is reflected also in the comments of States.

It may well be argued that the draft serves not only the interest of States willing to conclude agreements based on the traditional concept of the most favoured nation clause, but also the interest of States wishing to establish a treaty relationship of a special nature, corresponding to a specific situation. This results, of course, in the necessity to take into account all sorts of exceptions from the most favoured nation clause.³⁸ However, the Commission dealt only, in principle, with exceptions which apply in international economic relations.³⁹ That is why the controversies around the exceptions to the most favoured nation clause have their source, principally, in the conflicting economic interest of States.

The Special Rapporteur recognized certain exceptions as justified. These included preferences in favour of developing States, exceptions arising from the special situation of land-locked States and exceptions stemming from frontier traffic.⁴⁰ This qualification reflects the division of exceptions into those which are right (justified) and those which are wrong (unjustified) applied sometimes in literature, including Polish literature. Thus, T. Łychowski lists four cases when exceptions from the most favoured nation clause are considered to be the rule in international economic relations. These are: customs unions, frontier traffic, trade with one's own colonies and special situations.⁴¹

The discussion around the solutions adopted in the Commission's draft concerns, in the first place, presumed exceptions, i.e. such exceptions which, pursuant to generally accepted rules of international law, exclude certain benefits granted to a recipient State from the action of the most favoured nation clause, without necessity of listing these benefits in detail.⁴²

³⁸ YB ILC, 1976, vol. 1, p. 112 (R. Ago).

³⁹ These include: exception of frontier traffic, exception of land-locked countries, exception of preferences in favour of developing countries, exception of preferences extended to each other by developing countries.

⁴⁰ YB ILC, 1976, vol. 2, Part one, p. 121.

⁴¹ T. ŁYCHOWSKI, *Międzynarodowe umowy gospodarcze* [International Economic Agreements], Warszawa 1968, p. 43. See also: J. JUSZKIEWICZ, *Kwestia dyskryminacji w Układzie Ogólnym w Sprawie Cel i Handlu* [The Problem of Discrimination in the General Agreement on Tariffs and Trade], "Sprawy Międzynarodowe" 1978, No. 10, p. 105; M. RUCIŃSKI, *KNU w procesie normalizacji handlu Wschód-Zachód* [The Most Favoured Nation Clause in the Process of Normalization of East-West Trade], "Sprawy Międzynarodowe", 1974, No. 12, p. 60.

⁴² YB ILC, 1976, vol. 2, Part one, p. 119.

5. The Most Favoured Nation Clause and Its Application in Relations with Developing States

From the very outset of its work on the most favoured nation clause, namely since 1968, the Commission acted on the assumption that differences in the level of economic development between States are at the origin of many problems in international trade.⁴³

The proposed exception contained in the draft submitted by the International Law Commission is based on the understanding reached by UNCTAD and the scope of the exception corresponds to the scope of the generalized system of preferences. The Commission resisted the suggestions that the exception be extended to cover direct financial loans, low-interest credits, technical assistance and transfer of knowhow.⁴⁴ The proposals aimed at enlarging the scope of exceptional preferences in favour of developing countries led to a widening of the field of debate beyond the theme of international trade so as to include such topics as transfer of technology, exploitation of resources constituting the common heritage of mankind and many other fields of economic life and international relations.⁴⁵

The draft Article 23 concerning the exception in favour of developing States read as follows:

"A beneficiary State is not entitled under a most favoured nation clause to treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a scheme of generalized preferences established by that granting State, which conforms with a generalized system of preferences recognized by the international community of States as a whole or, for the States members of a competent international organisation, adopted in accordance with its relevant rules and procedures".⁴⁶

The work of the Commission on this Article ran in two stages. Its first version, which was at the basis of the Commission's work till 1976, was shorter and did not include the words "recognized by the international community". In the opinion of the Commission, such a restricted conception of the general system of preferences was better adapted to the sense of the Article, which was to "more accurately reflect the present situation as regards the general acceptability and implementation of a generalized system of preferences, having due regard to the actual participation of States in international organisations or arrangements concerned with the question".⁴⁷

The conception adopted by the Commission separated the problem of

⁴³ YB ILC, 1968, vol. 1, p. 188 (M. Yasseen) and vol. 2, p. 169.

⁴⁴ YB ILC, 1976, vol. 1, p. 147 (E. Ustor).

⁴⁵ YB ILC, 1976, vol. 1, p. 143 (P. Reuter, M. Sahovic).

⁴⁶ *Report ILC*, XXX Session, 1978, p. 138.

⁴⁷ *Report ILC*, XXX Session, 1978, p. 155.

exceptional preferences in favour of developing States from that of multilateral commercial negotiations, whose rules and procedures were defended by the United States.⁴⁸

The Commission was in agreement that Article 23 was the result of progressive development of international law. At its basis were first of all, problems of an economic nature. The Special Rapporteur called in his VII Report the proposed wording of Article 21 "a new international law of development".⁴⁹ The Commission was also aware of the fact that Article 23 fails to safeguard fully the interests of the developing States that they may be granted preferential treatment but only if the granting State wishes to do so. Thus the arrangement may depend on the political situation and involved a high degree of economic risk. The preferences granted to developing States are non-reciprocal and non-discriminatory. The first attribute was unanimously supported in the Commission.⁵⁰ However, the application of the principle of non-discrimination remains to some extent in the hands of the granting States and it can be said that the Commission expressed only a wish that the principle of non-discrimination be respected in the general system of preferences. The fact is that the preferences granted to a developing State depend on the free will of the granting State, so that they may contain an element of discrimination.

Attention may be drawn to these opinions which point out that the value of preferences are diminishing and that the developing countries are looking for other means which would ensure greater benefits from international trade and economic assistance.⁵¹

When adopting Article 30,⁵² the Commission was guided by the desire to include into the draft a general formula concerning the possibility of establishing new rules of international law benefiting the developing countries.⁵³

The Commission's views on the exclusion from the most favoured nation clause of the preferences which the developing countries are granting to each other must be seen in the light of the discussion on the exception

⁴⁸ Doc. A/CN.4/308, 1978, p. 26.

⁴⁹ YB ILC, 1976, vol. 2, Part one, p. 130.

⁵⁰ YB ILC, 1976, vol. 2, Part one, p. 128.

⁵¹ W. CIMOSZEWICZ, *UNCTAD a preferencje dla krajów rozwijających się* [UNCTAD and Preferences in Favour of Developing Countries], "Studia Iuridica", 1977, No. 6, p. 122.

⁵² Article 30 — New rules of international law in favour of developing countries: "The present Articles are without prejudice to the establishment of new rules of international law in favour of developing countries". *Report ILC*, XXX Session, 1978, p. 173.

⁵³ *Report ILC*, XXX Session, 1978, p. 176. Cf. title of Article 27 in its version of 1976: The relationship of the present Articles to new rules of international law in favour of developing countries (*Report ILC*, XXVIII Session, 1976, p. 68).

arising from a customs union and on the exception arising from preferences in favour of developing countries. There was no unanimity on the subject, and the opinion that reciprocal preferences extended by developing countries must be treated as an exception was questioned on the ground that economic integration by developed and developing countries must be accorded equal treatment, without taking into account the differences in quality which characterise these two types of integration.⁵⁴

The Commission failed to express itself unequivocally on the practice of States in this field. Some members of the Commission considered that, while the exception arising from preferences granted to each other by developing States figures on the agenda of several international organisations, there is not enough practical experience of States to support the view that such an exception had become a rule. The Special Rapporteur shared that view.⁵⁵ At the same time, he pointed to several examples of agreements concluded exclusively *ratione personae* and benefiting only those developing countries which decided to adopt such an arrangement.

In this connection, the Commission attempted to reply to the following question; is it possible, as in the case of preferences in favour of developing countries, to assert that there is a specific system of preferences which, in spite of some lacunae, could offer a reference for the establishment of a legal rule which the international community would be able to accept? It was only in the course of the second reading that the Commission decided to give a positive reply to this question.

At its XXX session in 1978, the Commission resolved to include into the draft an Article 24 entitled: "The most favoured nation clause in relation to arrangements between developing countries" which read as follows:

"A developed beneficiary State is not entitled under a most favoured nation clause to any preferential treatment in the field of trade extended by a developing granting State to a developing third State in conformity with relevant rules and procedures of a competent international organisation of which the States concerned are members".⁵⁶

The general rule embodied in Article 24 is limited in two ways. First, it concerns exclusively preferential treatment between developing States in the field of trade; second, it covers only such preferential treatment which was granted in accordance with the rules and procedures of a competent international organisation, to which the State concerned belong. Thus, the general outline of the Article follows the principles set out in the Charter of the Economic Rights and Obligations of States.

⁵⁴ YB ILC, 1976, vol. 1, (E. Hambro), p. 152, (A. Bilge), p. 154.

⁵⁵ YB ILC, 1976, vol. 1, p. 151 (N. Ushakov).

⁵⁶ Report ILC, XXX Session, 1978, p. 155.

Article 24 can therefore be qualified as one of those articles of the draft proposal which the Commission formulated in accordance with its mandate to establish rules within the progressive development of international law. In spite of the difficulties in defining the terms "developing State" and "developed State",⁵⁷ the Commission succeeded to offer a draft of the articles concerning the most favoured nation clause which reflected the needs of the developing countries in the fields of trade, economic cooperation and economic integration.

6. The Exception of Customs Unions

The exception of customs unions was one of the most thorny and controversial problems which the Commission had to face when working on the draft articles concerning the most favoured nation clause.

Before entering into a detailed discussion on the differences of opinion which emerged in the Commission it may be in order to devote a few remarks to the scope of the subject. In the understanding of the International Law Commission the exception arising from customs unions cover unions of States of an economic nature. The term "exception of customs unions" is an epitome universally used. Among unions of States of an economic nature we have to do most often with customs unions and free trade areas.⁵⁸ Undoubtedly, the discussion in the Commission on customs unions was greatly affected by the controversies which arose in connection with the treatment by the European Economic Community of States not belonging to the Community.

The majority of commercial agreements contains specific provisions excluding the benefits arising from preferences granted to each other by members of a customs union from the most favoured nation clause. The problem arises when the exception of a customs union is not specifically mentioned in the agreement. Under such circumstances it may be doubted whether a granting States is entitled to withhold from a third State the same benefits which it granted to its partners within a customs union, provided that the customs union was set up after the conclusion of the agreement between the granting state and the third state. The Commission was unable to reach an agreed position on the matter and this led to protracted discussions. Some members of the Commission held the view

⁵⁷ *Report ILC*, XXX Session, 1978, pp. 162—163.

⁵⁸ See *YB ILC*, 1976, vol. 1, p. 125. A. Martinez-Moreno raised this question, pointing out that unions of states of an economic nature include apart from customs unions and free trade areas also common markets, monetary unions and economic arrangements constituting a combination of the above mentioned.

that there is no customary rule accepted in international law which would automatically exclude the benefits granted to each other by members of a customs union from the action of the most favoured nation clause. Other members of the Commission argued that, in accordance with customary international law, any commercial agreement providing for most favoured nation treatment assumes an exception on the ground of a customs union, even if the agreement contained no provision to that effect.

Consequently, the Commission had to decide whether the adoption of an exception on the ground of a customs union would be desirable from the point of view of the progressive development of international law.⁵⁹ The divergent views of the members of the International Law Commission on the fundamental question of the exception on the ground of customs unions influenced the final results of the Commission's work. The practice of States provides a positive answer to the question as to whether the establishment of unions of States of an economic nature and the participation of States in such unions is permitted under international law. From the point of view of theory, the right of each State to join a customs union results directly from its sovereign authority. It does not matter whether a beneficiary State bound with a granting State by an agreement containing a most favoured nation clause will suffer as a result of the granting State joining a customs union, for it is difficult to accept the view that a beneficiary state possessed a right of veto with regard to the participation of a granting State in a customs union.⁶⁰

The right to set up customs unions and free trade areas is embodied in paragraphs 4 and 5 of Article XXIV of GATT which provides that customs unions and free trade areas may be established whenever they correspond to the needs to develop trade and economic integration between the interested States.⁶¹ On the other hand, paragraph 5 of Article XXIV tried to prevent an increase of trade barriers between customs unions by restricting the freedom of action of the States concerned in this respect.

At the time of the League of Nations the prevailing view was that customs unions constituted an exception from the most favoured nation clause sanctioned by tradition.⁶² This was confirmed in a resolution of the International Law Institute adopted in 1936. On the other hand, the United

⁵⁹ YB ILC, 1975, vol. 2, p. 9. Part III of the VIth Report of E. USTOR: *The Case of Customs Unions and Similar Associations of States*.

⁶⁰ YB ILC, 1976, vol. 1, p. 123, (P. Reuter).

⁶¹ General Agreement on Tariffs and Trade, Compendium of international agreements signed by Poland, Warszawa 1972, pp. 138—139.

⁶² "Except from the Conclusions of the Economic Committee of the League of Nations in Regard to the Most Favoured Nation Clause" quoted by the Special Rapporteur in the I Report, YB ILC, 1969, vol. 2, pp. 178—179, Exceptions to the Clause.

States and France objected against such a presumption after the establishment of a customs union between Germany and Austria in 1931.⁶³

The Commission was led to draw finally from the practice of States. It was established that in the period between 1919 and 1939 there were about 280 exceptions in the form of explicit contractual clauses stating that the benefits granted under a most favoured nation clause cannot be extended to benefit a beneficiary State when the granting State joins a customs union.⁶⁴ However, the study of State practice did not lead to unequivocal conclusions. It was argued that the practice of State went in this direction because the existence of such an exception could not be implied. The numerous exceptions formulated in the agreements proved that there was no customary rule in international law dealing with the matter. Such a thesis can hardly be questioned. It was unrelentlessly defended by the Special Reporter,⁶⁵ and many members of the Commission, while opposing his conclusions as to the impossibility of including an exception on the ground of customs unions into the draft, had to admit that he was right on that score.

The Commission discussed the possibility of including the exception on the ground of customs unions as an element of the progressive development of international law. Such a solution would be in conformity with the practice of States, it met, however, with opposition coming from two opposite directions. On the one hand, it was considered that the inclusion of an exception on the ground of progressive development is unjustified and superfluous. On the other hand, referring to Article 31 of the Vienna Convention according to which an agreement must be interpreted in a way which takes into account, among other things, all principles of international law applying in relations between the parties concerned, it was argued that the fundamental right of each State to join a customs union warrants the presumption that this constitutes an exception from the most favoured nation clause without reference to the progressive development of international law.⁶⁶

E. Ustor⁶⁷ the Special Rapporteur was against assuming that customs

⁶³ YB ILC, 1975, vol. 2, p. 14.

⁶⁴ J. JUSZKIEWICZ states that in the post-war period the tendency to create unions and other associations of states not only did not weaken, but on the contrary "[...] so far about two thirds of the GATT contracting parties made use of Article XXIV and one half of the remaining participate in looser preferential agreements recognized by GATT. Countries restricted to their own customs area are in a minority", (J. JUSZKIEWICZ, *op. cit.*, p. 116).

⁶⁵ YB ILC, 1976, vol. 1, p. 117.

⁶⁶ YB ILC, 1976, vol. 2, p. 132 (P. Reuter).

⁶⁷ YB ILC, 1976, vol. 1, p. 125 (A. Martinez-Moreno).

unions were exceptions from the most favoured nation clause and argued that customs unions had a destructive impact on the development of international trade. He made a clear distinction between economic integration of developing States and economic unions of States in general.⁶⁸ The statements and conclusions of the Special Rapporteur prompted his opponent P. Reuter to suggest that the Special Rapporteur's views reflect the interests of the State which he represents.⁶⁹ It is true that the socialist States do not favour the fragmentation of the world market and consider it to be a threat to their interests. The threat may be greater in their case than in the case of the developing states which enjoy preferential treatment in the developed States. However, this aspect of the problem was not raised in the course of the discussion held in the International Law Commission.

The attitude of the Special Rapporteur aimed at leaving the exception on the ground of customs unions outside the draft concerning the most favoured nation clause, in other words, to oppose the idea of the most favoured nation clause against the idea of customs unions, with the sole exception of the integration of developing States. A draft ignoring the existence of customs unions and other unions of States may have been neater from the theoretical point of view, but its significance would have been greatly reduced.⁷⁰

The comments offered by States to the draft presented at the XXVIII session prompted the Commission to consider carefully the proposal by F. Vallat submitted at the 1498 meeting, in the form of Article 23 bis⁷¹ entitled:

"The most favoured nation clause in relation to treatment extended by one number of a customs union to another member", and reading as follows: "A beneficiary State other than a member of a customs union is not entitled under a most favoured nation clause to treatment extended by the granting State as a member of a customs union to a third State which is also a member".⁷²

The adoption by the Commission of Article 23 bis implied a fundamental departure from the approach accepted previously under the influence of the arguments voiced by the Special Rapporteur and supported later by N. Ushakow,

⁶⁸ A member of the Commission, A. Ramangasoavina pointed out that the integration of the developing countries aims at strengthening of their economic potential, so as to better resist competition on the part of the developed countries which threatens their development. The integration of the developing countries must therefore be considered as a means to accelerate development and not as an end in itself. (*Ibid.*, p. 120).

⁶⁹ *Ibid.*, p. 120, (P. Reuter). E. Ustor is Hungarian.

⁷⁰ YB ILC, 1976, vol. 1, p. 118 (E. Hambro).

⁷¹ YB ILC, 1978, vol. 1, p. 125.

⁷² E. Ustor in an article the MFN Customs Union Exception, published in "Journal of World Trade Law", vol. 15, No. 5, Sept.-Oct. 1981, p. 383 quotes the enlarged

which led to the omission of the exception on the ground of customs unions in the successive versions of the draft, in spite of the dissenting opinions by many members of the Commission. It became increasingly evident that the absence of provisions concerning customs unions represented a lacuna which would weaken the draft as a whole, because it could be assumed that the draft as it stood would be rejected by many States. The comments offered by States reinforced that view. They failed, however, to impress the Special Reporter, N. Ushakow, who reverted to the provisions concerning the exception of customs unions and to the absence in international law of a generally accepted rule excluding from the action of the most favoured nation clause the benefits extended to each other by the members of a union. Those favouring the inclusion of an exception were more convincing, so that finally the draft proposed by F. Vallat was sent to the Drafting Committee for consideration in the light of the remarks made by the members of the Commission. The Commission acted in accordance with the suggestion of the Special Rapporteur, N. Ushakow who, while opposed to the adoption of Article 23 bis, was not willing to accept a special procedure, whereby the Article in question would have been submitted together with the comments directly to states.⁷³ Had Article 23 bis been treated differently, it would have led to the weakening of entire structure of the draft and of the authority of the Commission as a lawmaker. In its final version, however, the Commission rejected Article 23 bis, because of a lack of unanimity in the comments of States and international organisations. The Commission referred also to the lack of sufficient time necessary to study the problem, which did not seem very convincing considering the time spent on the consideration of the problem of customs unions.

The absence of provisions concerning customs unions should, however, as stated by the Commission, not be interpreted as an "implicit recognition of the existence or non-existence of such a rule [MFN customs union exception — note by *M. N*], but should rather be interpreted to mean that the ultimate decision is one to be taken by the States to which this draft is submitted, at the final stage of the codification of the topic".⁷⁴

version of Article 23 bis submitted in VI Committee, November 28, 1980; "A beneficiary State is not entitled under a most favoured nation clause to the treatment provided for in an agreement establishing a customs union or a free trade area or in a provisional agreement concluded with a view to the establishment of such a union or such a zone and extended by the granting State or party to a third State or party as a co-party to that agreement" (UN Doc. A/C.6/35.SR.65).

⁷³ YB ILC, 1978, vol. 1, p. 139, (F. Njenga), p. 140, (S. Jagota).

⁷⁴ Report ILC, XXX Session, 1978, p. 21.

7. Codification and Progressive Development of Rules of International Law as Regards Principles Concerning the Most Favoured Nation Clause

As regards the most favoured nation clause, the Commission considered it proper to express the opinion that "its work on most favoured nation clause constitutes both codification and progressive development of international law in the sense in which those concepts are defined in Article 15 of the Commission's Statute".⁷⁵

When considering the concrete provisions of the draft, the Commission discussed in detail the possibility of including solutions based on the principle *de lege* and *de lege ferenda*. The most interesting discussion took place in connection with the provisions in favour of the developing States and in connection with customs unions.

The part played actually and in perspective in these provisions by the progressive development of international law depended to a large degree on the material determining the content of the draft convention which was under discussion.⁷⁶ The material was very broadly conceived and merits to be considered with great interest, as far as the draft concerning the most favoured nation clause was concerned, especially in the context of the comments dealing with the scope of the draft.

The Commission was interested in the most favoured nation clause, above all, as a legal institution. This bias gave rise to certain misgivings even among the members of the Commission, who were aware of the shortcoming resulting from the insufficient study of the economic and political aspects of the problem. It was felt that such a concentration on the legal aspects may be sufficient from the point of view of legal codification. On the other hand, it was realized that from the point of view of the progressive development of international law one could hardly neglect the political and economic aspects of the clause without risking a total divorce with reality.⁷⁷

In fact, the Commission avoided any consideration of the political aspects of the clause, while as far as the consideration of the economic aspects was concerned, the Commission adopted a strategy whose results affected rather adversely the final outcome. Thus, the Commission "has attempted to maintain the line which it set for itself between law and

⁷⁵ Report ILC, XXX Session, 1978, p. 27. The creation of new law accompanies inevitably any codification activity. For a broader discussion of this subject see: K. WOLFKE, *Rozwój i kodyfikacja prawa międzynarodowego. Wybrane zagadnienia z praktyki ONZ* [The Development and Codification of International Law. Selected Problems from the Practice of the United Nations], Wrocław 1974.

⁷⁶ K. WOLFKE, *op. cit.*, p. 8.

⁷⁷ YB ILC. 1976, vol. 1, p. 118, (E. Hambro).

economics”⁷⁸ taking great care to avoid solutions of technical matters of an economic nature. This caution was dictated by the fact that the Commission had a limited capacity to deal with substantive problems arising from the application of the most favoured nation clause as an instrument in international trade and international economic relations in general, for the simple reason that this exceeded its competence.⁷⁹

The Commission omitted therefore in its final draft many elements forming part of the concept of the most favoured nation clause as understood by GATT, which weakened, in our opinion, the practical usefulness of the draft. It may also be recalled that, as mentioned above, it ignored also the exception of customs unions.

On the other hand, in the field which the Commission recognized as being of particular importance for the codification and progressive development of international law, namely in the fields connected with the situation of the developing States the Commission carried out a detailed analysis of some aspects of the economic policy of these States. Having in mind their interests, the Commission was trying to devise means whereby the exceptions from the most favoured nation clause of an economic nature could be consolidated into legal rules.⁸⁰ The attitude of the Commission reflected a recognition of the advisability to resort to the experience of international economic relations so as to balance the importance of the clause in this field with its role as a legal institution.

When considering the interdependence of the function of codification with the function of progressive development, the Commission pointed out that only in the case of provisions concerning the application of the most favoured nation clause in the economic relations with developing States were we dealing with rules covered by the concept of progressive development. The rules of international law concerning developing States belong to these rules which require very careful examination in the light of the new needs of the international community.⁸¹

Even though Articles 23 and 24 refer to new rules of international law, whose precision could hardly be considered as adequate, their introduction constituted, none the less, a step forward greeted with hope by the international community.⁸² They will, no doubt, enhance the prestige of the institution of the most favoured nation clause as a tool in the hands of international

⁷⁸ *Report ILC*, XXX Session 1978, p. 23.

⁷⁹ *Ibid.*

⁸⁰ *Report ILC*, XXX Session, 1978, p. 23.

⁸¹ S. NAHLIK, *Wkład ONZ w kodyfikację i rozwój prawa międzynarodowego* [UN Contribution to the Codification and Development of International Law], „Sprawy Międzynarodowe”, 19..., No. 8, pp. 104—121.

⁸² YB ILC, 1976, vol. 1, p. 148, (R Quentin-Baxter).

organisations.⁸³ Finally, the fact that the Commission failed to consider the question of the application of the most favoured nation clause in the relations between States of differing social and economic systems can also be viewed as remaining in accord with the spirit of progressive development of international law, since the concept of genuine reciprocity is opposed to the principle of most favoured nation treatment.

8. Final Remarks

While at the outset and at the initial State of the Commission's discussions on the most favoured nation clause some ambiguity persisted as to the purpose of the entire undertaking, it became clear, as the work progressed, that the Commission had in mind the preparation of an international convention on the subject. The form of the draft, the wording of the provisions, indicated that it was intended to arrive at a system which could provide the foundation of a codifying convention. The procedure adopted by the Commission in this case was the same as in all other codifying endeavours undertaken by it.

The serious differences in attitude manifested by States with regard to the essential provisions of the draft will, no doubt, cast a shadow over the judgement concerning the usefulness of the Commission's work. It may prove difficult for States to accept an international convention on the most favoured nation clause and this can be explained by some contradictions between the solutions worked out by the Commission and the attitude of states with a major role in international trade.

The degree in which the draft submitted by the Commission meets the expectations of States and conforms to their vision of international economic relations is not the same. The comments offered by the socialist States, supporting the general outline of the draft proposals submitted by the two Special Rapporteurs indicate the desire of these States to close the codification of the most favoured nation clause by the ratification of the results achieved so far. Several developed capitalist States take another view of the prospects of international trade. Judging the changes taking place in international trade after World War II from the point of view of their national interests, they favour modifications in the appraisal of the importance and role of the most favoured nation clause and, hence, find the draft proposals unacceptable. They consider that the Commission neglected to take into account all changes which occurred in international economic

⁸³ *Ibid.*

relations and was aiming only at reaffirming the traditional principles of international law.⁸⁴

While adhering to the traditional conception of the most favoured nation clause, as reflected, in the first place, by its reluctance to adopt the pragmatic solutions advocated by GATT, by its omission of the exception of customs unions and by its refusal to deal with the problem of reciprocity as regards the most favoured nation clause functioning in relations between States of differing social and economic systems, the Commission presented to the international community a proposal of undoubtedly greater precision but of reduced chances of general acceptance.

⁸⁴ *G.A.O.R. XXX Session, Sixth Committee, Summary Records of Meetings, 17 Sept.-5 Dec. 1975*, N.Y. 1976, p. 85.

Polish New Consular Law — Selected Legal Problems

by ZBIGNIEW CZUBIŃSKI

1. Any attempt to trace the development of the diplomatic and consular law systems back to their original source will inevitably show them as the oldest and the best defined branches of international law. At the same time, it will be shown that each of the two systems has proceeded along a different path of development. For it is known that at the earliest stage diplomatic law was almost exclusively based upon the common-law system. In contrast to this, the consular law took a written form almost from the start, as seen in numerous treaties dealing with the problems of land settlement, shipping, peace, trade and commerce, as well as in bilateral consular conventions between countries.

There is general agreement among the legal scientists that provisions constituting the consular law system belong both to the sphere of international law and to that of national law.¹

In the view of Kazimierz Libera,² the provisions of consular law should be considered as applicable to international and national activities. With regard to the consular law provisions governing national activities, he says that they can be divided into two major subgroups: 1) those applicable to the structure and functions of one's own consular posts established in foreign countries and 2) those applicable to the legal status and activities of foreign consular posts in the territory of the receiving State.

¹ See for instance, L. T. LEE, *Consular Law and Practice*, London 1961, p. 223; K. LIBERA, *O mocy obowiązującej przywilejów i immunitetów konsularnych* [On the Binding Force of Consular Privileges and Immunities], "Państwo i Prawo", 1957, No. 1, p. 91; W. NAMYSŁOWSKI, *System prawa konsularnego* [The System of Consular Law], Warszawa 1949, p. 12; J. SUTOR, *Prawo dyplomatyczne i konsularne* [Diplomatic and Consular Law], Warszawa 1977, p. 287.

² K. LIBERA, *Zasady międzynarodowego prawa konsularnego* [The Principles of International Consular Law], Warszawa 1960, p. 43.

As regards the provisions of national law applicable to the structure, functions and competence of one's own consular posts established in other countries, States usually tend to resort to the use of two variants: they either make such provisions in one consular law or act based on a comprehensive approach or they include them in a number of laws or acts belonging to the different branches of national law. The Polish legislators have apparently opted to choose the former one.³

The first consular law of Poland was the one of 11 November, 1924 on the establishment of consular posts and on the functions of consular officers.⁴ With minor modifications,⁵ it remained in force until 1 July, 1984—that is to say, until the date of entry into force of the Law of 13 February, 1984 on the Functions of Consular Officers of the Polish People's Republic.⁶

During the nearly sixty years of remaining in force, the consular law of 1924 was steadily growing out of date. At the end of that period, it was found difficult to bring the law up to date by means of amendment procedures. This aspect was brought to public attention by Janusz Stefanowicz, Sejm deputy-rapporteur who in his speech to the Sejm on 13 February, 1984 said that the 1924 law “has become an anachronism, something like the “Orient Express” not lacking in charm since it mentions dragomans and kavasses as being in the midst of employees of the Polish consular service”.⁷ It should be explained to the readers that dragomans and kavasses were traditionally employed as guards to protect consular posts in the Levantine countries. Under these circumstances, it has become necessary to adopt a new law to give better protection to the interests of the Polish State and of its citizens, to give a more up-to-date definition of consular functions in keeping with the requirements of contemporary law and international practice. The fact of ratification by Poland of the 1963 Vienna Convention on Consular Relations (the ratification date is 17 September,

³ Apart from Poland, this approach is used also in Belgium, the Netherlands, Sweden and in such East European socialist countries as the German Democratic Republic and the Soviet Union. See L. T. LEE, *Vienna Convention on Consular Relations*, Leyden 1966, p. 79 ff.

⁴ “Dziennik Ustaw Rzeczypospolitej Polskiej” [The Journal of Laws of the Polish Republic], No. 103, item 944.

⁵ Some changes of minor importance were made also by the law of 17 June, 1959 on the conduct of some consular affairs; “Dziennik Ustaw” [Journal of Laws], further cited as Dz. U. No. 36, item 225.

⁶ Dz. U., No. 9, item 34; hereinafter called the consular law of 1984.

⁷ J. STEFANOWICZ, *O funkcjach konsułów w PRL* [On the Functions of Consuls in the Polish People's Republic], address to the Sejm on 13 February, 1984. Its text published in “Diariusz Sejmowy”. No. 2/84.

1981) has no doubt provided a stimulus to speed up legislative works on the new consular law.⁸

The same stand on the issue has been taken by the other socialist countries. For instance, the new Soviet consular law of 25 June, 1976⁹ replaced the former one of 1926.¹⁰ In the German Democratic Republic, its law of 21 December, 1979 on the consular functions of that country's foreign representations¹¹ replaced its earlier law of 1957.¹²

2. In a manner different from the former law, the new consular law of Poland does not set forth detailed provisions concerning the establishment of consular posts and the rights and duties of consular officers. If the 1924 law devoted as many as 14 mostly comprehensive articles to these problems, the 1984 law handles the problems in a very general way in only 8 articles. An approach of this kind arises from the fact that the problems are resolved upon in detail in the country's other laws including the following ones:

1) the law of 29 May, 1974 concerning the office of the Minister of Foreign Affairs,¹³

2) the law of 26 June, 1974 known as the Labour Code,¹⁴

3) the law of 16 September, 1982 concerning the employees of state offices,¹⁵

4) the ordinance of the Council of Ministers of 24 March, 1983 concerning some rights and duties of officers in the diplomatic and consular services.¹⁶

In the same way as the 1963 Vienna Convention on Consular Relations,¹⁷ the Polish consular law 1984 makes provisions for the designation of the following classes of heads of consular posts:

a) consuls-general,

b) consuls,

⁸ The text of the Vienna Convention on Consular Relations; hereinafter called the Vienna Convention of 1963 together with the instrument of ratification in: enclosure to the Journal of Laws, No. 13, items 98 and 99 of 1982.

⁹ *Konsulskij ustav Sojuza Sovetskich Socialističeskikh Respublik of 25 June, 1976*, "Vedomosti Verhovnowo Soveta", No. 27, page 404.

¹⁰ *Konsulskij ustav SSSR of 8 January, 1926*, "Vedomosti Verhovnowo Soveta", No. 10, page 77.

¹¹ *Gesetz vom 21 Dezember 1979 über die konsularische Tätigkeit der Auslandsvertretungen der Deutschen Demokratischen Republik*, "Gesetzblatt," Teil I, No. 45.

¹² *Gesetz vom 22 Mai 1957 über den Aufbau und die Funktionen der konsularischen Vertretungen der Deutschen Demokratischen Republik*, "Gesetzblatt," Teil I, No. 40.

¹³ Dz. U. No. 21, item 115.

¹⁴ Dz. U., No. 24, item 141.

¹⁵ Dz. U., No. 31, item 214.

¹⁶ Dz. U., No. 20, item 90.

¹⁷ Cf. Art. 1 of the consular law of 1984 and Art. 9 of the Vienna Convention of 1963.

- c) vice-consuls,
- d) consular agents.

The former law made provisions for the three classes of heads of consular posts, excluding the one of the consular agents.¹⁸

3. The consular law of 1984 has preserved the category of honorary consular officers in spite of the fact that at this time Poland does not have consular headed by honorary consular officers. Article 5 of the law gives the Minister of Foreign Affairs the authority to appoint honorary consular officers in all the four classes as described above, both from among the Polish citizens having permanent residence in the receiving State, from among the citizens of the receiving State and from those of a third State.

Honorary consular officers may exercise only some functions. It is established that the scope of such functions shall be determined each time by the Minister of Foreign Affairs.¹⁹

The new law does not continue the former division of honorary consular officers into two groups:

1) honorary consular officers with complete legal capacity to act, i.e. those in which the head of an administrative and consular section is a permanent state official of the Polish foreign service,

2) honorary consular officers with limited legal capacity to act, i.e. those to which no permanent state official is assigned.²⁰

In contrast to the law of 1924, the one of 1984 does not resolve upon the question of possible remuneration of honorary consular officers for the exercise of their functions. There is not any particular definition of the post of an honorary consular officer.

The present law lays down regulations concerning the posts of honorary consular officers in a manner similar to that of the Soviet consular law of 1976.²¹ It is to be noted that no definition to this effect is given in the 1963 Vienna Convention on Consular Relations which nevertheless in Article 1, paragraph 2 provides for two classes of consular officers: career and honorary ones. During the Vienna Conference preceding the adoption of the Convention, the delegate of Portugal said that that was a very serious "methodological defect". He further proposed to supple-

¹⁸ Cf. Art. 5 of the consular law of 1924.

¹⁹ Art. 5, para. 1 of the consular law of 1984.

²⁰ More on the differences between honorary consular officers with complete capacity to act and those with limited capacity to act is to be found in W. NAMYSŁOWSKI, *Polskie prawo konsularne [Polish Consular Law]*, Lwów 1926, p. 34 ff.

²¹ See Art. 97 of the Soviet consular law of 1976. Also the consular law of the German Democratic Republic of 1979 in its Chapter VIII provides for the establishment of posts of honorary consular officers.

ment Article 1 of the Convention with the following provisions:

1) "Career consular officer" means any person who is an official of the sending State, who receives regular remuneration and who does not carry out in the receiving State any professional activity other than that concerning the exercise of consular functions.

2) "Honorary consular officer" means any person who is entrusted with the exercise of consular functions and who does not meet the requirements defined in point one above.

Although it received support from some groups of delegates, this amendment was finally defeated.²² In the absence of binding definitions, the legal scientists make attempts to fill the gap.²³

The fact that the Polish law maintains the provisions concerning the post of an honorary consular officer do doubt arises from the willingness to change the practice to date. The first signals to effect the change were given already in 1981. That year Poland ratified the 1963 Vienna Convention without any objections, thereby including Chapter III of the Convention describing the regime relating to honorary consular officers and consular posts headed by such officers.²⁴ It is significant to note that some socialist countries have changed their approach to this matter.²⁵

It might be worth recalling that before World War II Poland used to rely on the services of honorary consular officers to a very considerable extent. The consular convention which the country signed with the other countries as a rule provided a possibility of appointment of such officers.²⁶ Before the war, the Polish Ministry of Foreign Affairs was striving throughout the time to generate an encouraging atmosphere for the officers to serve,

²² UN Doc. A/CONF.25/C.2/SR.39. 44 states voted against this amendment, 24 states voted for it and there were 9 abstentions.

²³ See also L. T. LEE, *Vienna...*, p. 163; K. LIBERA, *Zasady... [The Principles...]*, p. 179.

²⁴ However, this does not imply the practical use of honorary consular officers. Art. 68 of the Vienna Convention says that States are free to decide whether they will appoint or receive honorary consular officers.

²⁵ There is no doubt that the Soviet approach has exerted considerable influence on the practice of the European socialist states. Relying on its consular law of 1926, the Soviet Union did not resort to the use of appointment of honorary consular officers until 1979. Yugoslavia is the only country to have had a number of honorary consular officers over the years since World War II.

²⁶ For instance in the Polish-Belgian consular convention of 1928, "Dziennik Ustaw Rzeczypospolitej Polskiej" No. 109, item 845 of 1931; in the Polish-Bulgarian convention of 1935, "Dziennik Ustaw Rzeczypospolitej Polskiej", No. 40, item 275 of 1935; in the Polish-French one of 1925, "Dziennik Ustaw Rzeczypospolitej Polskiej", No. 56, item 528 of 1928; in the Polish-Yugoslavian one of 1927, "Dziennik Ustaw Rzeczypospolitej Polskiej", No. 81, item 637 of 1931.

by inviting them to take part in meetings usually held in Warsaw under the official name of the Convention of Honorary Consular Officers of the Polish Republic. During such meetings the participants were briefed on the country's problems of foreign trade and on the tasks which they were expected to handle in looking for new marketing outlets and new trading partners.²⁷

The result of the efforts which the Ministry was taking over the years between the two world wars was that a network was successfully operating of the posts of honorary consular officers who were serving on the different continents of the world. This is illustrated by Table 1.²⁸

TABLE 1

<i>Category of post</i>	<i>Year</i>	<i>Europe</i>	<i>North America</i>	<i>South America</i>	<i>Asia</i>	<i>Africa</i>	<i>Australia</i>	<i>Total</i>
career consular officers	1933	54	6	4	5	0	0	69
	1939	57	6	7	11	1	0	82
honorary consular officers	1933	40	1	5	3	7	2	58
	1939	86	10	22	14	16	2	150
	1933	94	7	9	8	7	2	127
Total	1939	143	10	29	25	17	2	232

After World War II, the practice of appointment of honorary consular officers was eliminated in Poland. The longest serving honorary consular officer of Poland was the one of Nice in France whose post was in operation until 9 February, 1949. Since that year, however, no honorary consular officer has been appointed to serve at the pleasure of the Polish Government in other countries. Yet, over all those years Poland has not refused permission for other countries to have honorary consular officers act on the Polish territory. But in fact the number of such officers is very small. India and Italy are the only two countries to have their own honorary consular officers in Poland.²⁹ At the present time, the consular

²⁷ See K. LIBERA, *Instytucja konsula honorowego i jej wykorzystanie w polskiej służbie zagranicznej* [The Institution of Honorary Consular Officers and its Use in the Polish Foreign Service], "Zeszyty Naukowe Szkoły Głównej Planowania i Statystyki", Warszawa 1958, No. 6, p. 16.

²⁸ Statistics according to the Yearbook of the Foreign Service, "Dziennik Ustaw Rzeczypospolitej Polskiej", of 1939.

²⁹ See *Liste de corps diplomatique*, Varsovie 1983, pages 184 and 185.

conventions signed by Poland with other countries do not provide for a possibility of establishing the posts of honorary consular officers.³⁰

On consideration, however, it seems that it might be useful to resume again the practice of appointment of such officers. For one thing, their service would not be a burden upon the expenditure of the treasury in Poland. For the other, they could contribute to the more effective protection of the rights of Polish nationals and of the interests of the Polish State in other countries, most prominently in the field of the country's foreign trade. In numerous writings on the subject it is further contended that honorary consular officers are extremely helpful in situation when no diplomatic relations are maintained between countries.³¹

4. With regard to the exercise of supervision over consular functions, the consular law of 1984 makes provisions which are identical both for career and honorary consular officers. In the exercise of official functions each consular officer reports to the Minister of Foreign Affairs and his functions are supervised directly by the head of a diplomatic mission.³² This arrangement reflects the tendency prevailing since the beginning of this century to enhance the similarity of the diplomatic and consular services.³³ It is the current practice of nearly all States today not to regard the two services as two separate entities and in almost all cases they are incorporated in the same ministry dealing with foreign affairs.³⁴ Over the years between the two wars the term "foreign service" was used in Poland collectively to denote both diplomats and consuls.³⁵

Articles 3 and 4 of the 1984 consular law provide further confirmation of the kind of fusion existing between the two services in Poland. Article 3 of the law says that in the circumstances where diplomatic missions have no consular section, the performance of consular functions may be entrusted by the Minister of Foreign Affairs to any designated member of the country's diplomatic mission. Article 4 of the law determines that each consular officer has the duty to perform his functions personally and in the

³⁰ This applies also to all bilateral consular conventions signed by Poland after World War II, even to those ones which have ceased to be in force.

³¹ See I. P. BLIŠČENKO, *Diplomatičeskoe pravo*, Moskva 1972, p. 159.

³² Art. 8 of the consular law of 1984.

³³ See S. E. NAHLIK, *La tendance actuelle à assimiler le statut juridique des consuls à celui des diplomates*, "Yearbook of the Association of Attenders and Alumni of the Hague Academy of International Law," 1979/80, vol. 49/50, p. 69 ff.

³⁴ Cf. for instance J. SUTOR, *Niektóre problemy współczesnego prawa konsularnego* [Some Problems of Contemporary Consular Law], "Przegląd Stosunków Międzynarodowych," 1978, No. 4, p. 76.

³⁵ See S. E. NAHLIK, *Prolegomena prawa dyplomatycznego* [Introductory Remarks on Diplomatic Law], in: "Zeszyty Naukowe Uniwersytetu Jagiellońskiego," *Prace Prawnicze*, No. 21, Kraków 1967, p. 30.

circumstances when this is impossible he has the power to authorize other members of the consular post to perform such functions, but only those having consular and diplomatic ranks.

In accordance with the current provisions,³⁶ there are the following ranks in the foreign service of Poland:

- 1) ambassador extraordinary and plenipotentiary,
- 2) ambassador *ad personam*,
- 3) minister plenipotentiary,
- 4) councillor-minister plenipotentiary, consul general-minister plenipotentiary,
- 5) councillor, consul general,
- 6) First secretary, consul,
- 7) Second secretary, vice-consul,
- 8) Third secretary, consular agent,
- 9) attaché, consular attaché,
- 10) secretary-archivist, consular secretary.

The new consular law gives the Minister of Foreign Affairs the authority to entrust, in some exceptional cases, the exercise of consular functions in behalf of the Polish People's Republic to the head of a diplomatic mission of a third State or to the head of a consular post of a third State. In such cases, however, it is required to have the consent of the receiving State.³⁷ In the Polish consular practice before the last war and in that after 1945 cases are recorded of the performance of consular functions in behalf of Poland by the external authorities of a foreign State and of the performance of consular functions in the territory of Poland in behalf of third States by foreign diplomatic missions or foreign consular posts.³⁸

In accordance with the 1984 consular law, candidates designated to be career consular officers are required to have the following qualifications: higher education and additional professional training provided for members of the country's diplomatic and consular services. In addition, such candidates are required to have Polish citizenship and "high political and moral values".³⁹

³⁶ See the Ordinance of the Council of Ministers of 24 March, 1983 concerning some rights and duties of members of the diplomatic and consular service.

³⁷ See Art. 6 of the consular law of 1984. A possibility of this kind is provided in Art. 8 of the Vienna Convention of 1963. No possibility of this kind was provided in the consular law of 1924.

³⁸ Examples of such situations are given by E. PAŁYGA, *Consular Protection with the Participation of a Third State in Polish Practice*, "Polish Yearbook of International Law," vol. 5, 1974, p. 267 ff.

³⁹ Art. 2 of the consular law of 1984.

5. The new consular law provides a range of consular functions which is substantially much wider than that of the former law of 1924. In it, the functions are defined in twenty-four comprehensive articles. The old one had only nine articles devoted to consular functions.

In this context, it is worth reminding that the classical definition does not include all consular functions which are performed by consular officers in the modern times.⁴⁰ In keeping with that definition, such consular functions concern matters belonging to the sphere of *iuris avocandi*, i.e. involving situations in which a consular officer has to act in the capacity of administrative authorities calling upon the nationals of his own state to discharge their duties towards their own state. The range of consular functions also involves matters belonging to the sphere of *iuris protectionis*, i.e. involving situations in which a consular officer has to protect the interests of nationals of his own country before the authorities of the receiving State. It was Talleyrand who many years ago pointed to the wide-ranging nature of consular functions by saying that "the attributes of a consul are indefinitely varied".⁴¹

The problem of whether it is at all possible to define all consular functions kept coming up during the sessions of the International Law Commission working on the draft of the convention on consular relations.⁴² It was also brought up for discussions during the Vienna Conference. As many as twenty amendments were proposed to Article 5 of the Convention, the one on consular functions. Canada and the Netherlands jointly proposed an amendment to change Article 5 in its entirety and not to try to give a complete list of consular functions.⁴³ It was further proposed by the two delegations to replace Article 5 by a comprehensive definition embracing all consular functions. In the view of the proponents this approach would be a correct one in the sense that by taking it the trend towards a further expansion of the range of consular functions would not be curbed. Judging by the present approach of States to consular conventions, this tendency does not actually occur. Furthermore, the legal scientists, at least in their vast majority, seem to be sharing the view of the exponents of this

⁴⁰ The division of consular functions into those belonging to the sphere of *iuris avocandi* and those belonging to the sphere of *iuris protectionis* has been applied in Polish literature mainly by W. NAMYSŁOWSKI. See the work of the author antititled *Polskie Prawo konsularne* [Polish Consular Law], Lwów 1926, p. 11 ff.

⁴¹ Quoted after K. LIBERA, *Zasady...* [The Principles...], p. 390.

⁴² Report from the discussion on the subject in the "Yearbook of the International law Commission," vol. 1, 1959, p. 170 ff.

⁴³ UN Doc. A/CONF.25/C.L/L.39.

tendency.⁴⁴ Nonetheless the joint Canadian-Dutch amendment was rejected in spite of winning itself a fairly large group of supporters.⁴⁵

In the final version, Article 5 of the Vienna Convention sets forth consular functions in thirteen points. All of these functions are included in their entirety, along with some additions, in Chapter II of the Polish consular law of 1984.

The comparison of the consular law of 1924 with that of 1984 reveals that the new law sets forth a number of new consular functions. In particular, the law makes it obligatory for Polish consular officers to promote friendly relations between Poland and the receiving State by "expanding cooperation in the field of economy, science, technology and culture".⁴⁶ Furthermore, consular officers should facilitate the establishment of contact between competent authorities of the two States. In addition, Article 10, paragraph 3 of the new consular law says that within the scope of their competence consular officers.

"act to safeguard the implementation of international agreements being in force in relations between the Polish People's Republic and the receiving State".

This function is of great importance in view of the vast number of bilateral agreements on cooperation between Poland and other States.⁴⁷

Along with this, consular officers are obliged by the new law to pursue wide-ranging activities to disseminate information on Poland. They are obliged to give information to the authorities of the receiving State and to public opinion therein on the major directions of Poland's foreign and domestic policies, as well as on the country's achievements in the economic, scientific and cultural fields.⁴⁸

On the other hand, Article 10, paragraph 6 of the new law gives consular officers the function to ascertain developments in the receiving State and

"in particular those concerning the state of its economy, science and culture, as well as those in the field of legislation of that State, including that State's agreements concluded with third States".

⁴⁴ Cf. for instance I. BROWNLIE, *Principles of Public International Law*, Third Edition, Oxford 1979, p. 359; L. T. LEE, *Vienna...*, p. 51; H. NEUHOLD, W. HUMMER, Ch. SCHREUER, *Österreichisches Handbuch des Völkerrechts*, Wien 1983, p. 247, *Slovar Meždunarodno Prava*, Moskva 1982, p. 75.

⁴⁵ 42 states voted against the amendment, 26 state voted for the amendment and there were 8 abstentions. UN Doc. A /CONF.25/C.1/SR.9.

⁴⁶ Art. 27, para 1 of the consular law of 1984.

⁴⁷ As of 31 December, 1980 Poland had cultural and scientific cooperation agreements signed with 62 states. Quoted after S. DOBROWOLSKI, *Dyplomacja Polski Ludowej 1944 — 1980, organizacja i funkcjonowanie* [The Diplomacy of People's Poland 1944—1980, Organization and Functions], Warszawa 1981, p. 286 ff.

⁴⁸ Art. 10 item 5 of the consular law of 1984.

In Article 22 of the former consular law, this function was limited to reporting on the state of the economy in the consular district in which a consular officer exercised his functions.

In keeping with paragraph 4 of the above mentioned Article 10, consular officers have the function to act in order to strengthen ties between people of Polish origin living in other countries and the people of Poland.

A different approach is taken by the new consular law towards stating consular functions with regard to Polish vessels, their crews, passengers and cargo. In accordance with Article 23 of the 1924 consular law it was for the Minister of Foreign Affairs to determine consular functions in this particular field. Now, Article 28 of the present consular law sets forth such consular functions in as many as ten paragraphs. They are similar to those functions which are assigned consular officers by the consular conventions signed by Poland after 1970. By analogy, consular functions in respect of vessels are also applicable to inland navigation vessels, aircraft,⁴⁹ means of land transportation including their crews, passengers and cargo.

With regard to the new consular law, it should be said that its Polish legislation markers seem to have shared the view of some legal scientists saying that it is impossible to set forth all consular functions in just one law. For this reason, Article 29 is incorporated in the new law in order to give it required validity and flexibility and not to hamper the development of consular relations in general. That article says that apart from the functions set forth in the law consular officers may perform yet any other ones which are "envisaged by international law and customs, as well as entrusted to them by the Minister of Foreign Affairs". Stamenets to the same effect are made in the Soviet consular law of 1976⁴⁹ and in that of the German Democratic Republic of 1979.⁵⁰

The new Polish consular law also deals with the classical consular functions, especially those which involve helping and assisting nationals of the sending State, as well as performing certain functions of a legal and administrative nature. These functions were basically dealt with by the 1924 consular law. The present law, however, gives them a more comprehensive and detailed treatment similar to the manner of their handling in the bilateral consular conventions signed by Poland over the years after World War II, in particular after 1970.

General provisions for the performance of consular functions to help and assist Polish citizens are made in Article 11 of the consular law of 1984.

⁴⁹ Cf. Art. 6 of the Soviet consular law of 1976.

⁵⁰ Cf. Art. 4 of the consular law of the German Democratic Republic of 1979.

However, it is Article 12 of the same law which says that consular officers should arrange appropriate representation for Polish citizens before the tribunals and other authorities of the receiving State, if such nationals are unable to assume personally their own defence or establish at the proper time appropriate representatives.

Article 13 of the law says that consular officers should act so as to ensure that Polish citizens who are detained, under arrest or in any other manner deprived of freedom have protection by law and enjoy treatment compatible with the law and regulations of the receiving State and with international law.

Article 14 says that in cases provided for in the Polish law consular officers should establish guardianship or trusteeship for Polish citizens.

In accordance with Article 16 of the law consular officers should if the need arises provide Polish citizens with grants and loans.

As determined by Article 17 of the law, consular officers should receive documents, money and valuables for safekeeping, if doing so is indispensable to the protection of the rights and interests of Polish citizens.

In Article 15 of the law it is said that consular officers should perform other traditional consular functions related to handling the cases of estate inheritance, if the testator or the inheritor are Polish citizens.

It is further said that consular functions shall be fulfilled within the limits permitted by the law of the receiving State and by international law.

The way which the consular functions of helping and assisting are put in only now makes it possible to dismiss the doubts arising in connection with the interpretation of Article 15 of the former consular law of 1924. The article said that consular officers "were obliged to protect the rights, property and interests of Polish citizens", at the same failing to indicate the kind of authorities before which Polish citizens were to be protected. This evident failure has prompted some people to act on a false assumption that consular officers have the duty to protect Polish citizens and their interests without regard for whether they are to do this before the authorities of the receiving State or before those of Poland.⁵¹

With regard to the function of acting as notary, the 1984 law gives consular officers the right to handle the following business:

- a) making out and certifying the extracts, copies, duplicates and excerpts of documents (see Article 19, paragraph 1, item 1),
- b) certifying the authenticity of applicants' own signatures and hand signs on documents (see Article 19, paragraph 1, item 2),

⁵¹ Cf. W. NAMYSŁOWSKI, *Polskie...* [Polish...], p. 52.

c) legalizing official documents made out and authenticated in the receiving State or in Poland (see Article 21),

d) making out and certifying the translations of documents from the Polish language into a foreign one and from the foreign one into Polish (see Article 20, paragraph 1).

Apart from this, consular officers may act to make out authenticated deeds on condition that they receive prior authorization to this effect from the country's Minister of Justice. The Minister of Justice shall proceed to issue this authorization to consular officers only at the request of the Polish Minister of Foreign Affairs.⁵²

All consular functions of acting as notary have the same validity of law as those functions which are normally exercised by notaries in the territory of the Polish People's Republic.⁵³

Furthermore, the consular law of 1984 entrusts consular officers with the exercise of functions belonging to the sphere of legal assistance. Hence, in accordance with Article 18 consular officers shall:

- a) deliver letters and other documents,
- b) take evidence from parties, suspects, witnesses and experts,
- c) deliver requests concerning the extension of legal assistance to be granted by the courts and other authorities of the receiving State.

The functions of taking evidence and delivering documents and requests are fulfilled by consular officers only when Polish citizens are involved and when they express voluntarily their consent to this effect.⁵⁴

It is traditional for consular officers to perform certain functions of an administrative nature, belonging to the scope of competence of the officer of civil status. To this effect, Article 26 of the 1984 consular law says that consular officers shall have the right to:

- a) accept statements concerning the conclusion of marriage if persons wishing to enter upon marriage are Polish citizens,
- b) issue certificates stating full legal capacity to conclude marriage in other countries.

In addition to the above, consular officers assist in notifying the competent office of register of births and deaths of Polish citizens in other countries.⁵⁵

It is often contended that one of the most essential consular functions of an administrative nature is to keep registers of citizens of the sending State having permanent residence or staying temporarily in the consular

⁵² Art. 19, para 4 of the consular law of 1984.

⁵³ Art. 19, para 5 of the consular law of 1984.

⁵⁴ Art. 18, para. 2 of the consular law of 1984.

⁵⁵ Art. 26, para. 1 item 3 of the consular law of 1984.

district.⁵⁶ This function arises from the fact that in some States it is by law determined that the loss of citizenship automatically takes effect in consequence of continuous residence in other countries over several years. Therefore, in order to avoid possible complications such states introduced in the past a duty for their nationals to register with consular officers. As the Polish citizenship act of 1962⁵⁷ does not envisage the loss of citizenship in consequence of longer-term residence abroad, therefore it is not compulsory for Polish citizens to register with consular officers. Article 24, paragraph 1, item 1 of the 1984 law says that consular officers

“shall keep registers of Polish citizens having permanent residence in the consular district”.

It follows from this provision that it is not applicable to Polish citizens temporarily staying in the consular district. This kind of provision is different from the relevant provisions of the consular law in some other socialist countries.⁵⁸ The provision has a purely auxiliary function aimed at facilitating the work of consular officers. It is worth recalling that neither the consular law of 1924 nor the one of 1984 impose upon Polish citizens the duty to register with consular officers.

In their performance of the country's administrative functions in other States with a view to handling all essential business of Polish citizens staying abroad, Polish consular officers are given, in the same manner as that of the consular law of 1924, some power belonging to the sphere of Poland's passport and citizenship acts. Although the consular law of 1984 does not make any explicit provisions to that effect, such powers and functions are not as a rule entrusted to honorary consular officers.

In accordance with Article 25 of the new consular law, consular officers take statements regarding the choice, accession to or loss of Polish citizenship and issue decisions to permit the change of Polish citizenship to another one. They also take statements from the parents or guardians of minor persons concerning the accession of such persons to Polish citizenship or the choice by such persons of the citizenship of a foreign State. Regarding these questions, consular functions are defined in detail in the Polish citizenship act.

In so far as the passport law is concerned, Article 23 of the new consular law says that consular officers have the right to issue passports and other documents to Polish citizenship to permit them to cross the Polish

⁵⁶ See for instance K. LIBERA, *Zasady...* [*The Principles...*], page 477.

⁵⁷ Dz. U., No. 10, item 49.

⁵⁸ See for instance Art. 14 of the consular law of the German Democratic Republic of 1979.

boundary. In addition, they issue entry and transit visas to foreigners intending to travel to Poland.⁵⁹

6. Contrary to the former consular law, the new one provides some guidance for consular officers to follow in the exercise of their functions. Thus, consular officers are required to fulfill their functions in a manner which will contribute to maintaining the confidence and respect of Polish and foreign citizens for the system and law of the Polish People's Republic. In discharging their functions, consular officers should manage issues brought to their attention in a reliable, honest, effective and correct manner. One of consular functions is to provide Polish citizens with information concerning their rights and duties. Furthermore, it is at their own initiative and also as may be requested that consular officers should give advice and provide guidance to the persons concerned, regarding the protection of the latter's rights and interests.⁶⁰

Consular officers should refuse to exercise a function that would be contrary to law or to the principles of social coexistence.⁶¹

The consular law of 1984 makes provisions regarding consular fees. This problem is resolved upon in a manner identical with that of the consular law of 1924. Both laws give consular officers the entitlement to levy fees for consular acts. Specific procedures for the collection of such fees and for the calculation of their amount are yet to be defined by the Minister of Foreign Affairs in consultation with the other ministers concerned.

At the time of working on the draft consular law one of the serious problems facing the law-makers in their effort to enhance the orderly arrangement and unification of Polish law was how the country's Administrative Proceedings Code was to become applicable to consular functions. Thereafter, it is recognized that proceedings before Polish consular officers have a very special character and that rules concerning such proceedings will have to be approved by the Minister of Foreign Affairs. It is also recognized that the Code is applicable to consular acts in so far as they give rise to complaints and grievances against such acts. In the understanding of the

⁵⁹ In this connection, consular officers are given some scope of competence regarding the foreign currency law. Among other things, consular officers are given the right to impose upon physical persons arriving to Poland the duty to exchange foreign currencies into the Polish currency and to grant exemptions and reductions concerning the amount of exchange. See Art. 2, para. 3, Art. 4, para. 1, item 1 of the Ordinance of the Minister of Finance dated 25 February, 1981 concerning the exchange of foreign currencies by foreign persons and the payment of dues by these persons in the Polish currency of certified origin. Dz. U., No. 15, item 69.

⁶⁰ Art. 30, para. 1 of the consular law of 1984.

⁶¹ Art. 30, para. 2 of the consular law of 1984.

Code, the Minister of Foreign Affairs is recognized as the higher-level authority.⁶²

Like the law of 1924, the 1984 one does not deal with the question of consular privileges and immunities for Polish consular posts in other countries, as well as for those of foreign States established in the territory of Poland. This is because the problem itself is resolved upon by the relevant bilateral consular conventions and by the Vienna Convention of 1963 which devotes many articles to the problem. In the preamble to the Vienna Convention, it is said that the States Parties to the Convention realize that

“the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States”.

7. In assessing the scope of consular privileges and immunities it is usually assumed that the Vienna Convention provisions are the very minimum which States should afford each other in their consular relations. However, it is admitted that the bilateral conventions signed by Poland after World II provide a wider scope of consular privileges and immunities than that of the Vienna Convention. It applies in particular to the consular conventions between Poland and the socialist States in which the legal status of consular officers is kept close to that of diplomats in the receiving State.⁶³

Apart from international law, the question of consular privileges and immunities is resolved upon in the internal laws and regulations of individual States. On the one hand, they include that question in one law or act⁶⁴ (often inclusive of diplomatic privileges and immunities). On the other hand, articles concerning the question are found in separate laws or acts.⁶⁵ The Polish law-makers have apparently chosen the latter variant which is not very convenient for those concerned because it makes it difficult for them to get the knowledge of privileges and immunities to which they are entitled. In view of this state of affairs, it is stipulated to have another law in Poland to embrace comprehensively all consular privileges and immunities, to match the pattern of similar laws in some other countries.⁶⁶

⁶² Art. 31, para. 2 of the consular law of 1984.

⁶³ This problem is discussed at considerable length by among others S. E. NAHLIK, *La tendance...*, p. 69 ff.

⁶⁴ For instance the United States of America, Switzerland, Great Britain, the Soviet Union.

⁶⁵ For instance France, Spain, Hungary and Italy.

⁶⁶ After World War II. S. E. NAHLIK is the first scientist to have raised the problem of one law or act to include all problems related to the establishment and functions of foreign diplomatic missions in the territory of Poland. See S. E. NAHLIK'S work entitled

8. To recapitulate, it should be said that the law on the functions of consular officers of the Polish People's Republic is a successful one, both in respect of its construction and of its substance. It is hoped that it will have a positive effect upon the activities of the Polish consular service, thereby contributing to the more effective protection of the interest of the Polish People's Republic and those of its citizens in other countries. It is noted that the new law does not make too many changes in the organization and structure of consular posts. It continues to provide for the appointment of honorary consular officers, a practice which has not been in use since 1949. It also enhances the unity of the country's diplomatic and consular services. It is further noted that the law makes basic changes in Chapter II, the one on consular functions whose scope is enlarged in line with the requirements of international and Polish law. One of its major aspects is that of the provision of guidance for consular officers to follow in the exercise of their functions.

Osobowe klauzule dyplomatyczne — Konwencja Wiedeńska z 1961 r. a ustawodawstwo polskie [Personal Diplomatic Clauses — the 1961 Vienna Convention and Polish Law], "Państwo i Prawo," 1961, No. 2, p. 253.

International Taxation Agreements of the Polish People's Republic with the Eastern and Western Countries

by JAN GŁUCHOWSKI

1. General Characteristics of International Taxation Agreements

International taxation agreements aim at preventing double taxation. From the legal point of view double taxation occurs when the income or assets belonging to the same person are being taxed twice.¹ Double taxation on the international level results from the conflict of taxation laws of two or more States. Such a conflict arises, for example, because the same single subject fulfils the conditions of personal responsibility in matters of taxation in at least two countries.

Double taxation has a long tradition. In the socialist countries it acquired particular importance in the 1970s, because of the fact that more and more persons found employment abroad in connection with the implementation of bilateral or multilateral contracts. Furthermore, many socialist firms concluded contracts with firms from capitalist countries, providing for the employment of labour from the socialist countries in capitalist countries and *vice versa*. Finally, many persons draw income from abroad in the form of stipends or copy rights or royalties. In all these situations a lack of appropriate legal regulation can result in a reduction of income for the individual or a reduction of foreign exchange flow for the State.

In many socialist countries the problem of double taxation did not occur so long as their economic relations were limited only to contracts with firms from the CMEA States. These transactions were tax-free, since they occurred between State enterprises. Furthermore, for example in Poland, income gained occasionally in Poland by capitalist firms (licence fees) tax-free as a result of appropriate clauses in the contracts. These exemptions

¹ S. N. FROMMEL, *Taxation of Branches and Subsidiaries in Western Europe, Canada and the USA*. London 1978. p. 155.

did not include incomes from royalties, copy rights or fees paid to artists, which were charged by income tax at the source.²

In particular cases double taxation may be connected with taxes imposed on physical or legal persons by international organisations. As an example one may mention, on the one hand, the United Nations, because of the particular nature of the charges and, on the other hand, the European Coal and Steel Community, the Arab Council of Economic Unity and the East-Africa Community. But as a general rule taxation by international organisations occurs rarely and only when the organisations exercise supranational authority.³ As far as the CMEA is concerned, its charter does not provide for taxation of member-States.

The prevention of double taxation may take the form of a unilateral, partial or total renunciation by a State of its right to raise taxes; of the conclusion of multilateral agreements taking into account the particularities of the national taxation systems; of the conclusion of bilateral agreements. Taxation agreements constitute a substantial portion of all international agreements registered with the UN. It can be said that the entire globe is covered with its network.⁴ International agreements on the prevention of double taxation restrict the right of a contracting party to raise taxes from persons who would otherwise be taxable under internal taxation law. In other words, international taxation agreements restrict the applicability of the provisions of internal taxation law.

The first attempts at eliminating double taxation were made in the late 1920s; in the 1940s a draft convention was worked out.⁵ The date of February 25, 1955 can be considered as a landmark, because at that day the Council of the European Economic Community adopted the first recommendations concerning double taxation. In the years 1958—1961 the Financial Committee of the OECD presented four provisional reports and

² J. BIAŁOBRZESKI, *Opodatkowanie w świetle umów o zapobieganiu podwójnemu opodatkowaniu* [Taxation in the Light of Agreements on the Prevention of Double Taxation], "Finanse", 1975, No. 1.

³ J. WOŹNOWSKI, *Finansowanie działalności organizacji międzynarodowych* [Financing the Activities of International Organisations], in: W. MORAWIECKI, K. MICHAŁOWSKA-GORYWODA, J. WOŹNOWSKI, *Międzynarodowe organizacje gospodarcze* [International Economic Organisation], Warszawa 1974, p. 176, and M. WERAŁSKI, *Z zagadnień finansowych ONZ* [Some of the Financial Problems of the UN], "Finanse", 1964, No. 10.

⁴ T. NAGY, *Meždunarodnyje nalogovyje soglašenija Vengerskoi Narodnoi Republiki*, "Annales Universitatis Scientiarum Budapestiensis de Rolando Etvos Nominata," Sectio Iuridica, vol. 21, 1979.

⁵ *International Effort Towards the Elimination of Double Taxation. A Historical Background*, in: *Report of the OECD Committee on Fiscal Affairs*, 1977, p. 7.

in 1963 it submitted a final version, which with minor changes remains in force since 1977.⁶

At present we have still binding agreements concluded before World War II and more recent ones from the post-war period. The latter are, as a rule, based on the pattern set by the OECD. It can be said that the model agreement worked out by the OECD has made a great impact on the unification of international taxation agreements. It assisted at the conclusion of the taxation agreements of the Andean States in 1974 and of the African States in 1975.

The bilateral agreements signed by the Polish government with capitalist countries aimed at preventing double taxation are also based on the model agreement of OECD. The similarities are of a substantive nature (the subject of legal regulation) as well as of a formal nature (the structure of the agreements). The same applies to bilateral agreements signed by other member-states of the CMEA with capitalist States. On the other hand, the model agreement of the OECD had no influence on the multilateral agreements on the prevention of double taxation concluded between the socialist States.

The international agreements on the prevention of double taxation of income, assets, inheritance and donations provide for the rule of the exclusive right to raise taxes in the state where the taxable person resides. All other States have no such rights. However, when an international taxation agreement grants the right to raise taxes in the state of residence as well as in the State of origin of the income or assets, then it is necessary to apply means eliminating double taxation. The method in question is that of a tax credit.⁷

In relations between States a tax credit implies that in the first stage the State of residence of the taxable person assesses the tax on the basis of his or her total income irrespective of its place of origin, including the income originated and taxed in another State. In the second stage, the tax paid by the person in his or her state of residence is being reduced by the amount corresponding to the tax levied in the State of origin of the taxable income. The tax credit covers all kinds of income irrespective of the number of states where it originated and its assessment and reduction from the total of taxes due by the person concerned is left to the detailed provisions of internal taxation law.

Tax credits exist in two forms: in the form of a full credit and in the

⁶ Model Convention for Avoidance of Double Taxation with Respect to Taxes on Income and Capital, referred to as The Model Convention 1977.

⁷ M. WALUGA, *Instytucja kredytu podatkowy* [The Institution of Tax Credit], "Finanse", 1983, No. 1.

form of an ordinary credit. A full credit is applied when the State of residence of the taxable person reduces from the total sum of taxes the part equal to the tax levied in the State of origin of the income. An ordinary credit will apply when the reduction granted to the taxpayer by his or her state of residence will not exceed the portion of the tax which would be levied in that State on an income originating in another state. Which means that the State of residence of the taxable person applies to the portion of the income originating in another State its own tax schedule covering the entire income of the taxpayer, irrespective of the actual amount of taxes paid in that other state. An ordinary tax credit is usually applied to incomes derived from dividends, licence fees and interests.

Another method of eliminating double taxation, not connected with a tax credit is that of total or partial exemption. An exemption consists of the exclusion from the taxable basis of the portion of the income originating from another State which is not the State of residence of the taxpayer.

International taxation agreements on the prevention of double taxation of income and assets concluded by Poland provide for the application of a tax credit. Characteristic in this respect is the wording of the Agreement with Sweden (Art. 22) which we quote *in extenso*.⁸

"1. Subject to the provisions of paragraph 3, where a resident of a Contracting State derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State, the first-mentioned State shall allow:

"a) as a deduction from the tax on the income of that person, an amount equal to the income tax paid in that other Contracting State;

"b) as a deduction from the tax on the capital of that person, an amount equal to the capital tax paid in that other Contracting State.

"2. The deduction in either case shall not, however, exceed that part of the income tax or capital tax, respectively, as computed before the deduction is given, which is appropriate, as the case may be, to the income or the capital which may be taxed in the other Contracting State.

"3. Where a resident of a Contracting State derives income or owns capital which, in accordance with the provisions of this Convention, shall be taxed only in the other Contracting State, the first-mentioned State may include this income or capital in the tax base but shall allow as a deduction from the income tax or capital tax that part of income tax or capital tax, respectively, which is appropriate, as the case may be, to the income derived from the capital owned in that other Contracting State."

A tax credit is also provided for in international agreements concerning the prevention of double taxation of inheritance and donation. As a rule, priority in matters of taxation is being accorded to the state where the

⁸ The Agreement Between the Polish People's Republic and the Kingdom of Sweden on the Prevention of Double Taxation of Income and Assets, signed in Stockholm, June 5, 1975 ["Dziennik Ustaw"] [Journal of Laws], No. 13, item 51).

inheritance is located, although in some cases the inheritance tax can be levied in the state of residence of the testator. Before World War II Poland concluded four agreements of that type.

The socialist State did conclude a much greater number of agreements on the prevention of double taxation with the developed industrial States than with the developing States. Thus, Czechoslovakia signed agreements with Austria, Belgium, Cyprus, Finland, France, Holland, Japan, Norway, Portugal, Federal Republic of Germany, Sri Lanka, Sweden and Italy; Rumania — with Austria, Belgium, Denmark, Egypt, France, Japan, Canada, Pakistan, Federal Republic of Germany, Sweden, United Kingdom, Italy and USA; Hungary — with Austria, Denmark, Finland, Holland, Japan, Federal Republic of Germany, Switzerland, Sweden, USA, United Kingdom and Italy. The agreements signed by Poland are discussed in part 3.

International taxation law develops under the impact of changing national taxation systems, while on the other hand its role is growing as a result of the taxation agreements being concluded all over the world. There is an emerging pattern of a taxation law of a regional scope. In this connection one may refer to the integrationist taxation law of the CMEA countries or to the agreements concluded by the member-States of Western economic groupings.

International taxation law has been systematized in the literature of the socialist States. The institutions and sources of law (international treaties and agreements) can be grouped along the following subjects:⁹ a) agreements concerning double taxation, b) agreements on the exemption of international organisations, workers and employees from other countries from taxation, c) rules governing tax relief enjoyed by diplomatic and consular representatives, d) agreements on legal assistance in matters of taxation law, e) agreements on the prevention of tax evasion.

2. Short Outline of the Polish Tax System

In the Polish tax system, as well as in the tax systems of all other socialist States, the essential distinctive feature is the division of the taxes

⁹ Among the socialist states it is Poland, Hungary and the Soviet Union which contributed most to the research into the problems of international taxation law. The series of publications on the subject began with the discussion in the Hungarian Academy of Sciences. Cf. M. WERALSKI, *Dyskusja w Węgierskiej Akademii Nauk nad zagadnieniami międzynarodowego prawa finansowego* [Discussion in the Hungarian Academy of Sciences on the Problems of International Financial Law], "Państwo i Prawo," 1961, No. 10. Other publications on the same subject dating back to the 1960s are listed in J. GOŁUCHOWSKI, *Międzynarodowe prawo finansowe* [International Financial Law], in: *System instytucji prawno-finansowych PRL* [The System of Legal and Financial Institutions of the Polish People's Republic], vol. 1, Wrocław 1982, pp. 475—481.

between taxes raised from the socialized sector of the economy, from the private sector of the economy and from the population. The individual characteristics of these three groups of taxes reflect the principles upon which the socialist State is based, as well as the directions of the state's fiscal policies.

The law on the taxation of the socialized sector of the national economy was passed by the Sejm on February 26, 1982. The law is of a comprehensive nature and constitutes a codification of that part of the Polish financial law which concerns the subjects of the socialized economy. The list of those taxable is very wide-spread and includes: State enterprises and their organisations and associations, international or mixed enterprises, foreign legal persons operating in Poland on the basis of specific international agreements, banks (with the exception of the Polish National Bank), institutions of higher education and research establishments, cooperatives and their associations, companies of various nature, political, social and professional organisations.

The basic taxes levied from the above mentioned subjects representing the socialized economy are: turnover tax, wage bill tax, real estate tax and income tax. The law provides for the possibility to raise additional taxes, reserving the right to do so to the Council of Ministers. The subjects of the socialized sector who are taxable are registered in the competent taxation office and are obligated to calculate and to pay punctually the taxes due without special summons.

The private sector of the economy is divided for taxation purposes into two parts: one constitutes the sector of private farms and the other all remaining private firms. Private farmers pay a land tax and, additionally, an equalization tax and must contribute to the so called local fund.

All other private firms pay income tax. Taxes on means of production (for example, real estate tax) are of minor importance. The taxation of income is being done in the classical way. At the first stage is the turnover tax, which constitutes a form of preliminary tax. At the second stage is the income tax proper, which is levied when the taxpayer makes a profit, in other words, when the income exceeds the costs including the already paid turnover tax. The turnover tax is a flat rate tax and the income tax a progressive tax.

Very small private firms are not being taxed in accordance with the general principles (turnover tax plus income tax), but are subject to a simplified system, whereby there is no need to keep books for taxation purposes. These simplified forms of taxation include: a contractual lump sum tax, a cooperative lump sum tax, a taxation card and a licence fee. For the state they have the advantage of eliminating the cost of tax assessment,

for the taxpayer they offer the opportunity to increase income which will not be taxed.

The population pays a tax on wages and salaries — if employed in the private sector or if drawing salaries from two employers — an equalization tax, an income tax and a tax on inheritance and donations. Furthermore there are local taxes, namely a real estate tax, a tax on premises and a tax on pet dogs. Some local fees levied from the population can also be considered as taxes. These include a market place fee, a health resort fee and various administrative fees. The tax on pet dogs and some administrative fees are of a facultative nature and their introduction and abolition in a given area depend on the decision of the local authorities (People's Councils). It is they which have the authority to fix the level of these fees.

3. The Multilateral Agreements on the Prevention of Double Taxation of Income and Assets of Physical and Legal Persons in Poland and other Socialist States

The member-States of the CMEA concluded two multilateral agreements on the prevention of double taxation. The first, concerning the prevention of double taxation of income and assets of physical persons was signed in Hungary. The second, dealing with the prevention of double taxation of income and assets of legal persons was signed in Mongolia.

The agreements on the prevention of double taxation of income and assets of physical persons was signed in Miskolc, May 27, 1977.¹⁰ It applies to physical persons with permanent residence in CMEA countries which are the contracting parties to that agreement. If for purposes of taxation it is impossible to establish the place of permanent residence of the physical person it is assumed that the place of permanent residence is the state of nationality of the person concerned.

The agreement covers all kinds of taxes and fees levied from income and assets of physical persons on the territories of the contracting parties. Starting from the premise that physical persons should not have their income or assets taxed at the same time on the territory of two or more States, the contracting parties accepted the following seven fundamental principles.

1. Physical persons sent to work by any organ or organisation of a member-State of the CMEA at its trade, transportation or other agencies, including information centers and similar establishments, located on the

¹⁰ "Dziennik Ustaw", 1979, No. 10 item 66.

territory of another State are exempt from taxes and fees on their wages and salaries received from these representative offices and agencies located in the country where they work. The same principle applies also to employees of inter-state organisations and other international organisations (with the exception of those mentioned in point 2), delegated to work in these organisations from countries other than those of the organisations' headquarters.

2. Physical persons employed on the territory of the CMEA member-states in international economic organisations which are self-financing pay taxes and fees on their wages and salaries received from these organisations, in accordance with the legislation of the state where the organisations are located. This provision, however, does not apply, if the charters of these organisations or other relevant agreements concluded by them stipulate otherwise.

3. Physical persons sent by one of the contracting States to another contracting State in order to give technical assistance or to render services of a similar nature, are exempt from taxes and fees on their wages and salaries received from the organs and organisations of the State of their permanent residence in the State of their temporary employment. However, if these persons receive a salary from the organs or organisations of the receiving State, then these amounts (with the exception of the amount paid for rent) are taxable in accordance with the legislation of that State.

4. Physical persons sent to another contracting State to work, to study, for special training, to act as consultants, etc., and receiving salaries or other payments directly from organs and organisations of that State are taxable on these amounts, with the exemption of the amount paid for rent. Salaries and other payments received by these persons from organs and organisations of the State of their permanent residence are exempt from taxation in the other States signatories of the agreement.

5. Income of physical persons from copy rights of literary work, scientific publications and works of art exploited on the territory of the contracting States, as well as payments received for scientific discoveries, technical discoveries, industrial and utility design, technical innovation, etc., are taxable in accordance with the legislation of the State of permanent residence of these persons.

6. Physical persons traveling to another state party to the agreement for such purposes as: lecturing, theatrical performance, concerts, sporting appearances, etc., are exempt in the receiving State from taxes and fees on the wages, salaries and other payments received by these persons from organs and organisations of the State of their permanent residence. However, if these payments are made by organs or organisations of the

receiving State, they are taxable in accordance with the legislation of that State.

7. Taxation of real estate and movable assets of physical persons, including income derived from the exploitation of such assets, from inheritance, donation, lease, sale or exchange takes place in accordance with the legislation of the state where these assets are located.

The states participating in the Miskolc Agreement, namely Bulgaria, Czechoslovakia, Mongolia, German Democratic Republic, Poland, Romania, Hungary and the Soviet Union provided for the possibility to grant to physical persons additional tax relief on the basis of mutual consent or by unilateral decision. The agreement does not restrict the rights of the signatories to tax physical persons, provided that this does not violate its provisions.

The provisions of the agreement do not infringe upon the tax privileges of the diplomatic and consular staff, as set out in the generally accepted principles of international law or in special international treaties. Nor do they infringe upon previously concluded agreements on taxation by the States concerned.¹¹

The agreement has no expiration date, but it can be renounced by any contracting party at any time after five years from the date of its entry into force, this taking place by modification of the depositary at least six months before the end of the calendar year. The problems arising out of the application of the agreement are to be dealt with by way of consultation between the finance ministers of the interested states.

The various CMEA member-States became parties to the Miskolc Agreement between August 26, 1977 (the Soviet Union) and March 28, 1978 (Romania). Pursuant to Article IX of the agreement, Poland deposited at the Secretariat of the CMEA its instruments of accession which took place on December 30, 1977.¹² It has to be noted that Article IX provides for the possibility of accession to the Miskolc Agreement of other states. It is the Secretariat of the CMEA which performs the functions of the depositary.

The agreement on the prevention of double taxation of income and

¹¹ T. NAGY, *Multilateral Tax Agreements and Tax Coordination in the CMEA*. "European Taxation," 1979, No. 12. By the same author, *CMEA Multilateral Agreements for Avoidance of Double Taxation*, "Intertax," 1980 No. 4. J. GŁUCHOWSKI, *Wielostronne porozumienia państw socjalistycznych o unikaniu podwójnego opodatkowania* [The Multilateral Agreements of the Socialist States on the Avoidance of Double Taxation], "Sprawy Międzynarodowe," 1983, No. 4.

¹² The Declaration by the Government of April 17, 1979 on the Entry into Force of the Agreement on the Prevention of Double Taxation of Income and Assets of Physical Persons Drafted in Miskolc, May 27, 1977 ("Dziennik Ustaw", 1977, No. 10 item 67).

assets of legal persons was drafted in Ulan Bator and signed on May 19, 1978¹³ by the same member-States of the CMEA which were parties to the Miskolc Agreement. It concerns legal persons residing on the territory of the contracting parties. Should it be impossible to establish the place of residence of the legal person, then it is being assumed that the place of residence is on the territory of the State whose legislation presided over its formation. In particularly complicated cases the agreement provides for the determination of the residence of the legal person by way of consultation between the contracting parties.

The Agreement deals with taxes and fees levied on income and assets of legal persons on the territory of the contracting parties in accordance with their legislation. As a general rule, incomes of legal persons of the contracting parties earned on their territories directly or through the intermediary of branch offices are exempt from taxation on the territory of the other contracting parties. Matters of detail arising from the application of this principle are dealt with in Articles IV and V.

Article IV sets out the principles concerning real estate and movable goods of legal persons. Thus, real estate belonging to legal persons and income derived from its exploitation, sale or other disposal are taxable on the basis of the legislation of the state-party to the agreement on whose territory that real estate is located. Movable goods of legal persons as well as income derived from their exploitation, sale or other disposal are taxable on the same grounds as real estate. No restrictions have been placed on the right of the contracting parties to levy taxes on their territory connected with the movement of means of transport and exploitation of lines of communication.

The principles and procedures of taxation of income and assets of international organisations and their branches and offices set up by the signatory States of the Ulan Bator Agreement and located on their territories are determined by the Charters of these organisations. These Charters are drafted in the form of international agreements or special agreements, as the case may be, concluded by the states-parties to the agreement on the prevention of double taxation of legal persons.

Profits of international organisations incurring to their members are exempt from taxation on the territory of the State where the headquarters of these organisations are located. This provision applies also to that part of the profits which is due to the member of the international organisation from the State on whose territory the headquarters of the organisation are located.

As is the case with the Miskolc Agreement, the Ulan Bator Agreement provides for the possibility of the signatory States granting each other,

¹³ "Dziennik Ustaw," 1979, No. 10 item 68.

on the basis of mutual consent or unilateral decision, additional tax relief to legal persons as regards the taxation of their income or assets. Nor does it exclude the right of the signatory States to tax income and assets of legal persons, provided that this does not conflict with the provisions of the agreement.

The Ulan Bator Agreement does not infringe upon the tax privileges of diplomatic and consular representations as well as on the tax privileges of organisations and institutions enjoying similar status. Such privileges are sanctioned by generally accepted rules of international law, special international agreements and corresponding internal legislation of the States signatories of the agreement on the prevention of double taxation of income and assets of legal persons.

The agreement states explicitly that if the provisions of still binding agreements on the prevention of double taxation of income and assets of legal persons concluded by the signatory states prior to their acceptance of the Ulan Bator Agreement are contrary to the provisions of the latter, then the provisions of the Ulan Bator Agreement prevail. The remaining general questions have been settled in the same way as in the Miskolc Agreement.

The instrument of acceptance of the Ulan Bator Agreement was deposited at the Secretariat of CMEA by Poland on December 29, 1978.¹⁴ All other member-States of the CMEA became parties to the agreement in 1978. The first state to do so was Hungary (August 30, 1978) with Poland closing the list.

4. Bilateral Agreements on the Prevention of Double Taxation Concluded by Poland with Other Countries

In the inter-war period Poland signed several agreements on the prevention of double taxation: with Czechoslovakia in 1925, with Austria in 1926, with Hungary in 1928 and with the Free City of Gdańsk in 1929. After World War II, Poland signed bilateral agreements almost exclusively with capitalist countries. The sole exception is the agreement with China signed on January 22, 1977, which has, so far, not been published.

The first of this series were the agreements on the prevention of double taxation with Switzerland (concluded on June 13, 1961 in the form of an exchange of notes), with Greece (unpublished), Federal Republic of Germany¹⁵ and Italy.¹⁶ Other agreements were signed with the following

¹⁴ The Declaration by the Government of April 17, 1979 on the Entry into Force of the Agreement on the Prevention of Double Taxation of Income and Assets of Legal Persons Drafted in Ulan Bator May 19, 1978 ("Dziennik Ustaw" 1979, No. 10, item 69).

¹⁵ "Dziennik Ustaw," 1975, No. 31, item 163. Also, Protocol modifying the Law of October 21, 1979 ("Dziennik Ustaw", 1980, No. 1, item 1).

¹⁶ "Dziennik Ustaw", 1977, No. 9, item 37.

States at the following dates: with Austria¹⁷ in Vienna, October 2, 1974, with the United States of America¹⁸ in Washington, October 8, 1974, with Pakistan¹⁹ in Warsaw, October 25, 1974, with Sweden²⁰ in Stockholm, June 5, 1975, with France²¹ in Warsaw, June 25, 1975, with Denmark²² in Copenhagen, June 6, 1976, with Belgium²³ in Bruxelles, September 14, 1976, with the United Kingdom²⁴ in London, December 16, 1976, with Norway²⁵ in Oslo, May 24, 1977, with Malaysia²⁵ in Warsaw, September 16, 1977, with Finland²⁷ in Helsinki, October 26, 1977, with Thailand²⁸ in Bangkok, December 8, 1978, with the Netherlands²⁹ in Warsaw, September 20, 1979, with Spain³⁰ in Madrid, December 15, 1979, with Japan³¹ in Tokio, February 20, 1980, with Sri Lanka³² in Colombo, April 25, 1980.

Altogether, the Polish People's Republic concluded 21 bilateral agreements on the prevention of double taxation, including one with a socialist country and four with developing countries. There was a particularly sharp increase in the number of concluded agreements in the years 1974, 1976, 1977 and 1979. The comparison of the dates of signing with the dates of publication of the agreements reveals a time-lag nearing sometimes 4 years. Furthermore, some agreements reflect situations from the period preceding the signing of the agreement. It may therefore be assumed that the direct cause of the signing of some agreements were conflicts in matters of taxation.³³

From the point of view of their contents the bilateral agreements on the prevention of double taxation signed by Poland can be divided into three categories: a) agreements aimed at preventing double taxation of income derived from shipping and air transport, b) agreements aimed at preventing

¹⁷ "Dziennik Ustaw," 1975 No. 24, item 129.

¹⁸ "Dziennik Ustaw," 1976, No. 31, item 178.

¹⁹ "Dziennik Ustaw," 1976, No. 9, item 47.

²⁰ "Dziennik Ustaw," 1977, No. 13, item 51.

²¹ "Dziennik Ustaw," 1977, No. 1, item 5.

²² "Dziennik Ustaw," 1979, No. 5, item 24.

²³ "Dziennik Ustaw," 1978, No. 24, item 109.

²⁴ "Dziennik Ustaw," 1978, No. 7, item 20.

²⁵ "Dziennik Ustaw," 1979, No. 27, item 157.

²⁶ "Dziennik Ustaw," 1979, No. 10, item 62.

²⁷ "Dziennik Ustaw," 1979, No. 12, item 84.

²⁸ Ratified September 15, 1981.

²⁹ "Dziennik Ustaw," 1981, No. 31, item 168.

³⁰ "Dziennik Ustaw," 1982, No. 17, item 127.

³¹ Ratified on January 28, 1982.

³² Ratified on December 3, 1981.

³³ S. KOSTECKI, *The Principles of Taxation of Income Derived by Foreign Individuals and Legal Entities*. "Bulletin for International Fiscal Documentation," 1977, No. 12.

double taxation of incomes, c) agreements aimed at preventing double taxation of income and assets.³⁴ The contents of the agreements depend on the problems they deal with. The shortest are those dealing with the prevention of double taxation of incomes derived from shipping and air transport. Poland concluded such agreements with China, Switzerland, Greece and Italy.

Agreements on the prevention of double taxation of income were concluded with Japan, Malaysia, Pakistan, Thailand and the USA. Finally, agreements on the prevention of double taxation of income and assets were signed with Austria, Belgium, Denmark, Finland, France, Norway, Spain, the Netherlands, Federal Republic of Germany, Sri Lanka, Sweden and the United Kingdom.

As a rule, the bilateral agreements signed by Poland contain the following basic provisions.

Income from real estate, including income from the exploitation of farms and forests is taxable in the country where this piece of real estate is located. The term "real estate" is interpreted according to the law of the country of location.

Income from enterprises can be taxed only in the country of location, unless they operate in another country through their branches. In that case, income derived from the operation of that branch is taxable also in the State where it operates. An enterprise maintaining in another State an office with a representative authorized to conclude agreements and contracts on its behalf, is deemed to have a branch office in that State.

Dividends are taxable in both States, with the proviso that the tax levied in the state where the company paying the dividend is located cannot exceed a percentage fixed in the agreement. As a rule it amounts to 5% of gross dividend in the case of a company participating in the capital of the company paying the dividend in a proportion of at least 25%. In all remaining cases the tax on dividends cannot exceed 15% of the gross dividend. The term "dividend" used in the agreement means mainly income from equity and other rights deriving from the participation in profits.

Interest on loans can be taxed in both states concluding an agreement on the prevention of double taxation. In that case, where such interest is paid the tax cannot exceed a predetermined percentage. Article 11, p. 2 of the agreement with Malaysia provides that the tax cannot exceed 15% of the amount of interest due. In more recent agreements, such as those signed with Denmark, Finland or Spain (in all these agreements the problem is dealt with in Article 11, p. 1) it is provided

³⁴ *Ibid.*

that interest accruing in one state paid to a person residing in another State can be taxed only in the latter State.

Licence fees and income from copy rights, patents, sale of know-how, trade marks, motion picture distribution rights, use of recordings by radio and television can be taxed only in the State of residence of the person deriving such income. Hence, no taxes can be levied on such income in a State where that income originates. However, some of the agreements signed by Poland contain exceptions from that rule, provided that the tax cannot exceed 10% of gross income.

Income derived from the transfer of property title on a piece of real estate, or from the transfer of property title on equity and other rights in a company whose assets are composed mainly of real estate can be taxed in the State where these assets are located. Income from the sale of all other assets can be taxed only in the State where the person disposing of these assets is residing permanently.

The agreements on the prevention of double taxation single out the professions, which include, in particular, scientific, literary, artistic and educational activity. However, the term "professions" cover also physicians, lawyers, technicians, engineers, architects and dentists. The incomes of these people are taxable only in their State of residence. However, if such a person exercises an activity in another State and disposes in that State of proper facilities, then his or her income can be taxed in that State. Provided only that such income is taxable to the amount which can be ascribed to the exploitation of these facilities.

Wages and salaries can be taxed in the State of residence of the taxpayer. However, if the person works on the territory of another State and derives income from that work, he or she can be taxed in that State. Wages and salaries obtained in that State are exempt from taxation if the person concerned resides there for a period not longer than 183 days. Furthermore, are exempt from taxation wages and salaries paid by an employer who has no permanent residence in the country where the work is being done.

Income of members of executive and supervisory councils of companies are taxable in the State of residence of the company. Fees received by artists and sportsmen can be taxed in the State where they exercise their activity; however, some agreements provide for tax exemptions if these incomes are derived from activities carried out within the framework of cultural exchanges. The agreements provide for a general tax exemption of students and professors engaged in research and lecturing. In the latter case, some agreements, for example the agreement with Spain, provide for a tax exemption but only for a period not exceeding two years.

Other income, not mentioned above, is taxable in the State of permanent residence of the person deriving such income.³⁵

The agreements contain provisions concerning equal treatment. This means that nationals of the contracting parties cannot be taxed by any other contracting party in a manner more onerous than that applying to their own nationals. This principle concerns all physical and legal persons.

There are provisions for mutual consultation. Should a physical or legal person consider that an act by one or both contracting parties involve taxation which conflicts with the provisions of the agreement, it can, without prejudice to the means of appeal foreseen in the internal legislation of these states, submit its cases to the proper organ of the State of residence. The contracting parties can communicate directly. There is also a possibility of a verbal exchange of views within a commission composed of representatives of both sides. Mutual consultation plays an important role in the removal of obstacles and doubts which may arise in connection with the interpretation or application of the agreement. In Poland, the organ competent to deal with these matters is the Ministry of Finance. Finally, the contracting parties are bound to mutually exchange information which may be useful in the implementation of the provisions of the agreement.

5. Concluding Remarks

The multilateral agreements of the CMEA member-States as well as the bilateral agreements on the prevention of double taxation must be considered as important achievements.

The Miskolc and Ulan Bator Agreements contain formulae that point at objectives going beyond the avoidance of double taxation of income and assets of physical and legal persons. First, by concluding these agreements the contracting parties were aiming at broadening and strengthening economic, scientific and cultural cooperation as well as improving mutual relations in the sphere of finance and money. These problems lay within the authority of the Permanent Financial and Monetary Commission of the CMEA. Second, the contracting parties were seeking ways and means to improve conditions for a more comprehensive economic and cultural cooperation.

The tax relations of the socialist States, under international law, must be viewed in a much more positive light than the monetary and credit relations, under international law, or the establishment of joint companies

³⁵ M. WERSALSKI, S. BARTLETT, *Taxation of Persons Having Their Residence Abroad and Obtaining Income in the Territory of the Polish Peoples Republic*, "European Taxation," 1975, No. 1; V. LISSOWSKI, *Einige völkerrechtliche Fragen der Doppelbesteuerung*, "Bulletin for International Fiscal Documentation," 1976, No. 12.

or the undertaking of joint ventures. The development of monetary and credit relations is rendered difficult because of the non-convertibility of the national currencies of the socialist States. On the other hand, the access to Western credits was practically stopped in the early 1980s, as a result of the payment difficulties experienced by Poland and Romania. An additional negative factor was the deteriorating State of East-West relations. It goes without saying that the political climate affects to a considerable degree the access to the international credit market which depends not only on the payment abilities but also on mutual trust.

The undertaking of joint ventures by the member-state of the CMEA are also falling short of expectations. There are no more than a couple of joint enterprises, but there are scores of joint organs which are concerned with the coordination of production. The intention of the CMEA member-States is to give the highest priority to these aspects of economic integration of the CMEA member-States in the coming years. Joint ventures of the socialist States with States of other social and economic systems have lost their momentum in the 1980s, as compared with the situation prevailing in this respect in the preceding decade. It must furthermore be added that some socialist countries participated in such ventures rather rarely.

For the time being, the signing of multilateral agreements on the prevention of double taxation of physical and legal persons has solved that problem within the CMEA area. Furthermore, the many bilateral Agreements with the most important capitalist and developing countries produce tangible financial benefits to the nationals and enterprises of the socialist States.

International tax relationships acquired particular importance because of the international flow of manpower and the undertaking of international joint ventures. So far, mainly physical persons working abroad enjoyed the privilege of tax relief. For, the number of joint enterprises with other socialist countries and Polish participation is very small indeed. There are three of the kind: a Polish-Hungarian, Soviet-Mongolian and Polish-German Democratic Republic.

The Polish People's Republic has concluded more bilateral agreements on the prevention of double taxation than any other socialist State. Thereby Polish internal taxation law incorporates in its system taxation provisions characteristic of other States. What takes place is a reception of specific normative solutions. Whatever the differences in the subject and mechanism of this reception may be, the process itself promotes the harmonization of the taxation systems of the States participating in the bilateral taxation agreements.

The conclusion of bilateral taxation agreements promotes the acceptance of certain general principles, such as the principle of equal treatment,

which means that physical and legal persons of one State cannot be taxed more heavily than physical and legal persons of another State.

The reception of foreign normative solutions and the introduction into the internal law of general principles can take place with the aid of legislative techniques based on two fundamental methods.³⁶ The first consists in a transfer of the contents of the taxation agreements which become thereby part of the internal tax regulations. The second aims at a comprehensive regulation of the status of physical and legal persons of foreign origin on taxation matters in one normative act. The first method prevailed in Poland's practice, which was justified by the relatively small number of concluded agreements. However, with the growing number of such agreements general normative acts regulating the taxation system of foreign physical and legal persons had to be worked out.³⁷ Thus, international agreements on the prevention of double taxation restrict the right of the contracting States to levy taxes on their subjects on the strength of their internal taxation law.

The conclusion of bilateral agreements by Poland and other socialist States with States of different social and economic systems depends on the development of mutual economic relations. As a rule, such agreements are being concluded more frequently when the auspices are favourable, when international economic relations are flourishing and political tensions are low.

³⁶ A. KOSTECKI, *Umowy międzynarodowe zawarte przez PRL w sprawie zapobiegania podwójnemu opodatkowaniu* [International Agreements on the Prevention of Double Taxation Concluded by the Polish People's Republic], Vth International Symposium on Financial Law of the Socialist States, Poznań 1981, pp. 20—21 (unpublished).

³⁷ This took place in the 1970s. See, i.a. Instruction of the Minister of Foreign Trade of June 13, 1973 on the principles governing the participation in foreign companies ("Dziennik Urzędowy Ministerstwa Handlu Zagranicznego" No. 12, item 51); Instruction of the Minister of Finance of May 26, 1976 on the opening and operating of bank accounts of foreign nationals carrying out economic activities on the territory of the Polish People's Republic ("Monitor Polski," No. 25, item 109). Instruction of the Minister of Finance of May 26, 1976 concerning permits to carry out some operations involving foreign exchange by companies of mixed capital ("Monitor Polski," No. 25, item 110); Decision of the Council of Ministers of February 7, 1979 concerning the establishment and operation on the territory of the Polish People Republic of enterprises with the participation of foreign capital ("Monitor Polski," No. 4, item 36).

Le rôle normatif de la pratique de l'extradition de criminels nazis

par LEON SZPAK

Les crimes commis à l'occasion ou pendant la Seconde Guerre mondiale non seulement ont fait naître la nécessité d'élaboration des normes du droit international régissant la poursuite et le châtement des criminels de cette guerre mais encore ont fait comprendre qu'il était nécessaire d'élaborer des normes semblables qui pourraient à l'avenir servir d'un fondement juridique suffisant à la lutte contre toute sorte de crimes de guerre (crimes contre la paix, crimes de guerre sensu stricto et crimes contre l'humanité y compris le génocide). La présente étude se propose de montrer l'évolution des actes du droit international et des droits internes, et d'examiner le point de savoir si, et dans quelle mesure, l'expérience liée à l'extradition de criminels de guerre nazis a exercé une influence sur ces nouvelles normes. Cette étude peut en même temps contribuer à la réponse à deux questions pratiques: quelles sont les dispositions pouvant servir de fondement à l'extradition des criminels de guerre et quelle doit être la procédure à suivre ?

L'analyse des actes du droit international sur la liquidation des effets de la Seconde Guerre mondiale¹, concernant aussi bien l'Allemagne que les

¹ Comme on le sait, après la fin de la Seconde Guerre mondiale, on n'a pas réussi à adopter un seul acte universel de droit international régissant l'extradition et le châtement des criminels de guerre. Ce but a été atteint par l'adoption de quelques actes juridiques de différents caractères. Les uns ce sont des conventions générales concernant les pays ennemis, entre autres les traités d'armistice ou de capitulation, les déclarations des Grandes Puissances du 5 juin 1945 sur la prise du pouvoir suprême en Allemagne et les Accords de Yalta du 2 août 1945. Les autres ce sont des actes juridiques régissant de façon détaillée la poursuite et le châtement des criminels de guerre. La doctrine et la pratique y classent l'Accord en matière de poursuite et de châtement des grands criminels de guerre de l'Axe européen et la loi n° 10 du 20 décembre 1945 du Conseil de contrôle allié en Allemagne. Ces actes juridiques sont en quelque sorte unifiés par la Convention du 26 novembre 1968 sur l'imprescriptibilité des crimes de guerre et des crimes contre l'humanité.

Il convient de souligner tout particulièrement le rôle et la signification pour l'extradition de la Déclaration de Moscou sur les atrocités du 1^{er} novembre 1943. Elle a été parfois

autres anciens pays ennemis, nous apprend que ces actes ne contiennent aucune disposition permettant d'admettre qu'à l'extradition des criminels de guerre de la Seconde Guerre mondiale devaient être appliqués les principes relatifs à l'extradition des criminels de droit commun, en particulier les principes de poursuites limitées, de non-extradition des nationaux, de non-extradition des délinquants politiques, et, partant, la possibilité de donner asile aux criminels du guerre. On n'y trouve pas non plus de disposition dont résulteraient la nécessité d'un contrôle judiciaire de la procédure d'extradition ou la faculté de refuser l'extradition en invoquant la prescription des délits commis par l'individu concerné. Ce qui résulte de ces actes c'est l'obligation absolue de poursuivre et de châtier les criminels de guerre. Face à cet impératif catégorique, il faut admettre que l'Etat invité à extradier un criminel de guerre peut, à défaut de règles spéciales de procédure, appliquer la procédure d'extradition, à l'exception toutefois de ces règles et restrictions qui empêchent l'extradition. Cette opinion est pleinement confirmée par les résolutions de l'Assemblée Générale des Nations Unies du 13 février 1946², du 31 octobre 1947³ et du 18 décembre 1971⁴. Elles affirment que les criminels de guerre, quelle que soit leur nationalité doivent être extradés à l'Etat qui en fera la demande. La résolution du 18 décembre 1971 souligne expressément que le refus opposé par un Etat d'apporter son concours à l'arrestation, à l'extradition (LS), au jugement et au châtiment des personnes coupables de crimes de guerre ou de crimes contre l'humanité est contraire aux buts et aux principes de la Charte des Nations Unies et aux normes universelles du droit international (4°).

Cependant, dans les années suivantes, l'Assemblée Générale des Nations Unies montre une tendance à s'éloigner de ces règles rigoureuses au profit de solutions témoignant davantage un esprit de compromis. Cela trouve son reflet dans la résolution 3074/XXVIII/ relative aux principes de la coopération internationale en ce qui concerne le dépistage, l'arrestation, l'extradition et le châtiment des individus coupables de crimes de guerre et de crimes contre l'humanité, adoptée le 3 décembre 1973 par l'Assemblée Générale de l'O.N.U.⁵. Les principes figurant dans cette résolution peuvent

invoquée dans la pratique en tant que principal fondement juridique d'une demande d'extradition des criminels de guerre nazis.

Pour plus de détails sur ce sujet v. L. SZPAK, *Ekstradycja hitlerowskich zbrodniarzy wojennych ze szczególnym uwzględnieniem praktyki polskiej* [L'extradition des criminels de guerre nazis, à la lumière notamment de la pratique polonaise], Warszawa 1979, p. 9 et suiv.

² A/Res. 3/I.

³ A/Res. 170/II.

⁴ A/Res. 2840/XXVI.

⁵ A/Res. 3074/XXVIII.

également s'appliquer à la coopération internationale en matière de poursuite de tous les autres individus ayant commis un crime de guerre.

La résolution en question interdit d'accorder l'asile aux individus soupçonnés d'avoir commis un crime de guerre et exclut la prescription de la poursuite et du châtement, mais en même temps elle affaiblit le principe selon lequel les criminels de guerre devraient être extradés à l'Etat lésé. En effet, aux termes du paragraphe 5 de cette résolution, « les individus contre lesquels il existe des preuves établissant qu'ils ont commis des crimes de guerre et des crimes contre l'humanité doivent être traduits en justice et, s'ils sont reconnus coupables, châtiés, en règle générale, dans les pays où ils ont commis ces crimes. A cet égard, les Etats coopèrent pour tout ce qui touche à l'extradition de ces individus ». D'autre part, le paragraphe 2 de la résolution confère à tout Etat le droit de juger ses propres ressortissants pour crimes de guerre et pour crimes contre l'humanité, préférant ainsi le principe de nationalité au principe territorial. Il se confirme donc que la résolution en question affaiblit le devoir d'extradition relatif aux criminels de guerre de la Seconde Guerre mondiale et qu'elle reflète dans ce domaine les tendances des instruments juridiques internationaux les plus récents⁶.

⁶ V. *infra*. Ajoutons que malgré une telle conception des principes de la coopération internationale en matière de dépistage, d'arrestation, d'extradition et de châtement des personnes coupables de crimes de guerre et de crimes contre l'humanité, au cours de la discussion du projet de résolution, on a soulevé le grief qu'ils avaient été élaborés dans un esprit préoccupé du passé sans tenir suffisamment compte des aspects contemporains de la poursuite et du châtement des criminels de ce genre. De nombreux pays, notamment ceux d'Amérique Latine, ont soulevé des réserves d'un autre caractère. Sans s'opposer ouvertement à l'idée de coopération dans ce domaine, ils indiquaient que l'adoption de ces principes serait difficile pour des raisons juridiques formelles parce que les législations de ces pays prévoient des principes différents dans les matières telles que l'imprescriptibilité et l'extradition. La position de la Pologne sur le problème de l'extradition a toujours été univoque et se résumait dans les objectifs suivants : exclure les crimes de guerre et les crimes contre l'humanité du domaine des infractions politiques ; admettre que la nationalité de l'auteur ne peut mettre obstacle à l'extradition ; admettre que l'extradition doit avoir lieu également quand l'acte servant de fondement à l'extradition n'est pas une infraction dans le pays requis ; que l'extradition doit avoir lieu même dans le cas où elle porterait atteinte à la règle *ne bis in idem* ; reconnaître que l'amnistie, le droit de grâce et le droit d'asile accordés par l'Etat requis ne mettent pas obstacle à l'extradition ; reconnaître que n'y met pas obstacle non plus le jugement prononcé à l'égard du criminel dans le pays requis, sous cette réserve que l'Etat requérant devrait prendre en considération le jugement et la peine prononcée. Cf. Doc. A/8823.

Les Etats occidentaux se sont opposés à cette interprétation radicale de l'extradition, en demandant que l'on n'aille pas au-delà des limites des conventions internationales existantes. Ce sujet est traité plus amplement par B. FRANCZYK et K. STASZKO. *Ściganie zbrodniarzy wojennych w świetle zasad ekstradycyjnych* [La poursuite des criminels de guerre à la lumière des principes extraditionnels], dans : *Norymberga nadal otwarty rozdział historii* [Nuremberg, un chapitre toujours inachevé de l'histoire]. Warszawa 1977, p. 259 et suiv.

Les résolutions susmentionnées peuvent être considérées comme une illustration de l'attitude des Etats à l'égard du problème de l'extradition des criminels de guerre. Le fait que l'Assemblée Générale — et aussi d'autres organes de l'O.N.U. — aient été obligés de s'occuper maintes fois de la poursuite et du châtement des criminels de guerre — prouvent qu'il y avait sur ce point des doutes de nature juridique et que tous les Etats ne s'acquittaient pas de l'obligation de châtier ou d'extrader ces criminels de la manière et dans la mesure requises par le droit international⁷. En tout cas, ces résolutions confirment le devoir de châtier les criminels de guerre et indiquent expressément l'interdiction d'appliquer à leur égard le droit d'asile et la prescription (principalement la résolution 3074/XXVIII).

Il est vrai que les résolutions de l'Assemblée Générale des Nations Unies ne représentent pas une source autonome de normes du droit international, elles jouent cependant un rôle croissant dans l'évolution de ce droit, notamment dans la cristallisation de normes nouvelles, universellement ou absolument obligatoires⁸. Et c'est certainement sans erreur que les résolutions susmentionnées peuvent être reconnues comme telles.

⁷ Cet état de choses a même fait aboutir à un conflit international. L'exemple en est le cas d'Adolphe Eichmann. Ce criminel de guerre nazi, personnellement responsable de l'organisation d'un système d'extermination massive de la population juive sur les territoires occupés, s'était réfugié après la fin de la guerre en Argentine qui accordait abri à des criminels hitlériens. Le 11 mai 1960, il a été enlevé par des Israéliens, transporté à Jérusalem et traduit en justice. L'Argentine a considéré cet enlèvement comme une violation de sa souveraineté par Israël et a saisi d'une plainte le Conseil de Sécurité qui le 23 juin 1960 a condamné Israël. Le conflit diplomatique argentino-israélien s'est terminé à l'amiable par une déclaration des deux Etats en date du 4 août 1960. Le gouvernement argentin a renoncé à réclamer Eichmann, ce qui a été interprété comme le refus de lui prêter une protection quelconque.

Au cours du procès le tribunal a dû se prononcer sur sa compétence juridictionnelle. Entre autres le tribunal a déclaré qu'une personne jugée pour avoir enfreint les lois de l'Etat ne peut s'opposer au procès pour cause d'illégalité de son arrestation ou des moyens à l'aide desquels elle a été traduite devant le tribunal de cet Etat, ce qui est reconnu non seulement en Israël mais aussi aux Etats-Unis et en Grande-Bretagne. Contre Eichmann on a également utilisé l'argument qu'il n'avait pas été formellement extradé à Israël par l'Argentine, il ne pouvait donc être question d'une limitation quelconque de l'objet d'accusation et de jugement comme cela aurait pu avoir lieu dans l'application d'une procédure normale d'extradition. On a soulevé également que les actes reprochés à l'accusé étaient des crimes contre l'humanité et en tant que *delicta iuris gentium*, à défaut d'un tribunal international, pouvaient être jugés par les tribunaux de tout Etat, et en particulier par le tribunal israélien puisqu'il avait commis les crimes les plus graves sur la population juive. Voir M. CHERIFF BASSOWNI, *Genocide and Racial Discrimination*, dans: *International Criminal Law. Crimes and Punishment*, vol. I, Springfield Illinois 1973, pp. 527—529.

⁸ Cf. K. WOLFKE, *Problem norm bezwzględnie wiążących w prawie międzynarodowym* [Le problème de normes absolument obligatoires en droit international], « Acta Universitatis Wratislaviensis », n° 163, Wrocław 1972, p. 202; cf. également F. MORGENSTERN, *Asylum for War Criminals Quislings and Traitors*, « The British Year Book of International Law », 1948, p. 384.

1. Les règles relatives à l'extradition des criminels de guerre

A. L'interdiction de donner asile aux criminels de guerre

L'acceptation ou le refus du droit d'asile en matière de crimes de guerre présente une importance capitale pour la pratique de l'extradition des criminels de guerre. Bien que la règle de non-extradition des délinquants politiques (et, par la voie de conséquence, l'application du droit d'asile) soit universellement reconnue et trouve son reflet dans de nombreux traités internationaux et dans le droit interne des Etats, il n'en reste pas moins que — le droit de donner asile relevant de la compétence interne de l'Etat qui l'applique selon sa libre appréciation — il ne saurait être question d'une interprétation uniforme de la notion de « délit politique » et d'une pratique unique en matière de droit d'asile.

Cela résulte surtout du fait que les Etats faisant partie de la communauté internationale ont des systèmes socio-politiques et juridiques différents. C'est pourquoi un acte déterminé peut être qualifié par un Etat de délit politique, et par un autre de délit de droit commun.

Cette latitude dans l'application du droit d'asile avait attiré l'attention des Nations Unies encore pendant la guerre. On craignait que les criminels de guerre n'échappassent à la responsabilité pénale pour avoir obtenu le droit d'asile dans des pays neutres. En relation avec cela, parallèlement aux travaux préparatoires aux actes de droit international régissant la responsabilité de ces criminels, se poursuivait l'action tendant à garantir qu'après la guerre ces criminels ne trouveraient pas d'abri dans des pays neutres. La position des Nations Unies en cette matière a trouvé son expression dans les notes diplomatiques des grandes puissances adressées aux pays neutres⁹. Répondant à ces notes, les gouvernements du Portugal, de l'Espagne, de l'Argentine, de la Suisse et de la Suède ont déclaré que le droit d'asile ne serait pas accordé aux criminels de guerre¹⁰. Egalement le Brésil et les autres Etats parties à la Convention de Chapultepec de 1945 ont adhéré à la Déclaration de Moscou du 1^{er} novembre 1943¹¹.

⁹ L. SZPAK, *Prawotwórcze znaczenie doświadczeń z ekstradycji zbrodniarzy hitlerowskich dla rozwoju prawa* [La signification normative de l'expérience de l'extradition des criminels nazis pour le développement du droit], « Acta Universitatis Wratislaviensis », n° 638, Studia nad Faszyzmem i Zbrodniarzami Hitlerowskim, VIII, Wrocław 1982, p. 231.

¹⁰ *Ibid.*

¹¹ F. RAFAŁOWSKI, *Starania o ekstradycję zbrodniarza hitlerowskiego Stangla* [Les démarches en extradition du criminel nazi Stangl], « Problemy Praworządności », 1979, n° 11, pp. 50. 51.

Les tentatives d'unification des règles du droit international relatives à l'asile ont été entreprises seulement dans les premières années suivant la Seconde Guerre mondiale dans le cadre surtout de l'ONU. Ces travaux étaient dictés non seulement par la nécessité de régler la situation juridique d'un grand nombre de réfugiés politiques cherchant refuge dans d'autres pays mais aussi par la nécessité de poursuivre et de châtier efficacement les criminels de guerre. Cependant, la question de ne pas donner asile aux criminels de guerre n'a pas été réglée dans un acte universel spécial du droit international. Cela ne signifie pas que les Etats peuvent librement et légalement donner asile à ces criminels. L'interdiction de leur donner asile découle avant tout des actes du droit international régissant la poursuite et le châtiment des criminels de guerre et aussi des déclarations unilatérales de certains Etats.

Cette interdiction est formulée en outre d'une façon particulièrement claire par la Convention de Genève du 28 juillet 1951 sur la situation juridique des réfugiés, signée par plus de cinquante Etats, dont l'Argentine, l'Autriche, le Brésil, la Finlande, la France, l'Italie, la République Fédérale d'Allemagne, la Suisse et la Turquie¹². Aux termes de l'art. 1 pt. F de cette Convention ne peuvent bénéficier du droit d'asile les personnes qui ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, conformément aux accords internationaux élaborés pour établir les dispositions relatives à ces crimes. Cela résulte aussi de la Déclaration Universelle des Droits de l'Homme qui fait expressément restreindre le bénéfice du droit d'asile pour les personnes ayant commis des actes contraires aux buts et aux principes de l'Organisation des Nations Unies¹³. Cette disposition peut être interprétée comme une exclusion de la possibilité d'asile pour les criminels de guerre.

Par ailleurs, aux termes du § 2 de l'art. 1. de la Déclaration sur l'asile territorial, votée par l'Assemblée Générale des Nations Unies le 14 décembre 1967¹⁴, le droit de réclamer et de bénéficier de l'asile ne peut être invoqué par une personne soupçonnée d'avoir commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, définis dans les actes internationaux contenant des dispositions en cette matière. Egalement le point 7 de la résolution susmentionnée de l'Assemblée Générale des Nations Unies du 3 décembre 1973 dispose que les Etats ne doivent accorder asile à toute personne que l'on est sérieusement fondé de soupçonner d'avoir commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité.

¹² *Convention relating to the Status of Refugees Geneva, 28 July 1951*, United Nations Treaty Series, vol. 189, 1954.

¹³ Art. 14 — 2/.

¹⁴ A/Res. 2312/XXII.

La question de l'asile continue à intéresser l'O.N.U., comme en témoigne la conférence de l'O.N.U. sur l'asile territorial qui s'est tenue du 10 janvier au 4 février 1977. Bien que l'on n'ait pas réussi à rédiger le texte définitif d'une convention, les résultats de la conférence sont importants parce que les participants sont parvenus à tomber d'accord sur les problèmes les plus importants et les plus controversés, entre autres sur le champ d'application du droit d'asile. La disposition concertée de l'art. 2—2/a. du projet de convention précise que l'on ne peut accorder d'asile aux personnes à propos desquelles on est sérieusement fondé de croire qu'elles sont susceptibles d'être poursuivies ou châtiées pour avoir commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, tels qu'ils sont définis par les actes internationaux relatifs à ces crimes¹⁵.

A la lumière des actes du droit international et des résolutions de l'Assemblée Générale des Nations Unies, on peut affirmer que le champ d'application du droit d'asile est limité entre autres par l'interdiction de donner asile aux personnes soupçonnées d'avoir commis ou condamnées pour avoir commis des crimes contre la paix, des crimes de guerre et des crimes contre l'humanité. Ainsi semble-t-il a été universellement reconnu le principe que les criminels de guerre ne peuvent pas être considérés comme des délinquants politiques et que l'on ne peut, pour ce motif, refuser leur extradition¹⁶.

¹⁵ Cf. B. WIERZBICKI, *Azyl terytorialny w świetle prac konferencji ONZ [L'asile territorial à la lumière des travaux de la conférence de l'ONU]*, «Zeszyty Naukowe Akademii Spraw Wewnętrznych», 1978, n° 19, pp. 128—141 ; du MEME AUTEUR, *O azylach i ekstradycji przestępców [Des asiles et de l'extradition de délinquants]*, Warszawa 1982, p. 37 et suiv.

¹⁶ Du point de vue théorique, il ne devrait y avoir aucune difficulté pour cette raison avec l'extradition des criminels de guerre, car, comme nous l'avons déjà expliqué, tous les Etats devraient prendre des mesures législatives appropriées de façon que les normes du droit interne ne soient pas contraires aux normes universelles de poursuite de ces criminels. Et comment en est-il dans la pratique ? Les Etats socialistes ont inscrit une clause relative à l'asile dans leurs constitutions. Toutes emploient des formules semblables.

Par exemple, la Pologne Populaire accorde le droit d'asile aux ressortissants des Etats étrangers persécutés pour la défense des intérêts des masses laborieuses, la lutte pour le progrès social, l'activité en faveur de la défense de la paix, la lutte pour la libération nationale ou l'activité scientifique (art. 88 de la Constitution).

Dans les législations des pays capitalistes on ne trouve pas en principe de critères bien précis des situations où l'on peut bénéficier du droit d'asile. La principale caractéristique du droit d'asile territorial dans ces pays est une formulation très générale, voire l'absence des règles et des conditions de son application. Et si par ailleurs on tient compte du manque d'un sens unique donné dans la pratique des Etats à la notion de délit politique, les difficultés d'interprétation que l'on rencontre quand on cherche à établir qu'un acte donné est crime de guerre et ne peut être considéré comme un délit politique sont évidentes. V. B. WIERZBICKI, *O azylach i ekstradycji...*, p. 82 et suiv. Il y a eu des situations de ce genre dans la pratique des poursuites et du châtiment des criminels de guerre nazis. L'exemple en est le refus des Etats-Unis d'extrader à l'Union Soviétique le criminel de guerre

B. La règle de l'imprescriptibilité de la poursuite et du châtimement des criminels de guerre au regard de l'extradition

Le problème de la prescription des crimes de guerre ne s'est posé en principe qu'en 1965, lorsque le gouvernement de la R.F.A. avait décidé d'arrêter la poursuite et le châtimement des criminels de guerre en relation avec la prescription de leurs crimes en vertu du droit interne allemand. Cette décision avait fortement remué l'opinion mondiale. Les gouvernements et les parlements de nombreux pays avaient protesté en soulevant plusieurs réserves, entre autres de nature juridique¹⁷.

Les actes de droit international régissant la poursuite et la châtimement des criminels de guerre de la Seconde Guerre mondiale contiennent des

Adolphe Heusinger. Les crimes qu'il a commis dans quelques pays européens, en particulier en Union Soviétique, ont été totalement prouvés. Pour défendre ce criminel on a soulevé des arguments militant contre son extradition, le fait par exemple qu'il n'existe pas de traité américano-soviétique sur l'extradition et que la Déclaration de Moscou du 1^{er} novembre 1943 invoquée dans la demande d'extradition n'était pas applicable lors même que les accusations portées contre Heusinger auraient été fondées, car 15 années se sont écoulées depuis la fin de la guerre. Finalement, le gouvernement américain a repoussé la demande d'extradition en invoquant comme motif de cette décision le fait que le demande d'Union Soviétique était un acte de propagande et que les accusations formulées contre Heusinger étaient une tentative de brouiller et de discréditer l'OTAN.

Le cas de Heusinger démontre éloquentement comment on peut, pour des motifs politiques, interpréter comme on veut les actes des personnes que l'on entoure de protection et auxquelles on accorde un droit d'asile de fait, lors même qu'elles auraient été auteurs des plus graves crimes de guerre dont le génocide.

La réglementation en droit interne du droit d'asile accordé aux personnes poursuivies pour des délits politiques ne semble pas montrer que l'on ait mis à profit les expériences découlant de la pratique de la poursuite des criminels de guerre nazis. Il y a lieu de faire remarquer que les législations internes n'excluent pas expressément et univoquement la possibilité de considérer les criminels de guerre comme des délinquants politiques. Il est vrai que la réglementation interne de droit d'asile n'autorise pas encore à prétendre catégoriquement qu'elle peut être, dans chaque cas, mise à profit pour protéger les personnes soupçonnées d'avoir commis des crimes de guerre, néanmoins ce danger existe. On ne peut, bien entendu, parler ici d'un conflit de normes de droit interne avec le droit international étant donné la généralité du premier, mais pour cette raison précisément, dans des situations concrètes une contradiction est possible entre la décision de l'organe de l'Etat accordant asile et le principe du droit international interdisant cet asile aux criminels de guerre. Cf. K. SKUBISZEWSKI, *Konflikt normy krajowej i międzynarodowej* [Le conflit entre une norme nationale et une norme internationale], « Państwo i Prawo », 1979, n° 12, p. 3.

¹⁷ L. SZPAK, *Prawotwórcze znaczenie...*, p. 233. V. également J. BAFIA, *O bezterminowe ściganie zbrodni przeciw pokojowi, zbrodni wojennych i zbrodni przeciwko ludzkości* [Pour une poursuite imprescriptible des crimes contre la paix, des crimes de guerre et des crimes contre l'humanité], Warszawa 1980, p. 68 et suiv.

règles illimitées dans le temps qui sont toujours en vigueur. Aucun de ces actes ne contient de dispositions sur la prescription de la poursuite et du châtement des crimes de guerre. Dans la résolution 13/XXIV/adoptée à sa 878^e séance le 28 mars 1966, la Commission des Droits de l'Homme a déclaré qu'en droit international est en vigueur le principe d'après lequel les crimes de guerre et les crimes contre l'humanité sont imprescriptibles. D'autre part la Commission a affirmé que les Nations Unies devraient prendre toutes mesures possibles afin de confirmer et de compléter ce principe ainsi que de garantir son application universelle. Le Conseil Economique et Social a émis une opinion semblable¹⁸.

La Convention du 26 novembre 1968 sur l'imprescriptibilité des crimes de guerre et des crimes contre l'humanité a résolu de façon définitive et univoque le problème de la prescription des crimes de guerre. Réaffirmant dans son préambule la force obligatoire des déclarations et des actes juridiques concernant la poursuite et le châtement des crimes de guerre et des crimes de génocide, elle constate que ces documents ne contiennent aucune disposition prévoyant la prescription de la poursuite de ces crimes. Aussi dans son article I^{er} la Convention proclame-t-elle que ces crimes sont imprescriptibles « quelle que soit la date à laquelle ils ont été commis ». La Convention a un caractère déclaratoire, confirmant et précisant le principe de l'imprescriptibilité des crimes de guerre et des crimes contre l'humanité déjà existant en droit international. Mais la signification de la Convention ne se ramène pas seulement à confirmer le principe de l'imprescriptibilité des crimes de guerre et des crimes contre l'humanité déjà existant en droit international. Elle présente une haute importance pour cette raison également qu'elle impose aux Etats une obligation expresse d'adopter leur législation interne aux normes correspondantes de droit international à un degré tel que les dispositions internes sur la prescription ne soient pas applicables aux crimes dont il est question dans cet acte juridique¹⁹.

Le droit international général ne connaît pas la prescription. On ne peut parler de prescription que comme d'une institution de droit interne des Etats particuliers mais inapplicable aux crimes de guerre. Ainsi le problème de l'imprescriptibilité des crimes de guerre en droit international a été définitivement éclairci mais la question de l'application universelle de ce principe demeure actuelle. Il s'agit de ce qu'il soit appliqué en même temps par les Etats sur le territoire desquels des crimes ont été commis et par les Etats sur le

¹⁸ Résolution 1158/XII du 5 août 1966.

¹⁹ Art. IV de la Convention.

territoire desquels des criminels ont trouvé abri²⁰. Autrement le principe de l'imprescriptibilité des crimes de guerre n'aurait pas d'importance pratique.

²⁰ Il résulte du rapport du Secrétaire Général de l'O.N.U. traitant les résultats de l'enquête adressée le 19 mai 1965 à tous les Etats membres de l'O.N.U. au sujet de la prescription des crimes de guerre que la pratique législative des pays en cette matière est très variée et qu'elle s'écarte de l'état que l'on peut qualifier de normal. V. Doc. E/CN.4/306. A la lumière des réponses à l'enquête la position des Etats en matière de prescription peut se résumer comme ceci: a) dans les pays suivants, en vertu du droit commun ou des lois spéciales, la prescription n'est pas appliquée ou peut être modifiée soit relativement à tous les crimes contre la paix, crimes de guerre et crimes contre l'humanité, soit à l'égard de certaines catégories de ces crimes: Autriche, Bulgarie, Chine, Danemark, Etats-Unis d'Amerique, France, Hongrie, Inde, Islande, Israël, Italie, Kenya, Nigeria, Ouganda, Pologne, République Soviétique Socialiste d'Ukraine, Royaume Uni de Grande-Bretagne et d'Irlande du Nord, Singapour, Tchécoslovaquie, et U.R.S.S.; b) il semble que dans les pays suivants les règles de la prescription concernant les crimes de droit commun ont été appliquées aux crimes de guerre: Cambodge, Cameroun, Espagne, Japon, Malte, Maroc, Norvège, Suède, Turquie et Venezuela; c) les Etats suivants ont pris des mesures qu'ils jugent suffisantes pour assurer le châtimement des crimes commis pendant la Seconde Guerre mondiale et relevant de leur juridiction: Belgique, Pays-Bas et R.F.A.; d) la Bolivie et la Colombie ont exprimé l'opinion que les règles internes en matière de prescription ne devraient pas être appliquées aux crimes contre l'humanité et aux crimes de guerre.

La Pologne a été l'un des premiers pays à protester (le 26 avril 1960) contre la faculté de prescription des crimes de guerre. V. la déclaration du ministre polonais des Affaires étrangères du 26 avril 1960 (Zbiór Dokumentów [Recueil de Documents], 1960, n° 4—5, pp. 642—646).

Depuis 1965, la Pologne avait pris plusieurs initiatives contre la prescription de la poursuite et du châtimement des criminels de guerre. V. le memorandum présenté à l'ONU par le gouvernement de la République Populaire de Pologne sur la nécessité de prorogation de la période de poursuite des criminels de guerre (Zbiór Dokumentów 1965, n° 2—3, pp. 110—113). Simultanément avec l'activité déployée dans l'arène internationale avaient commencé en Pologne les travaux tendant à écarter toute possibilité de prescription de la poursuite des crimes de guerre dans le droit interne polonais. Ces travaux ont abouti au vote le 22 avril 1964 d'une loi sur l'arrêt du cours de prescription à l'égard des auteurs de crimes nazis les plus graves commis pendant la Seconde Guerre mondiale (Journal des Lois n° 15, texte 86).

Le Code pénal polonais de 1969 marque lui-aussi un progrès notable en cette matière. Aux termes de son article 109 les dispositions sur la prescription ne sont pas applicables aux crimes de guerre et aux crimes contre l'humanité. Comme cette règle figure au code pénal, elle est générale et toujours obligatoire donc applicable à d'autres crimes que ceux commis par les nazis. De ce fait la Pologne a définitivement tranché le problème de la prescription de la poursuite et du châtimement des criminels de guerre d'une façon conforme aux principes du droit international. On ne peut pas dire autant de la pratique législative de nombreux autres pays. Une pierre de touche en est la position adoptée par les Etats à l'égard de la Convention sur l'imprescriptibilité des crimes de guerre et des crimes contre l'humanité. A la XXIII^e session de l'Assemblée Générale des Nations Unies, 58 Etats

2. Les dispositions sur l'extradition des criminels de guerre dans les actes les plus récents de droit international

Parmi les actes de droit international élaborés et adoptés après la Seconde Guerre mondiale qui ne sont pas appelés à liquider les séquelles de cette guerre en matière de poursuite des criminels de guerre (sauf la Convention sur l'imprescriptibilité) mais qui, directement ou indirectement, règlent le problème de l'extradition, il faut mentionner la Convention du 9 décembre 1948 pour la prévention et la répression du crime de génocide, la Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne (I), la Convention de Genève pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer (II), la Convention de Genève relative au traitement des prisonniers de guerre (III), la Convention de Genève relative à la protection des personnes civiles en temps de guerre (IV) — en date du 12 août 1949, la Convention du 14 mai 1954 pour la protection des biens culturels en cas de conflit armé, la Convention du 26 novembre 1968 sur l'imprescriptibilité des crimes de guerre et des crimes contre l'humanité ainsi que la Convention du 30 novembre 1973 sur l'élimination et la répression du crime d'apartheid.

Ces actes ont indubitablement pris naissance sous l'influence des expériences liées à la poursuite et le châtimement des criminels de guerre de la dernière guerre mondiale. Non seulement ils ont complété et perfectionné le droit matériel, mais contiennent encore entre autres les dispositions de procédure concernant la poursuite et le châtimement des auteurs des crimes qu'ils définissent.

La Convention pour la prévention et la répression du crime de génocide dispose dans son article VI que les personnes accusées de génocide seront

ont voté pour la Convention du 26 novembre 1968, et 7 Etats contre (U.S.A., Grande-Bretagne, République Sud-Africaine, Portugal, Australie, Honduras et Salvador), 36 Etats se sont abstenus — c'étaient les Etats de l'OTAN, les Etats scandinaves et ceux d'Amérique Latine sauf le Chili et le Mexique. La Convention n'a été signée jusque-là que par 21 Etats.

La pratique extraditionnelle des Etats prouve qu'il ne s'agit pas seulement d'un problème théorique. Une illustration en peut être le cas d'extradition du Brésil de Gustav Franz Wagner, ancien adjoint au commandant du camp d'extermination de Sobibór, auteur de crimes de génocide, figurant sur la liste des criminels de guerre n° 78, sous le n° 748, corresponsable de la mort de 250 mille personnes, dont un grand nombre fut assassiné par lui-même, connu pour son sadisme et cruauté exceptionnels. Son extradition a été demandée par l'Autriche, la Pologne, la R.F.A. et Israël. Par son arrêt du 20 septembre 1979, la Cour Suprême de Brésil a rejeté les demandes d'extradition en invoquant la prescription des crimes de Wagner. Celui-ci fut relâché. La Cour s'est appuyée sur la loi brésilienne n° 394 de 1938 sur l'extradition concernant les criminels de droit commun. En vertu de cette loi les crimes de guerre se sont prescrits 20 ans après leur perpétration.

traduites devant les tribunaux compétents de l'Etat sur le territoire duquel l'acte a été commis ou devant la cour criminelle internationale compétente à l'égard de celles des Parties contractantes qui en auront reconnu la juridiction. Il résulte de cet article que la Convention a adopté le principe de la compétence territoriale pour la poursuite et le châtimement des auteurs des crimes définis par elle, ce qui signifie que de telles personnes seront extradées à l'Etat lésé au cas où elles ne seraient pas traduites devant une cour internationale. Par ailleurs la Convention statue que ces personnes ne seront pas considérées comme des délinquants politiques pour ce qui est de l'extradition (art. VII).

On pourrait donc croire que le problème de l'extradition a été réglé par cet acte d'une manière ne suscitant pas de doutes. Mais il n'en est pas ainsi. En effet nous lisons dans la suite de l'art. VII que l'extradition devra être conforme à la législation des Parties contractantes et aux traités en vigueur. Cette disposition ne précise pas de quels traités il s'agit et dans quelle mesure doivent être appliquées les lois des Parties et, partant, les dispositions relatives à l'extradition des criminels de droit commun. Il n'est donc pas clair quel est le rapport entre le principe de territorialité prévu à l'art. VI de la Convention et les règles relatives à l'extradition des criminels de droit commun, par exemple la règle de non-extradition des nationaux ou la règle de spécialité, découlant du droit interne et des conventions sur l'entraide judiciaire. Il est très important d'établir ce rapport, surtout en raison du fait que les règles relatives à l'extradition des criminels de droit commun ne permettent pas toujours de poursuivre les auteurs de crimes de guerre. Dans cette situation apparaît le risque de conflit des règles de la Convention avec les dispositions internes des Etats interdisant l'extradition des nationaux pour les infractions commises en dehors des frontières du pays²¹.

La manière dont la Convention sur le génocide a réglé le problème de l'extradition est donc critiquable. Cette appréciation n'est nullement atténuée par le fait que, conformément à la Convention, les Etats peuvent refuser l'extradition seulement de leurs propres ressortissants étant obligés à extradier les ressortissants des autres Etats.

Car le problème réside dans le fait qu'il ne faut pas que cette dérogation au principe de territorialité serve de base à l'avenir à un refus général de l'extradition des criminels. On peut en effet imaginer une situation où des citoyens d'un seul Etat soient des auteurs de génocide et alors, en appliquant le principe de nationalité, aucun d'eux ne soit extradé à l'Etat

²¹ L. OPPENHEIM, *International Law*, London — New York — vol. I, Toronto 1948, pp. 638, 639.

lésé. Une telle situation s'est présentée, nous le savons, en ce qui concerne les criminels de guerre nazis. C'est seulement l'abolition par le Conseil de Contrôle allié des dispositions allemandes interdisant l'extradition des nationaux qui a permis de résoudre ce problème juridique²². Cet exemple fait saisir les difficultés qui peuvent apparaître à l'avenir dans les cas où il faudrait extraditer en vertu de la Convention sur la prévention du génocide.

L'extradition a été réglée pareillement par les Conventions de Genève de 1949 sur la protection des victimes de la guerre. Chacune de ces conventions statue de façon identique que chaque Partie contractante aura l'obligation de rechercher les personnes prévenues d'avoir commis, ou d'avoir ordonnée de commettre, l'une ou l'autre des infractions appelées « graves » et qu'elle devra les déférer à ses propres tribunaux quelle que soit leur nationalité. Mais elle peut aussi, si elle le préfère, et selon les conditions prévues par sa propre législation, les remettre pour jugement à une autre Partie contractante intéressée à la poursuite, pour autant que cette Partie ait retenu contre lesdites personnes des charges suffisantes (I — art. 49, II — art. 50, III — art. 129, IV — art. 146). Ces conventions n'imposent donc pas aux Etats une obligation absolue d'extradition, mais leur donnent le droit de décider librement de la façon dont l'accusé sera traité. Elles exigent seulement que le criminel soit châtié. Il leur est indifférent dans quel Etat cela aura lieu — dans l'Etat lésé ou dans l'Etat requis. C'est l'application du principe de Grotius : *aut punire aut dedere*. Si l'extradition doit avoir lieu elle sera fondée, conformément aux dispositions précitées des Conventions, sur les principes et la procédure conformes au droit interne de l'Etat requis.

Ce mode de poursuite des criminels de guerre ne concerne que les auteurs d'« infractions graves ». En revanche, les Conventions de Genève ne règlent pas l'extradition des personnes dont les actes ne sont pas qualifiés d'infractions graves mais qui sont contraires à leurs dispositions. Dans ce cas seront applicables les procédures normales d'extradition des délinquants politiques et, semble-t-il, sans aucune restriction.

Cette liberté des Etats de décider de la façon dont ils pourront châtier les auteurs d'infractions à la Convention a été confirmée à l'art. 88 du Protocole I aux Conventions de Genève (entré en vigueur le 7 décembre 1978). L'alinéa 2 de cet article constate que les Parties contractantes doivent coopérer entre elles dans les affaires d'extradition mais, comme il résulte de cette disposition, non pas selon les règles concernant, par exemple, l'extradition des criminels de guerre de la dernière guerre mondiale, mais en appliquant le droit des Parties sans porter atteinte à leurs obligations

²² T. CYPRIAN, J. SAWICKI, *Walka o zasoby norymberskie 1945—1955* [La lutte pour les principes de Nuremberg 1945—1955], Warszawa 1956, p. 138.

déoulant des autres conventions bi- ou multilatérales relatives à l'extradition qui régissent en tout ou en partie l'entraide judiciaire en matière pénale.

La Convention du 14 mai 1954 pour la protection des biens culturels ne contient pas de dispositions expresses sur l'extradition. Dans son article 28 appelé « Sanctions », les Parties contractantes s'engagent à prendre dans le cadre de leur système de droit pénal toutes mesures nécessaires pour que soient recherchées et frappées de sanctions pénales ou disciplinaires les personnes, quelle que soit leur nationalité, qui ont commis ou donné l'ordre de commettre une infraction à la Convention. Cette disposition n'interdit pas l'extradition mais elle n'y oblige pas expressément non plus. Dans cette situation il y a lieu de constater que la Convention, bien qu'elle admette l'extradition, suscite une déception légitime.

La Convention sur l'imprescriptibilité règle d'une façon générale, elle aussi, l'extradition. Seul l'art. III est consacré à ce problème et il est ainsi conçu : « Les Etats Parties à la présente Convention s'engagent à adopter toutes les mesures internes, d'ordre législatif ou autre, qui seraient nécessaires en vue de permettre l'extradition, conformément au droit international, des personnes visées par l'art. II de la présente Convention ». Ainsi la Convention renvoie à des actes antérieurs de droit international, en approuvant leurs dispositions sur l'extradition de différentes catégories de personnes coupables de crimes de guerre. Il s'ensuit qu'en effectuant l'extradition des criminels de guerre il faut s'appuyer sur un acte concret de droit international dans la mesure où il admet l'extradition.

La Convention internationale sur l'élimination et la répression du crime d'apartheid, en qualifiant ce crime d'une espèce de crime contre l'humanité engage les signataires entre autres à adopter des mesures législatives ayant pour but la poursuite, le jugement et le châtimeut des coupables ou accusés d'avoir commis ce crime (défini à l'art. II), quelles que soient actuellement la résidence et la nationalité de l'auteur du crime (art. V). Cette disposition traduit donc la règle de la répression universelle. Dans les cas où il y aurait lieu d'effectuer l'extradition les Etats signataires l'effectueront conformément à leur législation et aux traités en vigueur (art. XI).

Les actes en question, tout comme les actes de droit international concernant la liquidation des séquelles de la Seconde Guerre mondiale, interdisent la prescription de la poursuite des crimes qu'ils définissent et contiennent la règle que ces actes ne peuvent pas être considérés comme des délits politiques²³.

²³ V. L. SZPAK, *Wpływ doświadczeń z ekstradycji zbrodniarzy hitlerowskich na rozwój prawa międzynarodowego* [L'influence de l'expérience de l'extradition des criminels nazis sur l'évolution du droit international], dans : *Norymberga nadal otwarty rozdział historii*, Warszawa 1977, p. 280.

L'adoption par le droit international universel le plus moderne de la règle en vertu de laquelle le droit d'asile ne peut pas être accordé aux criminels de guerre et ces derniers ne bénéficient pas de la prescription signifie que tous les Etats ont une obligation absolue de poursuivre et de châtier les auteurs des crimes de guerre par leurs propres tribunaux ou par les tribunaux des Etats lésés (après extradition préalable).

Sans nier le fait important qu'est indubitablement l'adoption et l'acceptation par la communauté internationale des actes juridiques en question, il faut cependant souligner qu'ils ne peuvent, malheureusement, servir de fondement juridique suffisant à l'extradition. L'analyse de ces actes prouve qu'ils règlent le problème de l'extradition d'une façon générale sans constituer pour autant un système uniforme et cohérent universellement admis de procédure des Etats en matière d'extradition des criminels de guerre. La conclusion ici s'impose que dans ces actes les règles relatives à l'extradition ne sont pas à la mesure des règles de fond qu'ils contiennent. Il serait extrêmement utile que les futures conventions internationales définissent avec plus de précision les obligations des Etats en matière d'extradition des criminels de guerre²⁴. Car on ne peut pas reconnaître comme satisfaisante la solution consistant en renvoi au droit interne des Etats. Une telle solution fait naître la crainte justifiée que l'application de ces actes dans le domaine de l'extradition ne suscite de nombreuses difficultés dans la pratique et qu'elle ne donne pas les effets escomptés dans la poursuite des auteurs de crimes de guerre.

Aussi la question se pose-t-elle de savoir pourquoi les actes les plus récents de droit international (à l'exception, en principe, de la Convention sur le génocide) n'ont pas adopté, à l'exemple des actes datant de la Seconde Guerre mondiale, l'obligation de l'extradition des criminels aux Etats lésés bien qu'après la Première et la Seconde Guerres mondiales tout le monde reconnût que c'était le procédé le plus juste et le plus sûr de leur châtement. Il se peut que ce fût sous l'influence de l'arrêt brusque de l'extradition des criminels de guerre nazis après 1949, lorsque les U.S.A. et la Grande-Bretagne avaient commencé, en dépit du droit international, à se dérober à leur devoir en cette matière. Dans cette situation les auteurs de nouveaux actes juridiques préféraient de mettre nettement l'accent sur l'obligation absolue de poursuite des auteurs des crimes de guerre par tous les Etats sans préjuger de la manière dont cette obligation serait exécutée. L'adoption par la Convention sur le génocide du principe de territorialité semble militer en faveur de cette thèse. Cela peut s'expliquer par le fait que la Convention a été élaborée et acceptée par les Etats à l'époque où l'obligation de l'extradition des criminels de guerre nazis était encore

²⁴ Cf. R. BIERZANEK, *The Prosecution of War Crimes*, dans : *International Criminal Law*, p. 93.

exécutée dans une mesure relativement large. Les actes postérieurs renoncent à ce principe, ce qui se laisse voir avec une particulière netteté sur l'exemple de la Convention pour la protection des biens culturels qui ne règle pas directement l'extradition mais fait seulement châtier les auteurs d'infractions à la Convention. Il est certain que ce genre de réglementation de la poursuite et du châtement des auteurs des crimes de guerre avait le plus de chances d'être accepté par de nombreux Etats.

3. L'interdiction de l'extradition des nationaux et le problème de l'extradition des criminels de guerre

Parmi les nombreux obstacles à une application intégrale de l'extradition des criminels une importance essentielle revient à la règle largement appliquée de non-extradition des nationaux (principe de nationalité). Elle a exercé également une influence notable sur le mode de réglementation de la poursuite des criminels de guerre dans les actes les plus récents de droit international et sur la pratique extraditionnelle après la Seconde Guerre mondiale. Les conventions internationales sur l'entraide judiciaire règlent de différentes manières l'extradition des nationaux. Les unes ne prévoient aucune restriction, c'est le cas, par exemple, de la convention américano-britannique, ou israélo-britannique. D'autres interdisent catégoriquement l'extradition de nationaux — c'est le cas, par exemple, des conventions conclues par la Pologne avec les pays socialistes; la Belgique, la France, le Luxembourg et la Suisse.

Il existe également des conventions qui laissent aux parties la liberté de décision en ce qui concerne l'extradition ou son refus. C'est le cas du Traité polono-britannique du 11 janvier 1932 et de la Convention italo-israélienne du 29 février 1956.

Les conventions d'extradition admettent la règle que l'Etat requis est exclusivement compétent de décider si la personne concernée par la demande d'extradition est son ressortissant²⁵.

Les solutions adoptées par les conventions internationales et concernant l'extradition de nationaux dérivent des solutions que l'on trouve dans les législations nationales. En principe, ne peut s'engager à extraditer ses nationaux que l'Etat dont la législation lui en donne droit. Parfois, cependant, les obligations internationales devancent les solutions nationales en cette matière. Il en a été ainsi après la Seconde Guerre mondiale. Les actes adoptés de droit international ont introduit — nous l'avons dit plus haut — l'obligation absolue de poursuite des criminels de guerre avant tout par les Etats lésés,

²⁵ Z. KNYPL, *Ekstradycja jako instytucja prawa międzynarodowego i wewnętrznego* [L'extradition en tant qu'institution du droit international et du droit interne], Warszawa 1975, pp. 48—50.

la nationalité donc de l'auteur ne pouvait faire obstacle à l'extradition. Les Etats avaient donc à modifier comme il fallait leur législation.

Cette question se présente autrement à la lumière des actes les plus récents de droit international destinés à réprimer les crimes de guerre. Le fait que ces actes adoptent le principe de nationalité universellement reconnu par le droit interne et que, en même temps, ils postulent l'application du principe de territorialité et du principe de la poursuite universelle des crimes de guerre, peut certainement aboutir dans la pratique au conflit de ces principes. Comme le droit international ne règle pas l'ordre d'application de ces principes, l'Etat sur le territoire duquel se trouve la personne soupçonnée d'avoir commis un crime de guerre ou condamnée pour l'avoir commis, a la faculté de décider lequel de ces principes sera appliqué. Cela signifie que l'Etat peut refuser l'extradition ou la demander en relation avec un acte délictueux commis par son ressortissant sur son territoire ou sur celui d'un Etat étranger. Cela d'autant plus que le principe de nationalité dérive du principe de souveraineté et les Etats ne renoncent pas de bon gré à leur juridiction à l'égard de leurs citoyens. Dans cette situation il y a lieu d'admettre que le principe de nationalité passera avant le principe de territorialité qui ne sera applicable que lorsque l'Etat sera en mesure et jugera bon de renoncer à sa juridiction. Ainsi, en cas de conflit avec le principe de nationalité, le principe de territorialité aura un caractère facultatif et secondaire²⁶.

En adoptant comme critère l'admissibilité de l'extradition de nationaux les législations internes se laissent diviser en trois groupes : celles qui interdisent l'extradition de leurs nationaux, celles qui en l'interdisant admettent des dérogations en faveur d'une obligation internationale différente et celles qui ne contiennent pas d'interdiction de ce genre²⁷.

Les pays socialistes et la majorité des pays européens, dont la R.F.A. n'extradent pas leurs nationaux. L'extradition des criminels de guerre nazis de la R.F.A. était fondée, comme on le sait, sur la loi n° 10 du Conseil de contrôle allié en Allemagne. Bien que cet acte juridique fût resté formellement en vigueur jusqu'au 30 mai 1956, l'extradition des criminels de guerre cessa en fait dès la création de la R.F.A. Et déjà en 1949, les dispositions du Code pénal de 1871 étaient devenues l'unique fondement légal de la poursuite des criminels de guerre dans ce pays. Le renoncement par la R.F.A. à l'application des actes de droit international en matière de poursuite et de châtement des criminels de guerre et le fait de s'appuyer exclusivement sur ses dispositions internes contraires au droit international, avaient entre autre pour but d'empêcher l'extradition des criminels de guerre nazis aux Etats lésés. En effet le gouvernement fédéral motive le refus

²⁶ Cf. B. FRANCZYK, K. STASZKO, *op. cit.*, pp. 266, 267.

²⁷ Z. KNYPL, *op. cit.*, pp. 54, 55.

d'extradition en invoquant son droit interne, à savoir l'art. 16—2/ de la Constitution qui interdit d'extrader ses nationaux. Il faut reconnaître que la position de l'Allemagne Fédérale est conséquente car, dès la formation de cet Etat, aucun criminel de guerre n'a été extradé, en vertu des décisions du gouvernement de ce pays, tant à la Pologne qu'à d'autres Etats, par exemple à la France²⁸. Il y a été reconnu que les seules juridictions compétentes pour châtier les criminels nazis étaient les tribunaux allemands²⁹. Cependant la situation de certains criminels est devenue paradoxale. Les autorités ouest-allemandes ne voulaient pas les extraditer et les tribunaux de la R.F.A., s'appuyant sur les accords de Paris de 1954 ne poursuivaient pas les criminels qui avaient été condamnés par contumace, ou en leur absence, par les tribunaux français. Encore en 1964 cela concernait environ 800 criminels nazis vivant en R.F.A. Pour faire cesser cette situation anormale, le gouvernement fédéral, agissant sous la pression de l'opinion publique française et des autorités de ce pays, a conclu avec le gouvernement de la République Française un accord sur la compétence juridictionnelle des tribunaux allemands pour les affaires des criminels condamnés en France.

Signé le 2 février 1971, cet accord n'a été ratifié, par la faute des autorités législatives allemandes, que le 30 janvier 1975, et il est entré en vigueur le 30 juin 1975. On estimait alors qu'il ne concernerait plus que 315 cas. Traduisant l'attitude pratique envers le problème de la poursuite et du châtimement des criminels nazis dans le contexte des réalités présentes, cet accord est en même temps un exemple éloquent de l'abandon de la règle de poursuite de ces criminels par les tribunaux des Etats lésés.

²⁸ L. SZPAK *Ekstradycja...*, p. 151 et suiv.

²⁹ On aurait pu croire que le gouvernement fédéral en refusant l'extradition des criminels de guerre nazis à l'Etat lésé aurait lui-même châtié, rapidement et équitablement, ces criminels. Or il n'en est pas ainsi. Avant 1978 en R.F.A. la procédure d'instruction a été engagée contre 84 403 personnes, dont 6432 criminels nazis seulement ont été condamnés depuis 1945. Dans 74 263 cas la procédure s'est terminée sans un jugement de condamnation. De 1958 à 1978, en R.F.A. 879 criminels nazis ont été accusés, dont 505 ont été condamnés, mais les jugements ne sont passés en force de chose jugée que dans 45% des cas. Un pourcentage important des accusés (333) avaient commis des crimes sur le territoire de la Pologne, v. M. REGENT-LECHOWICZ, *Moralno-prawne aspekty nieprzedawniania ścigania i karania hitlerowskich zbrodni wojennych i zbrodni przeciw ludzkości* [Les aspects moraux et juridiques de l'imprescriptibilité de la poursuite et du châtimement des crimes de guerre et des crimes contre l'humanité nazis], « Państwo i Prawo », 1979, n° 10, p. 8. Les chiffres illustrant la durée de l'instruction et des procédures judiciaires sont également éloquentes. En 1965, la durée moyenne de l'instruction des procès en cours contre les criminels de guerre a été d'un peu plus de 5 ans, en 1970 — 8 ans et actuellement elle est de 10 à 12 ans. Les procès judiciaires durent plusieurs années. P.ex. le procès de Düsseldorf contre 14 criminels du camp de Majdanek a duré plus de 5 ans. Cf. CZ. PILICHOWSKI, *Realizacja Konwencji ONZ o nieprzedawnianiu zbrodni hitlerowskich* [L'application de la Convention de l'O.N.U. sur l'imprescriptibilité des crimes nazis], « Sprawy Międzynarodowe », 1978, n° 12, p. 30.

L'attitude de la R.F.A. à l'égard de l'extradition est un exemple flagrant et éloquent de la façon dont on peut éluder les dispositions des actes de droit international tant en ce qui concerne l'adaptation de la législation interne aux règles internationales que l'application pratique de l'obligation au châtement des criminels de guerre de la dernière guerre mondiale. Il en est ainsi bien que les principes formulés dans les actes de droit international fassent partie intégrante du droit interne ouest-allemand, entre autres en vertu de l'art. 25 de la Constitution de ce pays. Par ailleurs, l'art. 139 de cette Constitution statue que ses dispositions ne portent pas atteinte aux dispositions juridiques sur la délivrance du peuple allemand des influences du national-socialisme et du militarisme. En dépit de cela, les autorités de la R.F.A. ne se sentent pas liées par les règles de droit international obligatoires en matière de poursuite des criminels nazis. La R.F.A. n'a jamais reconnu les principes du droit de Nuremberg, bien qu'elle soit le pays ayant des obligations particulières à cet égard³⁰.

Même Hans Vogel, ministre de la Justice de la R.F.A. a attiré l'attention sur la nécessité de la concordance du droit interne et de la pratique juridique de ce pays avec les principes du droit international universel³¹. Mais la compréhension de ce problème par la partie ouest-allemande ne se traduit pas, pour l'instant, par des poursuites plus actives des criminels de guerre nazis.

Un autre pays qui, en considération de sa législation, a refusé d'extrader un criminel du guerre est la Bolivie. En réponse à la requête de la France d'extradition du criminel de guerre Klaus Barbie-Altman, ancien chef de la Gestapo à Lyon, on motivait pendant longtemps le refus d'extradition par le fait qu'Altman est naturalisé Bolivien³².

³⁰ M. REGENT-LECHOWICZ, *op. cit.*, p. 10.

³¹ W. MICHALSKI, P. MAČKOWIAK, *Prawne aspekty układu między PRL i RFN* [Les aspects juridiques de l'accord R.P.P. — R.F.A.] dans : *Główne problemy prawne normalizacji stosunków PRL — RFN. Materiały z konferencji naukowej 26, 27 II 1979, Warszawa — Popowo*, Warszawa 1979, pp. 14, 15.

³² Klaus Barbie-Altman fut, sous l'occupation allemande, le chef de la Gestapo à Lyon. Dès le 1^{er} septembre 1944 il avait commencé à collaborer avec le service américain de renseignements. En 1945, il rentra en Allemagne pour y exercer la mission qui lui était confiée, entre autres dans la zone soviétique d'occupation.

Immédiatement après la guerre, et puis en 1951 la France avait demandé aux Américains son extradition mais la requête fut repoussée. Une première fois on déclara que l'extradition était impossible parce que Barbie servait « à des fins dénazification » Ensuite on affirmait qu'on « avait besoin de lui en considération de la sécurité de l'Etat ».

Cependant il est contraint à quitter l'Allemagne et réussit à venir en Amérique du Sud où en 1957 sous le nom d'Altman il obtient la nationalité bolivienne.

Les autorités judiciaires françaises ont jugé que Klaus Barbie-Altman était un criminel de guerre et l'ont condamné par contumace à la peine de mort. Ayant obtenu des preuves irréfutables de l'identité de Barbie-Altman, le gouvernement français a demandé son

Parmi les pays qui admettent des exceptions à l'interdiction d'extrader les nationaux mentionnons l'Italie et le Japon³³. L'article 13 du Code pénal italien interdit d'extrader les nationaux, à moins de disposition contraire d'une convention internationale. D'autre part, l'art. 26 de la Constitution italienne statue que l'on peut consentir à l'extradition d'un ressortissant italien quand une convention internationale le prévoit. Il semble que c'est l'un des exemples peu nombreux d'adaptation du droit interne au droit international, afin de permettre la poursuite de nationaux coupables d'avoir commis des crimes de guerre. Dans la cas d'Italie c'est l'exécution de l'art. 45 du Traité de paix du 10 février 1947.

Le Code polonais de procédure pénale apporte une solution intéressante mais il semble, malheureusement, pas bien judicieuse en ce qui concerne les

extradition au gouvernement bolivien. Une note officielle à ce sujet avait été remise par l'ambassadeur de France en Bolivie au ministre de la Justice de ce pays le 3 février 1972.

Le président Pompidou avait demandé dans une lettre personnelle adressée au président Hugo Banzer que le criminel fût livré aux autorités françaises. Après deux semaines, le président de la Bolivie a répondu que l'affaire de l'extradition de Klaus Barbie-Altmann relevait de la justice bolivienne et qu'en tant que chef de l'exécutif il ne pouvait ni ne voulait empiéter sur les compétences des tribunaux. Finalement, le gouvernement bolivien, après que la Cour Suprême eut connu de l'affaire, refusa d'extrader ce criminel à la France.

Le porte-parole du gouvernement bolivien a informé à ce propos que Klaus Barbie-Altmann était un Bolivien naturalisé et que son cas serait examiné par un tribunal pénal bolivien qui déciderait s'il pouvait être jugé en vertu de la législation de ce pays pour les crimes commis en France.

Après ce refus le gouvernement français a renouvelé sa demande. Le président Banzer a déclaré le 14 juillet 1973 que la Cour Suprême bolivienne avait reconnu la demande d'extradition de Barbie-Altmann comme incompatible avec « le droit concernant ceux qui vivent en Bolivie ». Cette déclaration semble reprendre l'argument d'après lequel Barbie-Altmann ne pouvait être extradé en tant que ressortissant bolivien.

La situation n'a changé qu'après le retour de l'émigration du président Herman Siles Zuazo. Klaus Barbie fut arrêté par les autorités boliviennes le 25 janvier 1983, et le 12 février, après un séjour de plus de trente ans en Bolivie, expulsé vers la France. Le gouvernement bolivien a pris cette décision en vertu d'une loi sur l'émigration qui permet d'expulser un ressortissant bolivien qui avait acquis la nationalité bolivienne sur la base de fausses pièces d'identité. Cet argument a permis aux autorités administratives et non judiciaires de décider rapidement l'extradition.

Les autorités françaises ont déclaré que Barbie serait accusé de crimes contre l'humanité, d'homicides, d'emploi de tortures, d'arrestation et de détention des gens et de confiscations illégales de biens.

Le cas de Barbie est un exemple de plus de ce que le fonctionnement de l'extradition des criminels de guerre est très insatisfaisant. En effet ce criminel n'a pas été extradé mais expulsé et cela grâce à la bonne volonté des autorités boliviennes actuelles. Si l'on avait appliqué une procédure « normale », son extradition eût été difficile et longue, voire impossible.

³³ Z. KNYPL, *op. cit.*, p. 60.

actes régissant la poursuite des criminels de guerre de la Seconde Guerre mondiale et la Convention sur le génocide. Bien que l'art. 534, § 1 de ce code (et aussi l'art. 118 du Code pénal) interdise d'extrader des ressortissants polonais, il résulte de l'art. 541, § 1 de ce même code que cette interdiction ne joue pas lorsqu'une convention internationale à laquelle la Pologne est partie en dispose autrement. C'est le principe de la priorité de la convention internationale sur le droit interne. De sorte que si une convention sur la poursuite des criminels de guerre statuait expressément (or aucune ne la fait) dans quelle mesure doit être appliqué le droit interne des Etats parties, la solution de ce problème sur la base des dispositions processuelles polonaises serait simple. Mais il n'en est pas ainsi. Nous avons affaire ici à deux normes en blanc qui prises ensemble n'expliquent rien du tout. Dans cette situation, dans le contexte du droit polonais également (et aussi celui d'autres pays qui n'extradent pas leurs nationaux) un conflit risque de surgir entre le principe de territorialité et le principe de nationalité. Il est vrai que dans notre doctrine et aussi dans le commentaire au Code de procédure pénale³⁴ on rencontre l'opinion que l'interdiction d'extrader les nationaux (art. 118 du Code pénal et art. 534, § 1 du Code de procédure pénale) ne concerne pas les criminels de guerre de la Seconde Guerre mondiale, mais cela ne semble pas tellement évident.

Les actes de droit international relatifs à la Seconde Guerre mondiale ne contiennent pas de disposition expresse qui imposerait l'extradition de nationaux, bien qu'il résulte de l'injonction catégorique aux Etats lésés qu'une telle obligation existe certainement. Il n'en reste pas moins que le droit international concernant cette période n'a pas expressément écarté — comme il l'a fait pour l'asile et la prescription — l'application de la règle de non-extradition de nationaux. Aussi peut-on douter que la solution du Code polonais de procédure pénale concernant les criminels de guerre de la dernière guerre mondiale et le crime de génocide soit suffisante.

La législation interne de la Grande-Bretagne et celles des pays sur lesquels elle a exercé une influence, donc des Etats-Unis, du Canada et d'Israël ne connaissent pas l'interdiction de l'extradition de nationaux. Certains pays d'Amérique Centrale et d'Amérique du Sud, p. ex. l'Argentine, le Costa Rica, le Guatemala, le Honduras, la Nicaragua, le Salvador et l'Uruguay extradent eux aussi leurs nationaux³⁵. Toutefois cette façon de résoudre le problème de l'extradition de nationaux est la conséquence d'une tradition législative et non des changements voulus liés à la poursuite des criminels de guerre.

³⁴ *Kodeks karny — Komentarz* [Code pénal — Commentaire], Warszawa 1976, p. 824.

³⁵ Z. KNYPL, *op. cit.*, p. 57.

Il devient donc évident que la règle de non-extradition de nationaux, reconnue par de nombreux pays, doit exercer une influence négative sur la pratique de l'extradition des criminels de guerre nazis et qu'elle a marqué les actes les plus récents de droit international qui ont renoncé au principe de territorialité au profit des principes de nationalité et d'universalité.

Il ne résulte pas du droit interne des Etats — et la pratique de l'extradition des criminels de guerre nazis le confirme (sauf une brève période après la fin des hostilités) — qu'excepté le refus du droit d'asile et l'imprescriptibilité, les autres principes ne sont pas applicables aux criminels de guerre et qu'il existe une procédure extraditionnelle spéciale.

Dans la doctrine également les avis sont partagés sur le point de savoir si les autres principes relatifs à l'extradition des criminels de droit commun sont applicables aux criminels de guerre. Dans la doctrine occidentale on a même avancé la proposition que les Etats restés neutres pendant la Seconde Guerre mondiale, qui ne sont pas parties aux actes juridiques régissant la poursuite des criminels de guerre, ne sont pas liés par ces actes et n'ont pas à respecter leurs dispositions. Aussi un obstacle pourrait-il par exemple être mis à l'extradition d'un criminel de guerre par la règle de non-extradition des délinquants politiques³⁶.

4. Conclusions

Les actes de droit international régissant la poursuite et le châtement des criminels de guerre (non seulement ceux de la dernière guerre mondiale) constituent un droit international universel.

L'obligation donc qui en découle de châtier les criminels de guerre est une obligation absolue pour tous les Etats faisant partie de la communauté internationale³⁷. Et puisque les dispositions relatives à l'extradition sont contenues dans ces actes, l'obligation d'extrader les criminels de guerre aux Etats lésés est, elle aussi, absolue. Cette conclusion catégorique découle certainement des actes de droit international régissant la poursuite et le châtement des criminels de guerre de la Seconde Guerre mondiale. Ces criminels devraient être châtiés par les tribunaux internationaux et par les tribunaux des Etats lésés. L'adoption du principe de territorialité impose aux Etats l'obligation

³⁶ R. G. NEUMAN, *Neutral States and the Extradition of War Criminals*, « American Journal of International Law », vol. 45, p. 497.

³⁷ Cf. A. KLAFFKOWSKI, *Ściganie zbrodniarzy wojennych w Niemieckiej Republice Federalnej w świetle prawa międzynarodowego* [La poursuite des criminels de guerre en République Fédérale d'Allemagne au regard du droit international], Poznań 1968, p. 255.

de prendre des mesures législatives appropriées tendant à adapter leur droit interne au droit international, entre autres en vue de permettre l'extradition des criminels de guerre. En revanche, le problème de l'étendue de l'obligation d'extrader les criminels se présente autrement à la lumière des actes les plus récents de droit international. Il résulte, il est vrai, de ces actes l'obligation absolue de châtier les criminels, mais les dispositions relatives à l'extradition ne sont pas aussi catégoriques. Chaque Etat en vertu du principe de répression mondiale a le devoir de châtier le criminel se trouvant sur son territoire. Cependant s'il ne le fait pas pour telle ou telle raison, c'est alors qu'il a le devoir d'extrader.

On n'est pas fondé à admettre que l'extradition des criminels de guerre est une espèce à forme achevée d'extradition qui diffère de l'extradition traditionnelle des criminels de droit commun. Le fait que d'Allemagne occupée on ait extradé des criminels sur la base des principes différents et suivant une autre procédure ne remet pas cette conclusion en question. Pour cette raison d'abord que ces principes et cette procédure n'étaient pas appliqués dans les rapports entre les autres Etats, et parce que, encore avant la fin de l'occupation de l'Allemagne, les autorités militaires anglaises et américaines avaient sensiblement dérogé à ces principes. Actuellement, les pays réquérants, et en particulier les pays requis d'extrader des criminels de guerre nazis invoquent les dispositions concernant l'extradition des criminels de droit commun. C'est indubitablement une conséquence d'une réglementation trop générale de l'extradition des criminels de guerre par les actes de droit international, aussi bien ceux concernant la Seconde Guerre mondiale que postérieurs. Ce droit n'a expressément formulé que deux règles relatives à l'extradition des criminels de guerre et qui marquent en même temps une dérogation aux règles d'extradition des criminels de droit commun, à savoir que les criminels de guerre ne sont pas considérés comme des délinquants politiques et, partant, ne peuvent bénéficier du droit d'asile ni de la prescription des poursuites et du châtiment. On peut, à dire vrai, partager l'opinion qu'il résulte des actes de droit international concernant les criminels de guerre de la Seconde Guerre mondiale, qu'à leur extradition ne peuvent être appliquées les autres interdictions connues du droit extraditionnel traditionnel, comme l'interdiction d'extrader les nationaux ou le principe des poursuites et de la double pénalisation. Cependant, il ne résulte pas de la pratique législative des Etats, traduisant le degré d'adaptation du droit interne au droit international en ce qui concerne la matière qui nous intéresse, et de la pratique de l'extradition non plus que ces règles soient universellement reconnues et appliquées. Seule la question de l'imprescriptibilité des crimes de guerre a été expressément réglée par le droit interne mais de certains pays seulement. En revanche, on ne trouve pas en droit interne des dispositions détaillées en vertu desquelles les crimes de guerre ne sont pas

des délits politiques, ce qui, en présence d'un grand nombre d'états factuels de ces crimes et à défaut d'une interprétation homogène par les Etats de la notion de délit politique, a provoqué et peut provoquer à l'avenir des abus. Le droit international en envoyant en matière d'extradition et de châtement des criminels de guerre au droit interne des Etats et aux traités qui les lient, n'indique pas dans quelle mesure il doit être appliqué³⁸. De là de nombreux doutes et une pratique extraditionnelle parfois surprenante. Du fait précisément que l'extradition des criminels de guerre de la Seconde Guerre mondiale continue à être fondée sur les dispositions et les règles qui en résultent concernant les délinquants de droit commun (avec les exceptions précitées), du fait aussi que les actes de droit international les plus récents ne marquent toujours pas de progrès en cette matière, on ne peut, quand on pense à l'avenir, laisser de côté les dispositions traditionnelles concernant l'extradition des criminels de droit commun. Il faut dans cette situation chercher à ce que tous les Etats adaptent le plus rapidement possible leur droit interne au droit international. L'adoption expresse et universelle en droit interne de la règle que les criminels de guerre ne sont pas des délinquants politiques et qu'ils ne peuvent pas bénéficier du droit d'asile ainsi que la règle de l'imprescriptibilité de la poursuite et du châtement de tous les crimes de guerre marquerait un progrès notable et réalisable. En revanche, il est peu probable que dans un avenir prévisible les Etats reconnaissent comme absolument obligatoire le principe territorial de poursuite des criminels de guerre, bien que son adoption et application générale (conjointement avec le principe d'universalisme) soient — comme on le sait — le meilleur et le plus juste moyen de poursuite et de châtement des criminels de guerre, tant que ne sera pas institué un tribunal permanent international appelé à les juger. Cependant, l'adaptation du droit interne au droit international est nécessaire car les tribunaux nationaux seront toujours enclins à appliquer la norme nationale s'ils ne réussissent pas à éliminer, par interprétation, les contradictions entre le droit national et le droit international³⁹. Sans un système d'extradition bien précis la poursuite des criminels de guerre sera toujours peu efficace. Il faut à cet égard tirer tous les enseignements de l'expérience relative à l'extradition des criminels nazis.

³⁸ J. M. van BEMMELEN, *Reflections and Observations on International Criminal*, dans : *International Criminal Law...*, p. 93.

³⁹ Cf. K. SKUBISZEWSKI, *op. cit.*, p. 13.

Les effets de l'application de la clause d'ordre public dans la doctrine et la législation contemporaines de droit international privé

par MIECZYSLAW SOŚNIAK

Le problème d'effets nés après l'exclusion de la disposition de droit étranger en conséquence de la référence à l'ordre public en droit international privé est souvent passé sous silence dans l'analyse du rôle de l'ordre public en matière de conflit des lois. Elle se concentre d'habitude sur les questions générales de la notion et des espèces de la clause d'ordre public, de la détermination des fondements de son application, son étendue etc. et s'il s'agit des questions spéciales, la clause est examinée avant tout du point de vue des domaines particuliers du droit civil¹. Cependant, le problème d'effets peut susciter des doutes sous ses différents aspects. Ce sont seulement quelques d'entre eux que nous pourrions traiter dans le cadre de la présente étude.

Les effets qui suscitent le plus grand intérêt concernent l'influence de l'exclusion de la loi normalement compétente sur la situation des parties, l'influence qu'elles apprécient tantôt positivement et tantôt négativement. A côté des résultats défavorables, cette exclusion peut aussi avoir des conséquences souhaitées par les parties, bien contrairement à la teneur des dispositions écartées par l'ordre public. L'influence avantageuse sur la situation des parties fait l'objet d'exemples le plus souvent cités de l'effet de la référence à l'ordre public en droit international privé : les empêchements et les restrictions prévus dans le droit étranger compétent sont éliminés (par exemple les empêchements au mariage, etc.). Bien que l'effet prohibitif constitue la plus fréquente manière d'action de la clause², ce sont ses effets positifs qui servent le mieux à justifier le besoin d'intervention de

¹ Comme, par exemple, H. A. STÖCKER, *Der internationale ordre public in Familien und Familienerbrecht*, «*Rabels Zeitschrift*», 1974, n° 1, p. 79 et suiv.

² Apparaissent différentes restrictions défavorables pour les parties et imprévues par le droit compétent. Cf. l'exemple classique dans la convention de la Haye du 2 juin 1902.

l'ordre public par l'idée de faveur aux parties. On tâche à démontrer que l'intérêt de l'Etat à écarter la compétence normale du droit étranger correspond souvent avec les intérêts individuels. Cela est évidemment lié aux aspects généraux du rôle de la clause d'ordre public en droit international privé.

Dans la doctrine des premières décennies de notre siècle, entre autres, dans la doctrine italienne³, allemande⁴, et polonaise⁵, les effets de cette sorte ont été appelés comme effets dans le sens permissif et prohibitif. Cette terminologie, qui ne suscite pas de doutes, est bien établie dans la doctrine du domaine considéré. Dans le cadre de notre étude, ce type d'effets ne sera pas examiné de plus près, de même que d'autres problèmes en matière d'effets d'application de la clause⁶. En revanche, nous allons concentrer notre attention sur le mode de détermination de la norme qui doit régler un cas au moment où la disposition reconnue primitivement applicable est écartée en conséquence de l'intervention de l'ordre public.

1. « Lacune » née après l'exclusion de la disposition étrangère

Quelle situation surgit après cette exclusion? Dans la doctrine, principalement en France⁷, on a introduit la distinction entre les effets « positifs » et « négatifs » de la clause. Les effets « négatifs » consistent seulement à éliminer la disposition étrangère. Ils font la règle. Par exemple, le droit étranger compétent ne permet pas l'adoption de l'enfant par la personne donnée. La disposition de cette teneur est écartée avec la référence à l'ordre public et l'adoption est admise. Mais — selon les partisans de la distinction mentionnée — sauf l'exclusion de la prohibition contenue dans la disposition étrangère, la loi du for n'intervient plus, laissant l'appréciation d'autres

³ A. RAPISARDI-MIRABELLI, *L'ordine pubblico nel diritto internazionale, saggio critico*, Catania 1908, p. 52 (« Manifesti in senso proibitivo et permissivo »).

⁴ F. KAHN, *Abhandlungen zum internationalen Privatrecht*, II B, München und Leipzig 1928, p. 83.

⁵ K. PRZYBYŁOWSKI, *Prawo prywatne międzynarodowe, część ogólna [Droit international privé, partie générale]*, Lwów 1935, p. 172.

⁶ Entre autres, le problème de ce qu'on appelle la « totalité » ou la « partialité » des effets ou le problème de la portée extraterritoriale de ces effets (« l'effet réflexe d'ordre public »).

⁷ Dans la théorie ancienne cf., par exemple, DESPAGNET, *Précis de droit international privé*, Paris 1906, 5^e éd., t. III, chapitre 3.

conditions de l'adoption au droit étranger⁸. Il n'y a donc que l'effet purement « négatif ».

Cependant, le plus souvent il y a ce qu'on appelle « double effet » de la clause : elle écarte le droit étranger en lui substituant un autre. Par exemple, l'ordre public d'un Etat ne reconnaît pas les empêchements religieux au mariage prévus dans la loi étrangère. L'ordre public non seulement élimine l'action de ces empêchements (l'effet négatif), mais aussi permet la conclusion du mariage selon les dispositions de droit interne (l'effet positif)⁹.

Cette manière de distinguer les effets de la clause a rencontré assez tôt la critique des représentants le plus éminents de la doctrine de droit international privé¹⁰. Ils ont soulevé entre autres que les prétendus effets négatifs entraînent aussi la substitution de la loi du for. Le problème de remplacement de la disposition écartée se présente toujours, bien qu'il soit difficile de parler toujours de la « lacune » (du moins au sens stricte du mot) née après l'exclusion de la disposition étrangère¹¹. Si, par exemple, (se référant aux exemples traditionnels) dans un pays on n'a pas reconnu l'institution de la mort civile et on a éliminé par conséquent la disposition étrangère (par exemple, en matière de succession), aucune lacune essentielle n'a pas surgi dans les bases légales de la décision (par exemple, sur la question successorale). Néanmoins, la décision mentionnée doit s'appuyer sur certaines règles, naturellement avec l'exclusion de l'institution de la mort

⁸ Ainsi dans la littérature française de l'entre-deux-guerres, par exemple, R. BIREAUD, *Contribution à l'étude de l'ordre public en droit international privé* (Thèse), Aix-en-Provence 1932, p. 127 et suiv.

⁹ Sur le « double effet » v., par exemple, P. LOUIS-LUCAS, *Remarques sur l'ordre public*, « Revue de Droit International Privé », 1933, p. 434; J. M. TRIAS DE BAS, *Règles générales de conflit de lois*, in: *Recueil des Cours*, t. 62, p. 75 et autres représentants de la doctrine d'entre-guerres. Dans la littérature sud-américaine, d'un « efecto double » parle W. GOLDSCHMIDT, *Summa del derecho internacional privado*, 2-a ed., Buenos Aires 1961, p. 104 et suiv.

¹⁰ Cf., par exemple, les remarques critiques de R. AGO, *Teoria del diritto internazionale privato*, Padova 1934, p. 329; J. P. NIBOYET qui dans son *Manuel de droit international privé*, Paris 1928, employait la notion d'« effet négatif de l'ordre public », l'a abandonnée dans le III^e volume de son *Traité de droit international privé*, Paris 1944, p. 565, pour la raison qu'elle — comme il l'explique — a été la source des malentendus. H. BATIFFOL, P. LAGARDE, *Droit international privé*, 7^e éd., t. I, Paris 1981, n° 364 considèrent que « La distinction semble plus apparente que réelle » E. VITTA, *Diritto internazionale privato*, I, *Parte generale*, Torino 1972, p. 408, ne se rallie pas à la critique totale de l'expression discutée, mais lui refuse la valeur pratique. Dans la littérature polonaise K. Przybyłowski se prononçait quelques fois contre la distinction discutée.

¹¹ Il est cependant difficile de nier que l'expression de cette sorte est universellement employée, aussi par les plus éminents représentants de la doctrine contemporaine. Cf., par exemple, W. WENGLER, *Internationales Privatrecht*, I Teil, Berlin 1981, § 7, 5 (p. 80 et suiv.).

civile inconnue dans ce pays. De même, dans le cas où la législation étrangère prévoit les empêchements raciaux, les restrictions de la capacité des femmes, la discrimination des enfants nés hors mariage etc., et nous refusons de les appliquer sur le territoire *legis fori*, il est difficile de parler de la lacune dans le système juridique *legis fori*.

Cependant, aussi dans ce cas nous devons proposer certaines bases nouvelles de la décision. Le fait de traiter seulement la disposition étrangère *per non est* ne règle pas l'affaire¹².

Comme l'effet « négatif » de l'application de la clause est nécessairement accompagné, de façon plus ou moins claire, de l'effet consistant à substituer une nouvelle base de décision à la disposition écartée (donc de l'effet appelé « positif »), il faut abandonner la distinction présentée d'autant plus que dans la littérature contemporaine on parle aussi de l'ordre public « positif » et « négatif » dans une acception différente et de l'autre point de vue¹³. Il convient en revanche de se concentrer sur la question de savoir où on doit chercher la base de la décision dans la situation née après l'exclusion de la disposition étrangère.

2. Conception de l'application des dispositions de la loi du for

A l'origine, la réponse à cette question ne suscitait pas de doutes : le tribunal cherche cette base dans son propre droit. C'est pourquoi dans la doctrine romaniste, l'effet « positif » de l'application de l'ordre public comprenait longtemps l'introduction exclusive d'une disposition de la loi du for à la place de la disposition étrangère écartée. Cela était d'ailleurs en accord avec la conception primitive de la nouvelle école italienne selon laquelle l'ordre public se réduisait à la teneur des dispositions internes de l'importance politique et sociale particulière excluant *a limine* l'application du droit étranger sans égard à son contenu. En outre, c'était la solution la plus simple et la plus facile pour le juge, suscitant peu de doutes et exactement prévisible. Pour cette raison la substitution de la *lex fori* à la disposition écartée paraissait primitivement comme allant de soi.

¹² En outre, comme l'a fait remarquer en Pologne K. PRZYBYŁOWSKI (« Nowe Prawo », 1951, n° 11, p. 20), la substitution à la disposition écartée sur la base de l'ordre public aura lieu non seulement dans le cas où la *lex fori* contient une norme expresse (qui, par exemple, déclare l'absence des restrictions prévues dans le droit étranger), mais aussi dans l'hypothèse où le principe de cette sorte résulte de l'interprétation.

¹³ Cf. à ce sujet, par exemple, G. REICHEL, *Europäisches ordre public im autonomen Kollisionsrecht*, « Zeitschrift für Rechtsvergleichung », 1975, n° 3, p. 217 et suiv.

On rencontre la conception de cette sorte dans l'opinion de la doctrine depuis plus d'un siècle. Il suffit de rappeler Savigny¹⁴, la doctrine italienne¹⁵, la doctrine et la pratique française¹⁶, belge¹⁷ et certaines énonciations de la doctrine suisse¹⁸. Egalement dans la doctrine de l'Amérique latine¹⁹ et dans la pratique et la théorie aux Etats-Unis, l'application de la loi du for en cas d'exclusion de la disposition étrangère constitue non seulement l'effet uniquement admis de cette exclusion, mais aussi la base même de la référence à la *public policy*²⁰.

Ce point de vue fut aussi accepté dans certains travaux de la littérature polonaise d'entre-guerres²¹. Après la seconde guerre, il fut aussi partagé, entre autres, par la doctrine hongroise de droit international privé²², certains auteurs autrichiens²³ ainsi que par quelques représentants de la doctrine ouest-allemande, s'opposant résolument à la conception "allemande" (discutée

¹⁴ F. C. VON SAVIGNY, *System des heutigen römischen Rechts*, VIII B, Berlin 1849, § 349, p. 32.

¹⁵ Entre autres, BADIALLI, *Ordine pubblico e diritto straniero*, Milano 1969, p. 285 et suiv. ; MORELLI, *Elementi di diritto internazionale privato*, 6-a ed., Milano 1959, p. 81; MONACO, *L'efficacia della legge nello spazio*, 2-a ed., Torino 1964; E. VITTA, *op. cit.*, p. 408 et suiv.

¹⁶ De la littérature d'entre-guerres v., entre autres, J. MAURY, *Règles générales des conflits de lois* in : *Recueil des Cours*, t. 57, p. 563, et *L'ordre public en droit international privé français et en droit international privé allemand*, « Revue Critique de Droit International Privé », 1954, p. 24. Dans la littérature plus récente, cf. P. LAGARDE, *Recherches sur l'ordre public en droit international privé*, Paris 1958, p. 201 et suiv. ; P. LEREBOURS-PIGEONNIÈRE, *Droit international privé*, 8^e éd., n° 381; H. BATIFFOL, P. LAGARDE, *op. cit.*, n° 364.

¹⁷ Par exemple, P. GRAULICH, *Principes de droit international privé*, Paris 1981, n° 222.

¹⁸ Par exemple, Ch. KNAPP, *Essai sur la sauvegarde de l'ordre public et la protection de faibles en droit international privé*, in : *Mélanges F. Guisan*, Genève 1950, p. 191 et suiv.

¹⁹ Cf., par exemple, H. VALLADAO, *Direito internacional privado*, 4-a ed., Rio de Janeiro 1969, p. 515 et suiv.

²⁰ Par exemple, A. A. EHRENZWEIG, *Private International Law*, New York 1972, pp. 37, 78 et *passim*. L'application de la *lex fori* assure le mieux « governmental interest » (selon la terminologie de B. Currie). Semblable est la position de la jurisprudence américaine, sur laquelle v., par exemple, Ch. JOERGES, *Zum Funktionswandel des Kollisionsrechts*, Berlin 1971, p. 108 et *passim*.

²¹ Parmi la littérature polonaise en français cf., par exemple, J. SUŁKOWSKI, *Conception du droit international privé d'après la doctrine et la pratique en Pologne*, in : *Recueil des Cours*, t. 41, p. 621 ou M. ROSTWOROWSKI, *La codification du droit international et interprovincial en Pologne*, « Revue de Droit International et de Législation Comparée », 1930, p. 60.

²² L. RECZEI, *Internationales Privatrecht*, Budapest 1960, p. 119.

²³ H. KÖHLER, *Internationales Privatrecht*, Wien 1966, p. 23.

ci-après) de la recherche des normes de remplacement dans le système étranger²⁴.

L'influence de la conception considérée s'est également fait remarquer sur le terrain législatif, entre autres, dans les anciens travaux de codification en France²⁵. Parmi les codifications contemporaines de droit international privé, pour la substitution de la *lex fori* au droit étranger écarté s'est prononcé nettement, entre autres, le droit de la République Démocratique Allemande de 1975 (Rechtsanwendungsgesetz 1975) dans la deuxième phrase du paragraphe 4 et le droit international privé de la Turquie dans son article 5.

Du point de vue théorique, la conception discutée est justifiée, entre autres, par le fait que la *lex fori* joue d'ailleurs le rôle subsidiaire par rapport au droit étranger qui ne peut être appliqué dans le cas donné²⁶. Cela n'a rien d'étonnant que ce type de substitution va de soi.

Le rôle encore plus important a joué le fait que la conception discutée trouva sa reconnaissance dans la pratique judiciaire de presque tous les pays du monde. L'importance indubitable avait ici ce que nous avons déjà souligné, à savoir la simplicité et la facilité de l'application de cette conception par le juge.

Il est néanmoins difficile de passer sous silence son appréciation parfois sévère du point de vue théorique. On lui a reproché, entre autres, l'opportunisme, la contradiction avec les principes fondamentaux de droit international privé et même le détournement de l'objectif de l'application de la norme de conflit. Le but du droit international privé consiste à déterminer la compétence du droit le plus étroitement lié à la situation donnée. Ce n'est pas toujours la *lex fori*. La fonction de la clause d'ordre public consiste à écarter la disposition, dont les effets d'application sont incompatibles avec l'ordre public *legis fori*. Elle ne consiste donc pas à écarter la compétence du système étranger tout entier en vue de lui substituer le système interne²⁷.

²⁴ « So wenig wie möglich in das ausländische Recht einzugreifen » — écrit, par exemple, G. KEGEL, *Internationales Privatrecht*, 4 Aufl., München 1977, p. 243.

²⁵ L'art. 55 du projet français de loi sur le droit international privé prévoit que les dispositions étrangères contraires à l'ordre public « seront écartées et remplacées par les solutions correspondantes du droit français », *La codification du droit international privé, Discussion de l'avant projet de la Commission de Réforme du Code civil, mai 1955*, Paris 1956, p. 291.

²⁶ Ainsi, par exemple, E. VITTA, *op. cit.*, p. 410.

²⁷ Dans la littérature polonaise, j'ai réuni ces arguments dans mon article intitulé *Skutki zastosowania klauzuli porządku publicznego w prawie prywatnym międzynarodowym* [Les effets d'application de la clause d'ordre public en droit international privé], « *Studia Cywilistyczne* », t. I, 1961, p. 205 et suiv. S'y réfère partiellement, T. ERECINSKI, *Stosowanie prawa obcego przez sądy polskie* [L'application du droit étranger par les tribunaux polonais], « *Nowe Prawo* », 1980, n° 6, p. 49.

Dans la littérature contemporaine on a fait remarquer, en outre, que l'application de la loi du for dépasse dans beaucoup de cas le but de la clause d'ordre public. Si, par exemple, le droit étranger s'oppose à la légitimation de l'enfant adultérin né hors mariage *per subsequens matrimonium*, il n'y a pas d'obstacle qu'on applique, après avoir écarté cette prohibition, d'autres conditions de la légitimation, conformément au droit étranger contenant la disposition écartée²⁸.

3. Conception dite « allemande »

La seconde conception adverse²⁹ n'a pas présupposé la nécessité de combler la « lacune » par les dispositions de la *lex fori*, bien qu'elle ait aussi admis cette possibilité, parfois en tant qu'*ultimum refugium*. La différence de l'accent, dont a encore parlé Zitelmann³⁰, se déplace maintenant des dispositions de la loi du for qui écartent la norme étrangère à l'examen du droit étranger sous l'angle de la possibilité de son application sur notre territoire. L'ordre public national est suffisamment protégé par l'exclusion de la disposition étrangère. Il ne faut pas écarter le système étranger dans sa totalité.

La recherche en ce sens fut amorcée par un arrêt allemand de 1922³¹. Il s'agissait d'une action intentée en Allemagne à laquelle le droit suisse était applicable. Conformément à ce droit, la prétention n'était pas soumise à la prescription extinctive. Les tribunaux inférieurs en Allemagne ont admis que les dispositions suisses en la matière doivent être écartées sur la base de la clause d'ordre public et ils ont prononcé la prescription s'appuyant sur les paragraphes 196 et 197 du BGB. Le Reichsgericht a accepté la référence à la clause dans ce cas, mais il a rejeté l'application subsidiaire des dispositions allemandes, ordonnant la recherche des dispositions matérielles suisses sur la prescription conformes à l'ordre public allemand. C'est seulement dans le cas où il était impossible de les trouver qu'il faudrait admettre l'application de la loi allemande.

Ce point de vue a trouvé avant tout le soutien de la part des auteurs allemands. Ils ont soulevé que la clause d'ordre public n'écarte pas le droit étranger *in globo*. Elle ne s'oppose pas au principe de la compétence de ce

²⁸ Ainsi, par exemple, W. WENGLER, *op. cit.*, p. 81.

²⁹ Appelée généralement en doctrine comme « allemande », cf. l'opposition de deux positions : « Sistema latino — sistema tedesco » chez E. VITTA, *op. cit.*, p. 409 et suiv.

³⁰ E. ZITELMANN, *Internationales Privatrecht*, t. I, Leipzig 1897, p. 326.

³¹ L'arrêt du Reichsgericht du 19 décembre 1922 largement discuté dans la littérature. Cf., par exemple, G. MELCHIOR, *Die Grundlagen des deutschen internationalen Privatrechts*, Berlin 1971, p. 365 et suiv.

droit, mais seulement à l'application de la disposition étrangère dont les effets seraient en conflit avec notre ordre public sur notre territoire³². L'application du droit étranger ne fait pas exception au principe de l'application du droit interne — toujours et partout. C'est exclusivement une approche de cette sorte qui pourrait justifier la référence constante à ce droit³³. La relation entre le droit étranger et la *lex fori* se présente cependant de la façon différente. C'est pourquoi, après l'exclusion de la disposition étrangère, qui choque notre ordre public, il faut chercher la solution dans le système étranger dont la compétence résulte de nos propres normes de conflit³⁴.

On s'est référé à ce propos à la fonction générale de l'ordre public en droit international privé³⁵. Dans la conception « des dispositions internes exclusives » ou « des dispositions de caractère d'ordre public » l'application de la loi du for constitue non seulement la conséquence naturelle de l'exclusion de la disposition étrangère, mais aussi le but de la référence à la clause. En revanche, dans la conception « défensive » où la clause est considérée comme moyen de protection du système du for, on avance sa fonction d'exclusion de la disposition étrangère, mais non — comme nous l'avons dit — du système étranger. La question de savoir si la *lex fori* entre à sa place est, dans cette approche, secondaire.

Evidemment, on a plusieurs fois soulevé le reproche (auquel nous allons encore revenir) qu'on applique le droit qui n'existe nulle part. Les partisans de la conception discutée furent conscients de cette conséquence. Malgré cela, ils ont considéré la compétence de la loi du for comme solution extrême admise seulement dans le cas où il est impossible de trouver dans le système étranger une norme applicable au cas donné³⁶. Ils admettaient aussi, après l'exclusion de la disposition étrangère, la possibilité d'adaptation (en allemand : *Anpassung*) par le juge de la « loi normalement compétente » aux principes « d'ordre public » de l'Etat du for. C'est seulement dans le cas où une telle adaptation (*Anpassung*) s'avère irréalisable qu'il est possible d'appliquer la *lex fori* en tant que « droit de remplacement » (*als Ersatzrecht*)³⁷.

³² L. RAAPE, *Internationales Privatrecht*, Berlin 1955, p. 95 et suiv.

³³ H. DÖLLE, *Der ordre public im IPR*, in: *Deutsche Landesreferate zum III Internationalen Kongress für Rechtsvergleichung in London*, Tübingen 1950, p. 408.

³⁴ P. G. VALLINDAS, *Der Vorbehalt des ordre public im IPR*, « *Rabels Zeitschrift* », 1953, p. 10; F. FIRSCHING, *Einführung in das IPR*, München 1974, p. 61, « Zunächst ist zu versuchen, die Lücke aus dem Zusammenhang der ausländischen Sachnormen zu schliessen ».

³⁵ K. H. NEUMAYER, *Zur positiven Funktion der Kollisionsrechtlichen Vorbehaltsklausel*, in: *Festschrift H. Dölle*, II B, Tübingen 1963, p. 190.

³⁶ Ainsi, H. DÖLLE, *Internationales Privatrecht*, 2 Aufl., Karlsruhe 1972, p. 113.

³⁷ Ainsi, K. H. NEUMAYER, *op. cit.*, pp. 207—208.

La conception discutée fut admise en son temps dans la doctrine allemande³⁸, au moins comme un point de départ³⁹. On peut aussi trouver ses partisans parmi les auteurs italiens⁴⁰, suisses⁴¹, autrichiens⁴² et espagnols⁴³.

Toutefois, c'est dans les années 1960 que cette conception a trouvé son expression législative, notamment dans l'art. 22 al. 2 du code civil portugais de 1966 qui prévoit expressément (et bien à la première place) le besoin d'appliquer « les normes les plus appropriées du droit étranger compétent » à la place de la disposition écartée⁴⁴. L'application de la *lex fori* n'est admise qu'en dernier ressort⁴⁵.

L'autre exemple d'influence de la conception discutée, bien que moins expressif, est le paragraphe 6 (seconde phrase) du droit international privé autrichien de 1978. Il prévoit, à vrai dire, l'application du droit autrichien à la place de la disposition écartée, mais *erforderlichenfalls*, c'est-à-dire en cas de besoin. La doctrine autrichienne contemporaine explique : « On applique la règle la plus voisine de la loi indiquée, règle qui en revanche ne heurte pas l'ordre public »⁴⁶.

La conception « allemande », elle aussi, a été sévèrement critiquée de différents côtés et dans les différents pays. Par exemple, dans la littérature française on l'appelle « solution bâtarde » en soulevant que : « Introduire dans le droit étranger une règle qui n'y est pas admise contrevient au principe que la loi étrangère doit être appliquée telle qu'elle existe »⁴⁷.

³⁸ Elle a été aussi adaptée par Nussbaum, Lewald, Frankenstein et autres.

³⁹ Par exemple A. N. MAKAROV, *Grundriss des internationalen Privatrechts*, Frankfurt a/M 1970, p. 100.

⁴⁰ Par exemple, B. PALLIERI, *Diritto internazionale privato*, 2 ed., Torino 1950, p. 121.

⁴¹ A. F. SCHNITZER, *Handbuch des internationalen Privatrechts*, I B., IV Aufl., Zürich 1957, p. 237. Parmi les travaux plus anciens cf., entre autres, H. MARTI, *Der Vorbehalt des eigenen Rechts im IPR der Schweiz (Diss.)*, Bern 1940, p. 64 et suiv.

⁴² L. SCHEUCHER, *Der ordre public im österreichischen Recht*, « Zeitschrift für Rechtsvergleichung », 1960, I, pp. 15—39.

⁴³ Cf., par exemple, J. A. CARILLO SALCEDO, *Derecho internacional privado*, 2-a ed., Madrid 1976, p. 329 et *passim* ainsi que la jurisprudence et littérature espagnoles y citées.

⁴⁴ Cette disposition est ainsi formulée : « São aplicaveis, neste caso, as normas mais apropriadas legislação estrangeira competente ou, subsidiariamente, as regras do direito interno portuges ».

⁴⁵ Discutant cette solution la doctrine portugaise se réfère expressément à l'influence allemande. Cf., par exemple, I. G. VELASCO, *Concepción del derecho internacional privado en el nuevo código civil portugués*, Salamanca 1971, p. 107. Cf. aussi l'introduction à la traduction française de cette partie du code civil portugais par A. FERRER-CORREIRA et J. BAPTISTO-MACHADO publiée dans la « Revue Critique de Droit International Privé », 1968, p. 158.

⁴⁶ Ainsi F. SCHWIND, *La codification du droit international privé en Autriche*, « Revue de Droit International et Droit Comparé », 1977, n° 4, p. 362.

⁴⁷ Ainsi H. BATIFFOL, P. LAGARDE, *op. cit.*, n° 364.

L'application du droit étranger « remanié », c'est « une véritable dénaturation » de ce droit. En conséquence, « le remède semble pire que le mal »⁴⁸.

Il est caractéristique que les voix critiques se sont aussi laissées entendre en Allemagne occidentale. Aux reproches français s'est également associée l'édition posthume du manuel classique de Leo Rappe⁴⁹. Les dispositions, créées ad hoc, du droit étranger « adapté » y sont appelées comme *Fantasierecht*. Elles ne correspondent ni au droit étranger, ni à la loi du for, et forment un *Kunstrecht* qui n'existe nulle part. Les recherches dans le système étranger sont généralement vouées à l'échec et conduisent même aux résultats grotesques. La référence à la *lex fori* sert beaucoup mieux le respect du principe d'égalité des systèmes et la sécurité juridique.

En somme, les critiques de la conception discutée⁵⁰ ont été faites dans plusieurs directions. Avant tout, on lui a reproché qu'elle ne constitue qu'une modification de l'application de la *lex fori*. La « sélection » des dispositions étrangères n'est effectuée qu'exclusivement sur la base des principes de la loi du for. Ensuite, la conception discutée est dirigée contre le fonctionnement normal des normes de conflit qui consistent à désigner le droit compétent. Si, en considération de l'ordre public interne, nous ne pouvons pas suivre cette désignation, la seule solution possible est de revenir aux principes de la *lex fori*. La « sélection » des dispositions étrangères n'est nullement justifiée. Elle conduit d'ailleurs (comme je viens de le dire) à l'application du droit qui n'est nulle part en vigueur. On applique ce droit hors le domaine déterminé par ses propres normes de conflit de la manière arbitraire et détachée des règles généralement admises de désignation du droit compétent. S'il s'agit en revanche de l'institution d'« adaptation » (*Anpassung*), évoquée dans ce contexte, la solution discutée se place au-dessus d'elle, conduisant soit à la composition artificielle des dispositions étrangères seulement, soit à un mélange bizarre des normes étrangères et nationales. Ainsi au fond, la conception discutée ne comble pas la « lacune » par la norme compétente étrangère, mais par une norme spéciale, créée de façon artificielle par le juge (selon les critères de la *lex fori*), ce qui conduit — comme on le souligne dans la doctrine italienne — à « manipolamento del diritto straniero »⁵¹.

⁴⁸ Ainsi Y. LOUSSOURAN, P. BOUREL, *Droit international privé*, Paris 1978, n° 256.

⁴⁹ L. RAPPE, F. STURM, *Internationales Privatrecht*, I B, 6 Aufl., München 1977, pp. 201, 219—220.

⁵⁰ Par exemple, H. BATIFFOL, P. LAGARDE, *op. cit.* Cf. aussi la critique d'E. VITTA, *op. cit.*, p. 412.

⁵¹ E. VITTA, *ibid.*

4. Position contemporaine des législations et de la doctrine

Je viens de citer les dispositions législatives qui se prononcent soit en faveur de la conception de la *lex fori*, soit pour la conception dite « allemande ». La majorité font cependant dans les dernières décennies les dispositions de droit international privé qui ne prennent aucune position à ce sujet, en se limitant seulement à la formulation générale de la clause d'ordre public. Il en est ainsi dans le droit international privé espagnol⁵², yougoslave⁵³, tchécoslovaque de 1963 (art. 36), polonais de 1965⁵⁴ et dans les Principes de la Législation Civile de l'URSS de 1961 (art. 128).

Par rapport à toutes ces solutions législatives, il est permis d'avancer la supposition que le problème d'effets de la clause a été passé sous silence à dessein. La question est depuis trop longtemps discutée en théorie et résolue de manière différente dans la pratique pour qu'elle puisse échapper à l'attention des législateurs. Si, malgré tout, ils ne l'ont pas réglée, il faut admettre qu'ils ont agi exprès pour ne pas préjuger la question. Cela est nettement souligné dans les motifs de la loi polonaise de 1965.

La solution intermédiaire a trouvé son expression dans les débats *de lege ferenda* en Allemagne Fédérale⁵⁵. Le problème d'effets a été complètement

⁵² L'art. 12 al. 3, Titulo preliminar de 1974 au code civil espagnol ; cf. aussi B. V. HOFFMANN, A. ORTIZ-ARCE, *Das neue spanische IPR*, «*Rabels Zeitschrift*», 1975, n° 4, p. 655.

⁵³ L'art. 4 du droit international privé yougoslave de 1982.

⁵⁴ Comme il résulte de l'exposé des motifs à l'art. 6 de cette loi, « on a reconnu superflu de régler expressément les effets d'application de la clause » aussi en ce qui concerne les exceptions possibles au principe de se référer au droit national à la place du droit étranger écarté et « la seule distinction de l'effet négatif des effets en même temps négatifs et positifs de la clause, la distinction qui n'est d'ailleurs pas justifiée ». La même opinion a été exprimée par le rapporteur du projet de droit international privé polonais K. PRZYBYŁOWSKI, *Kodyfikacyjne zagadnienia polskiego prawa prywatnego międzynarodowego* [Problèmes de codification du droit international privé polonais]. «*Studia Cywilistyczne* », t. V, 1964, p. 17. La conception de cette sorte avait d'ailleurs une bonne tradition dans les travaux de codification du droit international privé de l'entre-deux-guerres et a été pleinement acceptée par la doctrine polonaise à l'époque de la codification d'après-guerre, comme je l'ai soulevé dans mon article déjà cité sur *Les effets d'application de la clause*, de 1961, p. 210.

⁵⁵ On y a dit, entre autres : « Soweit eine ausländische Norm wegen Verstosses gegen den inländischen ordre public nicht angewendet werde, könne die Lösung entweder durch Lückenfüllung aus dem ausländischen Recht oder durch eine Ersatzanknüpfung, notfalls durch die Anwendung der *lex fori* gefunden werden ». Ainsi dans : *Reform des deutschen IPR*, *Colloquium im. M. Planck Institut*, Tübingen 1980, p. 78.

passé sous silence dans le projet officiel du droit international privé de cet Etat⁵⁶.

La position intermédiaire discutée est aussi adoptée par un nombre de représentants de la doctrine occidentale et des pays socialistes. S'il s'agit de ces premiers, une des conceptions de compromis, malheureusement assez compliquée et pas facile dans tous les points à réaliser, a été présentée par W. Wengler qui propose dans certains cas l'application du droit étranger et dans d'autres — l'application atténuée de la *lex fori*⁵⁷. Dans ces différentes hypothèses, le rôle fondamental revient au lien entre la situation donnée et le droit interne de l'Etat du for⁵⁸.

Caractéristiques sont également les tentatives de la solution intermédiaire présentées par P. H. Neuhaus. Il a enrichi les deux solutions déjà discutées de deux autres encore : la référence aux principes communs généraux (s'ils existent) et l'application de la loi d'un autre Etat (par rapport à ceux qui entrent en jeu)⁵⁹. Parmi d'autres théoriciens, M. Ferid, par exemple, admet éventuellement la référence à une autre disposition étrangère sous certaines conditions seulement. On peut aussi traiter comme solutions intermédiaires les opinions de certains théoriciens contemporains français qui enrichissent la conception traditionnelle de la *lex fori* de nouveaux éléments⁶⁰. Cependant, selon eux la *lex fori* constitue en principe l'élément décisif de substitution. Elle décide dans quelle mesure, par égard aux traits particuliers de la situation donnée, il est possible d'admettre l'application d'autres dispositions du système de droit étranger normalement compétent.

S'il s'agit des pays socialistes, en Union Soviétique, par exemple, tous les théoriciens ne se prononcent pas au sujet des effets⁶¹, mais ceux qui le touchent, indiquent le besoin de chercher dans le système étranger les dispositions conformes à l'ordre public interne avant d'appliquer éventuellement la loi du for⁶².

⁵⁶ Cf. *Entwurf eines Gesetzes zur Neuregelung der IPR* (BR Drucksache 222/83), l'art 6 (cité d'après IPRAX 1983, n° 5, p. 255).

⁵⁷ *Abgemilderte Anwendung* — W. WENGLER, *op. cit.*, p. 81.

⁵⁸ La notion de *Binnenbeziehung*, est comme on le sait, toujours employée dans la justification de l'application de la *Vorbehaltsklausel* par la doctrine et la jurisprudence de l'Allemagne occidentale.

⁵⁹ P. H. NEUHAUS, *Die Grundbegriffe des internationalen Privatrechts*, Berlin 1962, § 52.

⁶⁰ Cf., par exemple, les développements sur cette question de P. MAYER, *Droit international privé*, Paris 1977, p. 170 et suiv.

⁶¹ Par exemple, M. M. BOGUSLAVSKIJ, *Meždunarodnoe častnoe pravo*, 2^e éd., Moskva 1982, p. 94.

⁶² Ainsi A. B. LEVITIN, *Voprosy publičnogo porjadka v meždunarodnom častnom prave*, in : *Problemy meždunarodnogo častnogo prava*, Moskva 1960, p. 228 et avant tout L. A. LUNZ, *Meždunarodnoe častnoe pravo, obščaja čast'*, Moskva 1959, p. 239 et dans la 3^e éd. de ce système, Moskva 1973, p. 318.

Vers la solution intermédiaire semble aussi s'incliner la théorie tchécoslovaque. Elle avance la solution la plus simple : la *lex fori*, mais avec des exceptions dans les cas où le remplacement de la disposition étrangère par le droit national conduirait à un élargissement excessif du domaine de l'ordre public. Elle prévoit donc la possibilité de recourir aux principes généraux du droit étranger qui ne heurtent pas l'ordre public du for⁶³.

Dans la doctrine polonaise, c'est encore à l'époque de la codification du droit international privé polonais, que j'ai attiré l'attention sur le besoin d'abandonner la conception de la *lex fori* en tant que solution unique⁶⁴. Dans les années suivantes, la position intermédiaire a été également acceptée par les représentants de la doctrine polonaise⁶⁵. Je la soutenais plus tard dans mes précis de droit international privé polonais⁶⁶ en soulignant que conformément à la teneur de la loi polonaise de 1965, il ne faut pas préjuger si à côté de la référence à la *lex fori*, il n'est pas possible d'admettre, dans certains cas, l'application d'une autre disposition étrangère qui n'est pas en conflit avec l'ordre public polonais⁶⁷. Certains auteurs polonais sont allés encore plus loin proposant la recherche d'une disposition étrangère appropriée avant l'application de la *lex fori*⁶⁸.

⁶³ Ainsi Z. KUČERA, *Mezinárodní právo soukromé*, Praha 1975, p. 90.

⁶⁴ A savoir dans mon article précité sur *Les effets d'application de la clause...*, p. 194 et suiv., où la deuxième conception est largement discutée et dans ma monographie précitée sur *La clause d'ordre public en droit international privé*, p. 212.

⁶⁵ Entre autres, W. LUDWICZAK, *Międzynarodowe prawo prywatne [Droit international privé]*, 3^e éd., Warszawa 1979, p. 93 où l'auteur parle du besoin de la « solution souple » sans préférer la première ou la seconde conception.

⁶⁶ *Précis de droit international privé polonais*, Wrocław—Warszawa 1976, p. 86 et B. WALASZEK, M. SOŚNIAK, *Zarys prawa międzynarodowego prywatnego [Précis de droit international privé]*, 2^e éd., Warszawa 1973, p. 126.

⁶⁷ Ainsi dans le manuel *Prawo prywatne międzynarodowe [Droit international privé]*, 2^e éd., Katowice 1981, p. 104 où 20 ans après la première publication sur ce sujet, j'ai essayé de trouver un équilibre entre les deux positions.

⁶⁸ Ainsi J. JAKUBOWSKI dans l'ouvrage collectif *Prawo międzynarodowe i stosunki międzynarodowe [Droit international et rapports internationaux]*, Warszawa 1980, p. 465, selon lequel avant d'appliquer les dispositions polonaises (à la place du droit étranger écarté), il faut examiner si, dans ce droit étranger, on peut trouver une autre disposition compatible avec notre ordre public. Aussi T. ERECIŃSKI dans l'article précité sur l'application du droit étranger (« Nowe Prawo », 1980, n° 6) et dans ses travaux postérieurs (entre autres, dans la monographie *Prawo obce w sądowym postępowaniu cywilnym [Le droit étranger dans le procès civil judiciaire]*, Warszawa 1981) recommande au juge la recherche dans le système étranger compétent « de la norme la plus proche dans sa teneur et sa fonction » à la norme étrangère écartée par notre ordre public.

5. Conclusion

Les conclusions qu'on peut tirer de cette étude ne se prêtent pas à une formule univoque. Sans doute, la *lex fori* en tant que moyen de substitution à la disposition étrangère écartée a perdu son autocratie. Les dispositions législatives prévoyant sa compétence exclusive dans les cas discutés sont rares et le nombre de partisans de cette exclusivité, bien qu'il soit important, diminue considérablement.

Toutefois, cela ne revient pas à dire que la méthode d'exploration des dispositions étrangères par le juge, recommandée par le deuxième courant théorique, a entièrement remplacé la solution ancienne. Il est vrai qu'elle fut admise il y a des années avec approbation aussi en dehors de son terrain maternel allemand, mais bientôt elle a rencontré (comme nous l'avons déjà dit) des critiques considérables. En tant que solution législative, elle ne fut admise que par un petit nombre de systèmes de droit international privé. C'est pourquoi il serait difficile de la considérer comme conception équivalente à la conception traditionnelle d'autant plus si l'on prend en considération la pratique judiciaire de la majorité des pays du monde⁶⁹. Par conséquent, il nous reste soit la fidélité à la conception de la *lex fori*, soit l'admission d'une solution modifiée.

S'ils s'agit de cette dernière, les tentatives présentées (par exemple, par Neuhaus ou Wengler) ne sont pas satisfaisantes parce qu'elles sont trop compliquées pour la pratique judiciaire et trop artificielles pour la théorie du droit international privé. En outre, bien des cas se laissent expliquer beaucoup plus simplement. Si, pour revenir aux exemples déjà invoquées, le droit étranger n'admet pas la légitimation de l'enfant « adultérin », la question se réduit en effet à écarter cette prohibition étrangère, de même qu'on écarte les dispositions discriminatoires concernant les enfants nés hors mariage, les dispositions racistes, etc. Il s'y agit sans doute d'une intervention de la loi du for dans l'application du droit compétent, justifiée en considération de l'ordre public, l'intervention — dans le sens « positif » — selon la terminologie ancienne. Il est hors de doute que sauf cette prohibition incriminée, les dispositions étrangères concernant la légitimation de l'enfant en général trouvent leur application, si elles ne soulèvent pas des réserves de l'ordre public *legis fori*. Cette solution n'est basée ni sur la « sélection » ou la « recherche » ad hoc des dispositions dans le système étranger ni, d'autant plus, sur leur adaptation (*Anpassung*) aux dispositions nationales. Il serait également superflu d'évoquer ici un lien plus ou moins fort de la situation donnée avec le territoire *legis fori* (*Binnenbeziehung*).

⁶⁹ De laquelle il serait difficile de s'occuper dans le cadre de la présente étude, à cause de son abondance et son lien avec d'autres domaines du droit international privé (de la famille, des successions, etc.) qui exigeraient une analyse à part.

Il en est ainsi dans la majorité des situations liées aux effets d'application de la clause d'ordre public.

Par conséquent, il n'y a pas besoin de discuter la priorité de la *lex fori* par rapport à la « sélection » des dispositions étrangères ou — au contraire — de considérer la *lex fori* comme un droit de remplacement (*Ersatzrecht*) à défaut de ces dernières. La loi du for possède cette priorité par la nature des choses, car elle résulte de la conception même de la clause d'ordre public en droit international privé où l'on met accent sur la protection de l'ordre public national, c'est-à-dire celui de la *lex fori*. C'est lui donc qui doit décider de la manière et de l'étendue de la substitution.

Cela ne veut pas dire, bien évidemment, qu'il s'agit de se servir de la clause pour élargir la compétence de son propre droit. La question entre dans le cadre de la problématique de conflit des lois où tous les systèmes juridiques ont la position égalitaire. C'est pourquoi l'intervention de l'ordre public se limite toujours au domaine nécessaire et relativement restreint : l'exclusion de la disposition étrangère concernant une question particulière (par exemple, une des conditions d'un acte déterminé), l'exclusion faite conformément aux principes de l'ordre public national et ne touchant pas à d'autres questions laissées à la compétence normale du droit étranger. Il convient de soulever ici les mérites des représentants de la deuxième conception présentée qui ont essayé, à juste titre, de limiter une sorte d'hégémonie de la *lex fori* élargissant le champ de protection de l'ordre national contre le droit étranger.

Cette large conception du rôle de la loi du for laisse-t-elle beaucoup de place à la seconde des solutions présentées ? Il semble que ce seront les cas beaucoup plus rares, prévus plutôt en théorie que rencontrés dans la pratique. Néanmoins, il faut les prévoir. Il faut également les admettre dans le cadre de la tendance à l'application aussi vaste que possible du droit compétent désigné par les normes de conflit internes. Le plus souvent, il s'agira des principes généraux du droit étranger, suppléant dans telle ou autre mesure la disposition écartée. Cependant, il est difficile d'exclure aussi le cas où le caractère et le but du rapport juridique créé à l'étranger selon la loi étrangère ne peut être « sauvé » que par une adaptation convenable des dispositions particulières étrangères et non pas par un « enfoncement » de ce rapport dans le cadre des dispositions nationales. Toutefois, il est difficile de voir dans cette méthode la règle, elle a plutôt un caractère exceptionnel.

Pour toutes ces raisons, il faudrait reconnaître comme erronées aussi bien une formulation législative de la clause qui prévoit comme possibilité unique la substitution de la *lex fori*, que la formule qui impose au juge la préférence de la sélection dans le système étranger d'autres dispositions

appropriées. Cette dernière démarche est, comme nous avons essayé de le démontrer, dans la majorité des cas complètement superflue. Il semble que la meilleure approche consiste à laisser la solution du problème à la pratique en ouvrant la possibilité d'aller dans les deux directions. La majorité des formules législatives de la clause dans les systèmes de droit international privé contemporains, y compris la formule polonaise, suivent cette voie.

Polish Court Judgements in International Civil Law Cases

by MACIEJ TOMASZEWSKI

MARRIAGE

Capability to conclude marriage by a foreign citizen in Poland — Applicability of national law — Prohibition to conclude marriage with foreigners in national law — Polygamy — Functions of public policy clause.

The Supreme Court, Civil and Administrative Chamber. Resolution of the 7 judges of 20 January 1983 (III CZP 37/82) on the motion of Raad Kadhuma H. with Elżbieta Ł. as participant to release from obligation to submit in the Registry Office proof of legal capacity to conclude marriage ("Orzecznictwo Sądu Najwyższego", seria cywilna, 1983, No. 8, item 107, "Nowe Prawo" 1983, No. 9—10, p. 246 with a gloss by Krzysztof Pietrzykowski).

The Supreme Court, at its regular session decided to present the following legal question to the 7 Supreme Court judges: whether in every case prohibition to conclude marriage with foreigners contained in the national law of the petitioner constitutes ground for refusal to release from obligation to submit proof mentioned by Article 46—1 of the law on the registry of personal status.

The Supreme Court, 7 judges sitting, decided and agreed to inscribe the following legal rule into the Book of Legal Principles:

"Prohibition to conclude marriage with foreigners, foreseen by the national law of the petitioner, by itself (*per se*) does not constitute an obstacle for the court to release him from obligation to present the Registry officer the proof of legal capacity to conclude marriage according to this law (Art. 46—1 of the law on the registry of personal status and Art. 6 of private international law)".

Below, the full text of the reasons of this resolution is given.

"Petitioner is the citizen of Iraq. Marriage law of the Republic of Iraq allows polygamy. Petitioner, however, is not married. According to the decision of the Revolutionary Council in Iraq of 27 May 1978, documents certifying the marriage by the citizen of Iraq

with a foreigner have no legal force on the territory of Iraq and therefore have no legal effect. Pointing to the fact that contradiction existing between petitioner's national law and basic principles of the legal order now binding in Poland constitutes irremovable obstacle to conclude marriage with a Polish citizen in Poland, the District Court refused to release the citizen of Iraq from obligation to present proof mentioned in Article 46—1 of the law on the registry of personal status. The legal question formulated at the beginning arose for the Voivodship Court while considering petitioner's appeal from the above decision.

"1. While deciding the question presented later by the ordinarily composed Supreme Court Chamber to the 7 Justice of the Supreme Court, one must begin by stating, that Polish conflict of law rules subject material requirements to conclude marriage to the national law of each of the parties (Art. 14 of private international law). However, circumstances excluding possibility of contracting marriage foreseen by the national law of the foreigner intending to conclude marriage with a Polish citizen, may be different from those mentioned by the Polish family and guardianship code. The law has thus obliged the foreigner to present the Registry Officer the proof of his capacity to conclude marriage according to his national law, while at the same time allowing for the release from such duty by the court, if obtaining the proof mentioned above is difficult (Art. 5 of the Family and Guardianship Code in connection with Art. 46—1 of law on the registry of personal status). Capacity to conclude marriage is understood here as ability to conclude marriage (Art. 14 of private international law). Therefore, the judicature, supported by legal doctrine, uniformly concludes that in result of the proceedings the court may release a foreigner from the obligation to submit such proof only after it has been established that he conforms to the requirements foreseen by his national law to conclude valid marriage in Poland with a Polish citizen (Art. 562 of the code of civil procedure).

"Consequences of the violation of prohibition to conclude marriage with a foreigner may be different. Prohibition mentioned in the legal question now under consideration constitutes a general prohibition to conclude marriage with foreigners by citizens of the national State of the petitioner, sanctioned by the refusal to recognize marriages concluded against such prohibition as valid on the territory of that State. Mentioning the fact that stating existence of such prohibition does not release the court from obligation to establish 'whether in that matter national law of the petitioner does not contradict basic principles of the legal order in the Polish Peoples Republic', in its decision of 16 November 1971 III CRN 404/71, ('Orzecznictwo Sądu Najwyższego Izba Cywilna i Izba Pracy,' 1972, No. 5 item 91) the Supreme Court placed the above mentioned prohibition along with other circumstances excluding possibility to conclude marriage, valid according to the foreign law. However, from the fact that 'from the point of view [...] of public policy clause, legal status of a Polish citizen in the light of the national law of the foreigner cannot be immaterial for the State' (Resolution of 22 June 1972, III CZP 34/74 — 'Orzecznictwo Sądu Najwyższego Izba Cywilna i Izba Pracy', 1973, No. 4 item 52), the Supreme Court concluded that 'in case of ascertaining that the marriage of a Polish citizen with a foreigner is invalid according to the national law of the that foreigner, the court refuses to release him from obligation to submit proof mentioned in Article 46—1 of the law on the registry of personal status. Following this opinion, in its decision of 26 August 1974, I CR 698/74 ('Orzecznictwo Sądów Polskich i Komisji Arbitrażowych,' 1976, No. 7—8 item 141), the Supreme Court had also stated decidedly that 'contradiction between national law of the foreigner and basic principles of public order binding in Poland constitutes an irremovable obstacle to marriage.' In consequence, it also leads to the refusal to release the foreigner from obligation to submit proof of his legal capacity to conclude marriage according to his law. Referring to the

critical voices already raised in literature, in its motives of the legal question, the Voivodship Court expresses reservations as to the way public policy clause was applied in these cases, and suggests that position taken by the Supreme Court — introducing strict prohibition to grant such release in cases mentioned in the above-cited statements, — finds no grounds in Article 6 of the private international law. Thus, the problem comes down to the function of the public policy clause and to the explanation of the manner in which such clause should be applied in particular cases.

"2. Provisions of the foreign substantive law should be applied on the territory of Poland, because Polish conflict of law rules call for it. In the light of such regulation, a foreigner whose national law prohibits marriages with citizens of other countries, has in principle no 'ability' — according to the provisions of this law — to conclude marriage with a Polish citizen on the territory of Poland. However, Polish law allows for renouncement of application of the foreign law in favor of its own legal order in case it is deemed necessary. In particular, Article 6 of private international law provides that 'foreign law may not be applied if its application causes effects contrary to fundamental principles of legal order in the Polish People's Republic.' Public policy clause expressed therein is thus in principle aimed at excluding certain provisions of the foreign law applicable on the virtue of Article 14 of private international law. Had the foreign law containing such prohibition been applied it would result in refusal of the Registry officer to admit declaration that the candidates marry each other. Therefore there are no counter-indications to refuse to respect prohibition contained in foreign law of such prohibition — unknown to Polish law and concerning issues other than the essence of marriage — contradicts fundamental principles of the Polish Family and Guardianship Code. Thus, prohibition to conclude marriage with foreigner (*per se*) cannot by itself constitute an obstacle to conclude marriage with a Polish citizen and — in consequence — to release him from obligation to submit proof mentioned in Article 46—1 of the law on the registry of personal status.

"3. The function of the public policy clause is thus to act primarily in a negative way. Whether contracting marriage with a Polish citizen is excluded in result of application of such clause, or whether all obstacles to conclude marriage on Polish territory are overcome, is decided according to the law — usually Polish one — which replaces the excluded law, and to the fundamental principles of the Polish legal order. These norms, in turn, may not only allow but also oppose contracting marriage. Indirectly, public policy clause acts in a prohibitive way, in the situation when according to provisions of its national law, a foreign citizen is capable of concluding marriage but certain obstacles exist under the proper norm of the Polish law. Therefore, a foreigner already married whose national law allows polygamy, cannot conclude marriage with a Polish citizen on the Polish territory, since Article 13, paragraph 1 of the family and guardianship code prohibits to marry a person who has been already married (decision of the Supreme Court of 11 October 1974, II CR 735/74 — 'Orzecznictwo Sądów Polskich i Komisji Arbitrażowych,' 1976, No. 7—8, item 142). Prohibitive effect of the public policy clause must result in refusal to release the petitioner from his duty to submit proof mentioned in Article 46 of the law on the registry of personal status, which is a condition of concluding a valid marriage in Poland. Thus, a particular, fundamental norm of the Polish law, concerning material condition for contracting marriage, which forbids a Polish citizen to conclude marriage with a foreigner, will always be an obstacle to release him by the court from obligation to submit to the Registry officer proof of his capacity to conclude marriage according to his law.

"4. Naturally, effects of the application of the clause are territorially limited. Marriage which is *ex lege* valid on Polish territory, may be treated as non-existent (*matrimonium*

non existens) by other legal systems, and especially on the territory of national State of the petitioner. This does not mean, however, that the risk of refusal to recognize their future marriage beyond Polish borders — if concluded against the prohibition contained in the national law of the petitioner — in every situation falls on the future spouses themselves. The negative effect does not exhaust the function of the public policy clause. The reason to introduce Article 6 of the private international law to the Polish legal system was consideration for State interest and citizens' welfare. Thus justifies position taken in the motivation of the resolution cited in the introduction, that this clause may also create difficulties for the Polish citizen — considering her welfare — in contracting marriage in Poland with a foreigner, to whom in the future, provisions of a foreign law may apply (Art. 17, para. 3, of the private international law), which by its effects may contradict fundamental principles of the Polish legal order. Discrimination of a woman in marriage undermines the family to be and by that, also the State interests. Thus, after having established on the grounds of the available material that the foreigner intends to settle with his future wife on the territory of the State which allows polygamy and refuses to grant a women rights equal to those of a man in marriage, considering this contradiction the court should as a rule refuse to release from obligation to submit proof mentioned in Article 46—1 of the law on the registry of personal status. However, since the rule is that the risk of refusal to recognize their marriage beyond the borders of the State in which it was concluded falls on the future spouses, a positive decision should become a rule in the situation, where all gathered material justifies the presumption, that the future spouses intend to settle in Poland or on the territory of a third state which does not discriminate woman in marriage. This means, that obstacles to grant the release in question may result not only from express legal provisions, but also from the circumstance of the given case."

Marital Property Community

Marriage of a Polish citizen with a foreigner — Real property acquired by the wife in the course of marriage — Lack of permission of the husband to acquire real property — Real property included in the statutory community of the spouses.

The Supreme Court, Civil and Administrative Chamber. Resolution of 4 March 1983 (III CZP 6/83) in case of Amad Al Din S. against Barbara Bogusława S. to establish right of ownership ("Orzecznictwo Sądu Najwyższego", seria cywilna, 1983, No. 8, item 114).

By its decision of 11 January 1983 the Voivodship Court in Łódź turned to the Supreme Court with the following legal question, to decide according to Article 391 of the code of civil procedure:

"Is real property acquired in the course of marriage by one of the spouses, of whom the other is a foreigner who did not receive permission to acquire real property according to the law of 24 March, 1920 on acquisition of real property by the foreigners (uniform text, 'Dziennik Ustaw' of 1934, N. 24, item 202) included into statutory marital community?"

The Supreme Court made the following resolution in this case:

"The fact that the second spouse is a foreigner and did not receive permission to

acquire real property does not preclude the possibility of including the real property acquired by one of the spouses being a Polish citizen into statutory marital community."

In the reasons of this resolution the Supreme Court has stated:

"The plaintiff Amad Al Din S., citizen of Iraq, moved to establish, that the built up agricultural real property of 54 acres located in K. district P. acquired by way of a notarial act (drawn up in the State Notary Public Office in Łódź, on 20 September, 1977) on the name of Barbara Bogusława S., constitutes his and of the above mentioned buyer aqquest on the ground of statutory marital community. Defendant did not admit the claim and moved to dismiss it, stating that the real estate in question was acquired by the from her separate founds, and this fact was acknowledge by the plaintiff in the, notarial act mentioned above.

"By the decision of 29 April, 1982, the District Court in P. moved for the plaintiff, citing among other things the following facts in the motivation of this decision. The parties who were students, concluded marriage in 1969 and had 3 children. Neither the defendant nor her parents had savings or other property. The mother of the defendant worked as a cook, the father as equipment repairman. After finishing the studies the defendant did not start working because she had to take care of the children. The family of the plaintiff living in Iraq, in the course of their visists brought them money and gold in the form of jewellery. The parties had received 1.300 dollars which the plaintiff placed in the Bank P.K.O. SA. Willing to acquire real property in dispute the plaintiff took those dollars from the bank and — in order not to sell the gold in his possession — borrowed from the witness Aleksandra K. the remaining sum of money. The loan was paid back after the sale of the car which the parties had bought during their stay in the FRG.

"The plaintiff, being a foreigner, did not receive permission to acquire real property, necessary according to the provisions of the law of 24 March, 1920 on acquisition of real property by foreigners (uniform text, 'Dziennik Ustaw' of 1933, No. 24 item 202). Therefore the notarial act was drawn on the name of the defendant. The fact that the plaintiff is a foreigner and did not receive permission to acquire real property, does not constitute an obstacle to include it into marital community property. To support that view, the Court deciding the case cited the decision of the Supreme Court of 24 September, 1970, III CZP 55/70, ('Orzecznictwo Sądów Polskich i Komisji Arbitrażowych', 1973 item 120). Defendant Barbara S. appealed from the above decision. In the cours of this appeal, a legal question was rised, cited in this resolution, and transferred to be answered according to Article 391 of the code of civil procedure.

While deciding this question, the Supreme Court noted the following:

"According to Article 1 of the law of 24 March, 1920 on acquisition of real property by foreigners, (uniform text, "Dziennik Ustaw" of 1933, No. 24, item 202), real property may be acquired by foreigners only after permission of competent authorities mentioned in this act is obtained. Acquisition without such permission is null and void.

"Provisions cited above and also others of the sbove law came into force long before statutory regime of marital property community was introduced. The regulation on this regime provides that at the moment the marriage is concluded, marital property community comes into being ex lege between the spouses — including their aquests (statutory community). The

latter includes objects acquired in the course of the statutory community by both spouses, as well as by one of them (Art. 31 and 32 of the family and guardianship code).

"Considering all these provisions together, it is easy to see differentiation of factors material for effective acquisition of real property during the period of statutory marital community, when one of the spouses, being a foreigner, did not receive permission to acquire this property and the other acquires it in conditions justifying including it to community property (Art. 23, of the family and guardianship code). Article VIII, paragraph 2—1 of the provisions introducing the civil code, leaves provisions of the law of 1920 as applicable. By doing so, the law did not regulate the above, visible divergence, but left interpretation of these provisions to practice. In what concerns land given in perpetual usufruct, this question was already decided. In the cited resolution of 24 September, 1970, III CZP 55/70, the Supreme Court expressed the opinion that real property given in perpetual usufruct in the course of marriage to one of the spouses, when the other one is a foreigner, and did not receive permission to acquire real property according to the provision of the law of 24 March, 1920, is included in statutory marital community, this opinion has met with both approval and criticism of the legal writers, which induced the Voivodship Court to present its doubts.

"It thus needs to be decided, whether arguments to the contrary may speak against this position, which — although expressed in connection with perpetual usufruct is even more applicable to acquisition of ownership of real property.

"It first of all needs to be stressed that aside from position taken on the issue in question, the importance and the aims of introducing by the family and guardianship code of the institution of statutory marital community are uniformly stressed by both the doctrine and the judicature. It is not questioned either, that it is not the contents of the legal act or the will of the acting spouse that are material for including an object acquired by one of the spouses to the statutory marital community. This results from the law itself and from the very essence of statutory marital community. In case then when only one of the spouses is the buyer, legal effects of such acquisition are estimated only as to the acquiring party. A positive decision in question of acquisition rises the possibility of establishing, whether the object of acquisition is included in the quests of the spouses according to the law of the family and guardianship code. Acquisition of property by the spouse who is a Polish citizen, whose spouse, the foreigner, did not receive permission to acquire real property, is also governed, as to the aspects in question, by the above given rules as to whether it can be included into the statutory community. Continued line of cases combines requirements of legal nature with the aims, the law sets up before the institution of statutory marital community property in satisfying material needs of a family and its correct functioning. The opinion expressed above is not undermined by the argument taken from the Article XXIII of the introductory provisions to the civil code. As it is stressed, since the legislator did not provide for the foreign acquirers the rules analogous to those of Article XXIII, he foresaw the application of the provisions of the law of 24 March 1920 having specific character beside the family and guardianship code provisions. Lack of intervention in the expected direction on the side of the legislator cannot speak for such conclusion since provisions of the civil code on acquisition of real property were largely changed already after the date of making and publishing the resolution of 24 September, 1970 (Cf. Act of 28 March, 1982 amending the law — the civil code and repealing the law on regulating ownership of farms — 'Dziennik Ustaw', No. 11, item 81). This may prove that the direction of interpretation commenced by the cited resolution and the following court practice have fulfilled the aims expected by the legislator and therefore there was no need for changes in proper provisions. Considering the above, this interpretation should

be supported, what has found its expression in the thesis of the present resolution."

Tort Liability

Communication accident on Polish territory — Applicability of Polish law — Scope of applicability of *lex delicti* — Lack of the grounds to accept passing of claims as to the costs of foreign medical care of the person injured to a foreign social security agency.

The Supreme Court, Civil and Administrative Chamber. Resolution of the 7 Judges of 26 March, 1982 (III CZP 61/1980) on the motion of the Minister of Justice of 5 September, 1980 modified by a note of 24 September, 1981 ("Orzecznictwo Sądu Najwyższego," seria cywilna, 1982, No. 11—12, item 161).

The Minister of Justice of the PPR presented the following legal question to the Supreme Court:

"Has a foreign social security agency a right to act for the reimbursement of costs of medical care of the person injured in the communication accident on the territory of Poland in the case where — under the law of the Federal Republic of Germany — the said agency took over the claim of the injured person for the reimbursement of such costs?"

The Supreme Court made the following resolution:

"A foreign social security agency which, according to its national law, has taken over the claim for reimbursement of costs of medical care, has no right to claim such costs from the person responsible for the damage, according to the Polish law, when the person injured was assisted at the expense of this agency after a communication accident which took place on the territory of Poland."

In justification of the above resolution the Supreme Court stated:

"According to Article 31, paragraph 1, of the Act of 12 November, 1965 called private international law ('Dziennik Ustaw', No. 46, item 290) obligation not resulting from a legal transaction is subject to the law of the state, in which the occurrence constituting the source of obligation has happened. Among other things, this provision concerns responsibility resulting from torts including communication accidents caused by mechanical vehicles. Issues of tort liability are legally complex, and involve several detailed legal problems. Here, the issue of determination of the *lex delicti* arises and of its subjective and objective scope. The question presented to the 7 Judges should be qualified as one of them.

"The issue of the scope of *lex delicti* is of great importance from the discussed point of view. Establishing the scope of legal problems included within the term 'law applicable for tort' (*lex delicti*) may be decisive for the question, according to which law — Polish or foreign — should the issue be resolved conforming to the private international law. The issue being the right of a foreign social security agency to claim reimbursement of medical care costs of the person, who was injured in a communication accident on the Polish territory. In another words, the question is whether Article 31 of private international law includes also the above issue.

"The answer to this question causes difficulties in judicial practice. One may note an opinion (Supreme Court decision of 23 September, 1975, I CR 810/74) according to which the scope of *lex delicti* (Art. 31, para. 1 of private international law) also includes the issue of transmissibility or transmission of claims of the person injured by an unlawful

act on another physical or legal person; *lex delicti* in the Polish law excludes applicability of a legal institution taken from the law not shown as applicable by Article 31, private 1 of the private international law. According to this line of interpretation there would be no grounds to apply in an autonomous way the law of a state other than Polish, in what concerns conditions of permissibility of claiming — on the principle of subrogation provided for in foreign law — the costs of medical care of the victim of the accident by the foreign legal entity of the public law.

“Another way of reasoning found its expression in an opinion (decision of the Supreme Court of 7 Judges of 12 December 1976, III CRN 75/76), according to which the scope of Article 31, paragraph 1 of the private international law includes not only obligations resulting from torts, but also from other occurrences, other than legal transactions, including also obligations rising from the law itself. In the latter category one should see the fact, that a person who had sustained damages received medical care outside of Poland, where the law transfers the right to claim the reimbursement of the costs of such care, and if such occurrence took place on the territory of a foreign state, conforming to Article 31, paragraph 1 of private international law, it is subject to the law of that State.

“The above position rises doubts, because the costs of medical care of the person who had been injured in result of a communication accident, stem from this very occurrence, i.e. the accident which constitutes a tort, and according to Article 31, paragraph 1 of private international law, the tort itself is the source of obligation. Therefore, the fact that medical costs had to be covered cannot be seen in the light of Article 31, paragraph 1 of this law as an independent occurrence not resulting from a legal transaction and thus decisive for the issue of applicability of the law governed by the place of this occurrence, i.e. foreign law. The very fact of receiving medical care and paying its costs cannot be dissolved from the source of obligation of tort character and treated independently from the point of view of the connecting factor showing the applicable law.

“The problem of *lex delicti* is especially complex from subjective point of view. Particular difficulties rise in connection with the issue of rights of the third persons in the form of social security agencies to rise recourse claims against persons responsible for tort, when the victim of the accident is in fact receiving medical assistance from the social security agency. This is so because the nature of the recourse claims of the social security agency — as a third person — is closely bound with the tort itself — its subjective and objective aspects. If it were not for the tort, the whole complex of problems would not arise. Recourse claims are of secondary character, and legally dependent from the point of view of the connecting factors known to private international law. From that point of view, the issue of admissibility of claiming the reimbursement of costs of medical care by a foreign social security agency is subject to the Polish law, and not the foreign law on that issue. However, it may not be separated from the issue of the law applicable to tort (*lex delicti*).

“From the view, that as to recourse claims of the social security agency only Polish law could apply, there follows another question, i.e. whether Polish law as *lex delicti* provides for such claims of a Polish social security agency to recover costs of medical care. In the light of the regulation in force, it must be answered in a negative way. However, it should be noted that even if the Polish law provided for such claims in a similar situation, this very fact, by itself, would not be decisive for the issue of claims of a foreign social security agency. The latter could bring up its recourse claims on the grounds of its own, proper law, which means other than Polish law shown as applicable, unless provisions binding in Poland expressly provided for a similar treatment of particular social security agencies. This, however, could result only from international agreements.

"*Lex delicti* (Art. 31, para. 1 of the private international law) also includes many problems connected with mandatory communication insurance. However, it does not follow, that a foreign social security agency could bring up its recourse claims to reimburse paid medical costs. Neither the regulations of the Council of Ministers of 28 November, 1974 on mandatory communication insurance ('Dziennik Ustaw,' No. 46, item 274 with later changes), nor the regulations of the Council of Ministers of 30 November, 1981 on mandatory communication insurance ('Dziennik Ustaw,' No. 30, item 166) provide for this kind of rights of a foreign social security agency. And if at all the above mentioned legal acts speak about recourse claims of a social security agency (para. 8 of the second mentioned resolution), it concerns the situation different than the one described in the legal question now under consideration.

The discussion here, should, however, be widened to include the problems of social security from the point of view of the Polish private international law. The latter, regulating the issue of the law applicable to a particular legal relation or distinct legal issue, has a very precise scope of application. According to Article 1, paragraph 1 of this law, it determines 'law applicable in international personal and proprietary relations in the domain of civil, family and guardianship law, as well as labour law'. All other domains of law, and in particular, public law, administrative law, remain beyond the scope of the private international law.

"Law of social security has neither civil or labour law character. Therefore, legal relation in the domain of social security has no civil law character either. Same is the character of legal relations in the domain of social security lying of legal relations in the domain of social security lying at the basis of regulation of paragraph 1542 of *Rechtsversicherungsordnung* of 19 June, 1911 with later changes (RVO). Generally speaking, recourse claims have no particular, independent character, their legal features are determined by the character of legal relation from which they stem.

"Thus, the conclusion that a Polish court would apply paragraph 1542 RVO, would consequently lead to the application and estimation of legal issues according to the foreign provisions governing social security, and this would contradict Article 1, paragraph 1 of the private international law.

"Consequently, looking at the issue under consideration from that point of view, one should take the position that issues regulated by the foreign social security law concerning claims of a foreign social security agency to reimburse costs of medical care, stay beyond the scope of *lex delicti* understood in a possibly wide way, as well as beyond the whole domain of the private international law. This results from the fact that foreign public law cannot be applied by way of Article 1, paragraph 1 of the private international law. Thus, considering specific character of the social security relation, one cannot use any of the connecting factors to conclude that foreign provisions governing social security apply. Only international conventions could provide solutions other than the above.

"This interpretation is not undermined by a possible view that a claim to reimburse costs of medical care based on paragraph 1542 RVO is of civil—law character since it is a recourse claim. This way of reasoning does not eliminate many serious difficulties in the process of interpretation. Again, first of all, the question appears, on the basis of which provision of the Polish international law other than that concerning *lex delicti* could one apply provisions governing recourse claims of a foreign social security agency. As mentioned before, there are no grounds to treat the fact of receiving medical assistance abroad as independent from the point of view of Article 31, paragraph 1 of the private international law.

"It must also be stressed that besides torts, Article 31, paragraph 1 of the law includes: obligations resulting from unjust enrichment, undue performance, unauthorised acting on behalf

of another. There is no doubt, that recourse claims *sensu stricto*, or claims resulting from subrogation are no legally independent 'occurrences' in the above sense. In the discussed situation, Article 27, paragraph 1, subsection 3 of private international law governing obligations resulting from insurance contracts cannot be considered, since we are dealing here with a prestation resulting from social security and with a recourse claim stemming from that regulation.

"Consequently, we should conclude that provisions of the private international law give no grounds for application by the Polish courts of the law of social security binding in the Federal Republic of Germany, conforming to which the social security agency is entitled to claim reimbursement of costs of medical care of a person sustaining damage, from persons responsible to repair such damage according to the principles of the civil law.

"Therefore, considering the above, the presented legal question should have been answered in the negative."

Arbitration

Scope of application of the Moscow Convention of 26 May 1972 — Exclusion of the jurisdiction of the Polish Courts.

The Supreme Court, Civil and Administrative Chamber. Decision of 21 December, 1982 (II CE 521/82) in the case of Česka Statni Pojištovna vs Polish Ocean Lines ("Orzecznictwo Sądu Najwyższego," seria cywilna, 1983, No. 9, item 136).

Czechoslovak State Insurance Agency (Česka Statni Pojištovna) sued the Polish Ocean Lines in the Voivodship Court in Szczecin for 241, 529 zloty with interest claiming damage of the cargo transported from a Polish port to Finland by the ship "Lębork" belonging to the defendant. The receiver of the cargo was a Finish enterprise, to whom indemnity is being paid by the plaintiff acting as the insurer.

In answer to the demand, the defendant moved for dismissal of the claim and brought up objection of the lack of jurisdiction, since the dispute is subject to arbitration according to provisions of the Moscow convention of 1972.

The Voivodship Court in Szczecin refused to dismiss the claim because of the lack of national jurisdiction and while deciding on the merits, dismissed the case as unjustified.

While doing so, the Voivodship Court expressed the opinion that the case lies within the jurisdiction of the common courts in Poland according to Article 1103—1 of the code of civil procedure, and not within the competence of arbitration provided for by Article 1 of the Moscow convention of 1972. This is so, because the subject matter of the case is indemnity paid by the plaintiff as the insurer of the receiver shown in the bill of lading, the latter being a Finish enterprise. In the opinion of the Voivodship

Court, in those circumstances one cannot claim that the dispute arose out of civil law relations in the course of economic cooperation between Poland and Czechoslovakia.

In connection with the appeal filed by the plaintiff, the Supreme Court decided on pre-trial rejection of the claim citing lack of national jurisdiction. In the justification of that decision, the court stated:

"In the light of Article 1 of the convention on resolving by way of arbitration civil law disputes resulting from relations of economic, scientific and technical cooperation signed in Moscow on 26 May, 1972 ('Dziennik Ustaw' of 1974, No. 7, item 37), all disputes among economic organizations, resulting from contractual and other civil law relations arising between them in the course of economic, scientific and technical cooperation, are subject to arbitration. At the same time, so generally described relations are understood as relations resulting from contracts, as well as other civil law relation arising in the course of cooperation.

"This clause is very wide and includes civil law disputes resulting from relations of economic, scientific and technical cooperation. This does not only mean contracts closely bound with foreign trade operations or transactions or occurrences. Also tort cases may be included, even though they are not distinctly mentioned, also disputes arising from unjust enrichment. Relations resulting from insurance and insurance recourse claims between economic units mentioned in article 1 of the above convention should be treated similarly. Economic, scientific and technological cooperation' is primarily an economic term, which may appear in various forms of civil law relations.

"In the light of such interpretation, according to Article 1 of the convention one should admit that a case in which an insurance agency belonging to a different State — COMECON member (CMEA) sues other economic organization — sea carrier (Polish Ocean Lines) for recourse claims to redress damage caused to the party even not belonging to a CMEA member State, is excluded from jurisdiction of the Polish and other member countries' courts.

"It should at the same time be stressed — as appears from the case materials — that according to the bill of lading the shipper was a Czechoslovak firm."

National Jurisdiction

Confirmation of the acquisition of an inheritance left by a foreigner who died abroad — A farm in Poland — Scope of national jurisdiction of the Polish courts.

The Supreme Court, Civil and Administrative Chamber — Resolution of 2 April, 1982 (III CZP 8182) in case of a motion of Roman H. to confirm the acquisition of an inheritance in the part concerning the farm situated in Poland ("Orzecznictwo Sądu Najwyższego", seria cywilna, 1982, No. 10, item 142).

By a decision of 17 July, 1981 the Voivodship Court in Przemyśl submitted the following legal question to the Supreme Court according to article 391 of the code of civil procedure.

"Should a Polish court deciding on a motion to confirm the acquisition of an inheritance left by a foreigner, who had a farm in Poland, pass the judgment on the succession of all the inheritance estate and on the succession of the farm, or should it limit its decision only to the issue of succession of the farm situated in Poland?"

The Supreme Court has passed the following resolution in that matter:

"The principle, according to which both the heirs to the inheritance estate following the general rules and the heirs to the farm should be mentioned in the same decision confirming the acquisition of the inheritance (Art. 1066 of the civil code and Art. 677 of the code of civil procedure), has no application in the situation when national jurisdiction of the Polish court concerns only a part of the inheritance estate left by a foreigner who dies abroad, that is the farm situated in Poland. In that case, the court should limit its decision on acquisition of the inheritance to that part of the inheritance only."

In the reasons of that resolution the Supreme Court stated *inter alia*:

"Provision of Article 677 of the code of civil procedure expresses the principle, that both the heirs to the whole inheritance estate and the heirs to the farm included in the inheritance estate should be mentioned in one decision confirming the acquisition of the inheritance. This principle is the consequence of another one namely, that confirmation of the acquisition of the inheritance should concern inheritance as a whole, and limitation of such declaration to a part of the inheritance only is inadmissible.

"In practice, a question appeared, what should the court do when the above principle [...] contradicts another principle of procedure, also mandatorily binding. The judicature has declared itself for the view supported also in legal literature that priority should in such situation be awarded to the stronger principle.

"Undoubtedly, stronger than the rule expressed in Article 677 of the code of civil procedure seems the principle that the Polish courts may pass judgments only within the limits of national jurisdiction.

"As it follows from comparison of Articles 1108 paragraph 1, and 1102, of the code of civil procedure jurisdiction in cases of confirmation of the acquisition of inheritance left by a foreigner includes only the farm (or other immovable property) included in the inheritance estate situated in Poland [...].

"As a consequence of such regulation, the inheritance estate left by a foreigner is divided into two parts — one constitutes the farm situated in Poland (or other immovable property) the second, all the rest of the inheritance estate. Only as to the first part jurisdiction — and what is more, exclusive national jurisdiction of the Polish court is justified. This means that only in those limits may a Polish court confirm the acquisition of the inheritance."

Recognition of a Foreign Judgement

Adoption order passed in Canada (province Ontario) — Conditions of recognition — Necessary proof of finality of a foreign judgement — Acknowledgement of finality by consulate insufficient.

The Supreme Court, Civil and Administrative Chamber — Decision of 29 October, 1982 (IV CR 458/81) on the motion of Maria Ludwika K. to recognize as valid on the territory of Poland a foreign judgement

concerning adoption of Dariusz D. ("Orzecznictwo Sądów Polskich i Komisji Arbitrażowych", 1983, No. 6, item 123).

Maria Ludwika K. — domiciled in Canada — moved in the Voivodship Court in Rzeszów to recognize as valid on the territory of Poland the order of the court of the city of Toronto, Province Ontario, declaring that on 19 October, 1979 she has adopted a Polish citizen, Dariusz D., born on 24 February, 1962. On the photocopy of the order there was no annotation as to its finality. The lack of such annotation was not eliminated during a month the petitioner was later given to do so, and therefore the Voivodship Court dismissed the motion to recognize by its decision of 22 November, 1980.

Petitioner appealed from that decision to the Supreme Court, which reversed the case and remanded to the Voivodship Court in Rzeszów for re-examination.

In the reasons, the Supreme Court stated the following:

"No doubts can be raised as to the statement of the Voivodship Court that only an unappealable (final) judgement of a foreign court can be recognized by the Polish Court. Commencement of proceedings to establish the lack of other obstacles to recognize (Art. 1146 of the code of civil procedure) is therefore conditioned by the proof by the petitioner that a foreign court's judgment is no longer open to regular appeal (Art. 1147, para. 2 code of civil procedure). In her appeal, the appellant did not contest the fact, that while filing the motion to recognize the judgment on adoption of the Court of The City of Toronto she enclosed no annotation to confirm that no regular appeal is still available to the parties. Nor did she contest the fact that later, within the time period given by the Voivodship Court she did not eliminate the lack of this document.

"However, justifying the delay with misunderstanding of the court instruction the appellant enclosed a copy of the adoption order with a certificate issued by the Consulate General of the PPR in Toronto to the effect that the order was issued conforming to the local law and that it was (final) unappealable. According to the above-cited provisions, the fact whether and when would the foreign court judgement become unappealable, must be established on the basis of the foreign procedural law. Therefore, only the court which has issued it or decided the case in the first instance has the right to declare as well as real capability to state that the judgment now to be recognized is in effect final. In another words, statement by the foreign court which has issued it, that the judgement now submitted to the Polish Court to be recognized is unappealable, constitutes the exclusive proof of finality (unappealability) of that judgement. Therefore, presentation by the interested party of the statement of the Consulate General of the PPR to the effect that no appeal from the order is permissible, does not comply with the requirement that a motion to recognize a foreign court judgment must be accompanied by a certificate that the judgment in question is final. By certifying the finality of the adoption order of the Court of the City of Toronto, the Consul General of the PPR has thus violated the scope of his competence awarded to him by Article 15 of the law of 11 November, 1924 on organization of the consulates and on activities of the consuls ('Dziennik Ustaw', No. 103, item 944). Because of that, the petitioner could not effectively state in her appeal that she has submitted to the Voivodship Court the proof of finality (unappealability) of the order in question together with the justification of her delay.

"This does not mean, however, that the appeal should be dismissed. Court's instruction should clearly and unambiguously point out the organ competent to issue confirmation of finality of the adoption order. The instruction given the petitioner does not contain such indication. Without giving it to the resident of a foreign country, not oriented in the matter, the Voivodship Court reacted prematurely by dismissing the motion to recognize judgement when the appointed period of time has passed without effect [...].

"Thus, in a new instruction, the court should inform the petitioner, that finality (unappealably) of the adoption order should be confirmed by the Court of the City of Toronto in the contents of the order, on its copy, or in a separate certificate [...]."

Recognition of a Foreign Judgement

Decision of a Swedish Court on the change of name — Conditions of recognition — The case does not lie within the competence of courts in Poland — Extensive Interpretation of Article 1145, paragraph 1 of the code of civil procedure.

The Supreme Court, Civil and Administrative Chamber — Decision of 2 September 1980 on the motion of Teofil K. to recognize a foreign court judgment ("Orzecznictwo Sądów Polskich i Komisji Arbitrażowych", 1983, No. 9, item 192 with a gloss of Andrzej Mączyński).

Teofil K., acting on behalf of her minor daughter, Luiza, brought the motion to the Voivodship Court in Warsaw to recognize as valid on the territory of Poland the decision of a Court in Malmö (Sweden) of 2 November, 1971. In the latter, in answer to the motion of the mother of minor Luiza, who was an illegitimate child, the Swedish court decided to give her the name of the mother's husband, to which he had agreed.

The Voivodship Court in Warsaw granted the motion to recognize the decision of the Swedish court by its decision of 10 April, 1980, later appealed from the Supreme Court by the Voivodship Prosecutor in Warsaw.

The Supreme Court dismissed this appeal, stating the following in the justification (*inter alia*):

"According to Article 1145, paragraph 1 of the Code of Civil procedure, recognized as valid on the territory of Poland are those judgements of the foreign courts in civil matters, which in Poland are decided by courts. Civil character of the case is established according to the Polish law of procedure as this is the law binding the court deciding the case of recognition of effectiveness of a foreign judgement.

"According to Article 1 of the code of civil procedure, civil matters include cases concerning family law, which means cases resulting from family relations regulated by this law. Among other things, also cases dealing with the name of a child, as regulated by the family law, eg. Articles 88, 89 and 90 of the family and guardianship code.

"Therefore a case concerning child's name given to him by the mother's husband not being the child's father (Art. 90 of the family and guardianship code) is a civil law matter within the meaning of Article 1 of the code of civil procedure, although appropriate declaration of the spouses is given not to court but to the Registry Officer.

"In case of declaration concerning the name, the spouses made it before the foreign

court (conforming to the provisions of the Swedish law, although according to Art. 19 of the Polish private international law Polish law would be applicable, as national law of the child and in that matter the foreign court passed an appropriate judgement.

"However, since the judgement of a foreign court, concerning the name of the child does not lie within the competence of the Polish court according to the Polish law, is not subject to recognition in the course of any other proceedings, especially administrative (the code of administrative procedure or other), because provisions concerning such proceedings do not contain regulation on recognition of decisions of foreign organs, neither administrative, nor judicial (in civil-law cases lying within the competence of administrative procedures), and at the same time, since conditions foreseen by the law (Art. 1146 of the code of civil procedure) as to recognition of a foreign court judgement are observed, the judgement in question (i.e. the judgement of the court) may be recognized in judicial proceedings.

"Teleological reasons, (*inter alia*, child's welfare, as in the case under consideration), may speak for an extensive interpretation of Article 1145, paragraph 1 of the code of civil procedure concerning due proceedings and organs adjudicating in civil law cases (e.g. as to judgement passed in civil-law cases — Art. 1 of the code of civil procedure — by other than judicial foreign organs, if only those organs are competent in those matters, or as to exclusions of competence of the courts in civil-law cases by the Polish law, even though the foreign law may provide for judicial proceedings in those cases)".

Report on Awards of the Court of Arbitration at the Polish Chamber of Foreign Trade

by ANDRZEJ W. WIŚNIEWSKI

1. Award of 8 April, 1983 in the Case No. 207/82

If in the contract the parties include a clause stating that the prices thereby accepted are determined in accordance with the anticipated provisions of a protocol between their respective foreign trade ministries, it should therefore be recognized that as accepted in the contract the prices bear a preliminary character and shall be subject to revision, consistent with the final contents of that government protocol.

Excerpt from Reasons

In the claim filed on 9 September, 1982 the Czechoslovak foreign trade enterprise "S" demanded the adjudication from the Bulgarian foreign trade enterprise "T" of sum of 4,647.—roubles constituting an unpaid part of the price of the delivery of electric car spare parts. The Bulgarian defendant maintained that the claimant had been paid the price due, as accepted in the contract. The defendant also moved for the claim to be dismissed and for the cost of proceedings to be borne by the claimant.

In essence, the dispute consisted in finding a way to interpret the parties' intention with regard to the prices, as declared in their four contracts dated 21 May, 1981 and forming the basis of replacement part deliveries to the defendant in the course of 1982. The fact not disputed between both parties was that, under paragraph 2 of each contract, they had agreed to prices eight percent higher over the ones of 1981. However, included

in each contract was also paragraph 3 as follows: "The price is determined in accordance with future arrangements between the foreign trade ministries of both countries regarding the question of price determination in the course of 1982."

Following the conclusion of the contract, in June 1982 the respective foreign trade ministries signed a protocol according to which in the course of 1982 the parties were to use prices not eight but only four percent higher over the ones of 1981. However, the claimant asserted that he regarded the prices as final in terms of paragraph 2 of the above contract and that the provisions of the protocol may not apply to contracts signed previously. In the defendant's view, the prices were only preliminary in terms of paragraph 2; therefore, he alleged, the objective of incorporating paragraph 14 in the contracts was to make the final prices subject to future decisions by the ministries.

In the settlement of the dispute, the Arbitral Tribunal shared the view of the defendant. If the parties had regarded prices established under paragraph 2 as final at the conclusion of the contracts, they would not have included paragraph 14, at least not in the wording given. Furthermore, the Tribunal said that paragraph 14 could not be assumed to be only taking note of the fact that the prices were determined in keeping with ministerial decisions, which was what the claimant asserted, since firstly such future decisions were clearly indicated and secondly an alleged statement of fact would not be true because the price rise was actually not by eight but only by four percent. In the opinion of the Tribunal, the parties' intention was—as is often done in contractual practice between CMEA enterprises—to establish preliminary prices and to agree to accept as final such prices as the foreign trade ministries would approve for the year of 1982. Since the ministries agreed to raise the prices by four rather than by eight percent over the ones of 1981, so the former prices should be regarded as being in accordance with the parties' intention at the time of the contract-making.

For his reasons the Tribunal has decided to dismiss the claim and to charge the claimant as the losing party with the cost of proceedings.

2. Award of 29 April, 1983 in the Case No. 116/82

1. The minister's decision to set apart the whole output of specific goods to meet domestic market requirements shall not be regarded as a circumstance of force majeure exempting the producer, and—consequently—the exporter.

2. *If it does follow from the contract's contents that it is connected with another contract to be concluded by the parties, therefore in the absence of other provisions it is assumed that the conclusion of the other contract shall be a precedent condition with regard to the entry into force of the first one.*

Excerpt from Reasons

The litigation involves the sum of 36,960. — roubles claimed by a German Democratic Republic foreign trade enterprise as the buyer from a defendant Polish foreign trade enterprise as the seller, on account of contractual penalties for the latter's failure to deliver goods. The claim was stated on 26 May, 1982 with the inclusion of an additional demand of interest for the time of delay and the costs of proceedings.

The claimant contends that his claim arises from two contracts for the delivery of rubber footwear to be performed until the end of 1980. The claim is made for the following amounts:

A. 20,160. — roubles under the contract of 26 February, 1980;

B. 16,800. — roubles under the contract of 5 September, 1980.

The defendant requested that the claim be wholly dismissed, arguing with regard to the amount given in Point A above that his company could not accept any liability for the failure to deliver goods since it was caused by the circumstance of *force majeure*, i.e. by the miners' strike in coal mines. In connection with the strike, the Polish Chemical Industry Minister's Representative ordered the whole output of footwear, earlier allocated for export to the German Democratic Republic, to be set apart to meet the miners' needs. To provide evidence for the circumstance, the defendant submitted a letter signed by the Representative dated 29 June, 1982. In addition the defendant invoked the provision of Article 471 of Poland's civil code which in his view exempted him from liability.

With regard to point B above, the defendant argued that no contract for the disputed delivery had ever been concluded by the parties, wherefrom the claimant had no right to demand the payment of penalties.

In the course of the hearing on 29 April, the claimant argued against the defendant's views, maintaining with regard to Point A above that the miners' strike could not be regarded as the circumstance of *force majeure* exempting the defendant from any liability. He said the incident was unrelated

to rubber footwear production and did not prevent the delivery of goods.

With regard to Point B and in defiance of the arguments advanced by the defendant, the claimant said that included in the files of the case there was a contract signed by the two parties. Furthermore, the latter contract was an independent one in spite of the reference contained therein that it was bound with another contract to be signed by the parties for the delivery of child's footwear.

The Tribunal decided as follows:

With regard to Point A above, the defendant was wrong to expect that the strike can be regarded as the circumstance of *force majeure* exempting him from liability. He also wrongly invoked the provision of Article 471 of the Polish Civil Code as legal grounds for his exemption. The defendant's liability should be considered in terms of paragraph 68 Point 2 of the CMEA General Conditions of Delivery, as well as in terms of paragraph 2 of the Protocol between the Foreign Trade Ministry of the Polish People's Republic and the Foreign Economic Relations Ministry of the German Democratic Republic, signed on 19 December, 1968. The protocol contained special provisions applicable to the contract.

The Tribunal recognized that there is no causal connection between the strike and the failure to deliver the goods. The Tribunal determined that the administrative decision was an obstacle in the way of the delivery. Following this, the products originally allocated for export were later diverted to meet domestic market requirements. A decision of that kind could not be regarded as the circumstance exempting the defendant from liability. Consequently, the amount of 20,160.— roubles was adjudicated from the defendant.

With regard to Point B above, the claim for 16,800.— roubles was dismissed. The Tribunal arrived at a conclusion that despite its signing by the two parties the contract in dispute never entered into force and no legal consequences in the form of liability for nonperformance could conceivably follow therefrom.

It follows from the contents of the contract that it is connected with another contract to be concluded for the sale of goods between the parties. But no attempt was made to lay down the terms on which the two contracts were bound with each other, i.e. by what date the other contract was to be concluded, what consequences would follow in the event of a failure to conclude the other contract, etc. The Tribunal assumed that the parties' intention was to make the entry into force of the disputed contract dependent on the conclusion of the other one. The other contract was never concluded wherefrom it should be inferred that the original contract did not enter into force either.

The Tribunal decided that the arbitration fees should be paid by the two parties in proportion to the result of the litigation.

3. Award of 3 August, 1983 in the Case No. 258/81

If by his failure to cooperate properly the buyer causes a delay in the elaboration of a time-table of deliveries, and in consequence causes deliveries themselves to be delayed, the seller's liability for the delay shall be limited in proportion to the buyer's contribution thereto.

Excerpt from Reasons

The Romanian foreign trade enterprise "U" (or the claimant) filed its claim with the Court of Arbitration at the Polish Chamber of Foreign Trade on 10 October, 1981. The claimant demanded the defendant Polish foreign trade enterprise "C" be adjudicated to pay the amount of 112,658. — roubles as contractual penalty for the delay in the delivery of two sets of devices concerning which the parties has signed a contract on June 22, 1977.

The defendant moved for the claim to be dismissed, contending that the delay in the delivery was in fact caused by the claimant who had failed to provide in due time all pertinent data needed for the elaboration of the time-table, and moreover had failed to send the defendant time project points, thereby causing the delay in the completion of technical documentation. The defendant also raised the issue of Poland's energy crisis of that time as a factor contributing to the delay. He alleged, finally, that the date of delivery had been prolonged by the parties' agreement.

On the basis of the submitted documentation and of the explanations provided by the parties, the Tribunal established the following:

On 22 June, 1977 the parties concluded a contract according to which the defendant was bound to supply the claimant with the sets of devices. The first delivery was to take place in the first quarter of 1980, the second one — in the second quarter of 1980. The time of delivery was never deferred, in spite of the suggestions made by the defendant to that effect.

Prior to the conclusion of the contract, on 15 October, 1976 the parties had worked out the technical guidelines. According to Annex No. 6 to the guidelines, the time-table was to be elaborated during later negotiations.

But until the time of signing the contract the time-table was not worked out. At any rate, there is no evidence to say that the time-table then took shape.

In accordance with paragraph 5 of the contract signed on 22 June, 1977 it was to become effective in keeping with the annexes to the technical guidelines agreement dated 15 October, 1976. In view of the lack of the time-table, as provided for in Annex No. 6, the contract could not be fulfilled in spite of its conclusion, especially when it came to the duties of the supplier.

In his letter of 15 August, 1977 the defendant asked the claimant to furnish the time-table or to agree to a meeting during which it could be worked out. It follows from the letter that the defendant regarded the matter as urgent. The letter remained without reply. It was only on 13 September, 1977 that the time-table was established during the defendant's representatives stay in Bucharest. It was only then that the claimant furnished his proposals. There is no evidence to prove the defendant's allegation that on the occasion in Bucharest only a cleanly typed copy of the time-table elaborated already at the conclusion of the contract was distributed. The finding made in this regard is authenticated by the defendant's letters of 15 August and of 6 December, 1977.

In consequence, the delay in elaborating the time-table amounted to 83 days. This could cause a delay in the beginning by the defendant of works connected with the performance of contract.

According to the time-table, the claimant was supposed to make out and furnish the project prints (drawings) in the course of seven weeks after the conclusion of the contract. The defendant was to use the prints in completing the technical documentation. Relying on the copy of the postal mailing order, it seems that the claimant dispatched the prints on 26 August, 1977. The address on the postal mailing order is typed properly. It follows from the defendant's incoming mail register, submitted during the proceedings, that the prints reached the addressee on 21 December, 1977. At the present moment, it is impossible to determine what caused such a great delay in forwarding the prints. The defendant tends to believe that the cause was that of the incomplete address typed on the prints. The shorter address does in fact appear on the letter to which the prints were enclosed by the claimant. But this is no evidence to say that a similar incomplete address had in fact appeared on the wrapping of the prints. The evidence would have been that of an original envelope, which however the defendant does not dispose of. On the contrary, it may be assumed from the above postal mailing order containing the complete address that the same address had appeared on the envelope or other kind of wrapping. Therefore, it

cannot be recognized as proven that the flawed addressing by the claimant brought about the delay in furnishing the prints.

However, it should be kept in mind that in his letter of 6 December, 1977 the defendant urged the claimant to expedite the mailing of the prints wherefrom it may be concluded that the defendant was not in receipt of the prints at that late date. The claimant did not respond to the letter and left it without any reply, in spite of the fact that in due course of events he should have immediately informed the defendant about the mailing date of the prints.

There is no evidence, however, to assume that in the course of the contract's performance the defendant encountered difficulties in connection with the energy crisis in Poland. At least, the defendant did not make any notification to the claimant in this regard, which he was bound to do in keeping with paragraph 69 of the CMEA General Terms of Delivery 1968/75.

It arises from the transport document that the first delivery of the equipment took place on 22 January, 1981 and the other one — on 27 April, 1981. The claimant charged the defendant with a contractual penalty of 112,658. — roubles.

Taking into consideration the facts as described above, the Tribunal has decided as follows:

1) The contractual penalty was calculated properly, considering the time of delivery as accepted in the contract and not subject to any deferment.

2) In this litigation, the problem is to provide an answer to the question whether by his behaviour the claimant brought about any effect on delaying the fulfillment of the defendant's duty set forth in the contract dated 22 June, 1977 (paragraph 67b Point 4 of the CMEA General Terms of Delivery). In consideration of the foregoing, it must be recognized that the claimant failed to co-operate with the defendant at the performance of the contract. This applies in particular to the agreeing of the time-table on which the proper fulfillment of the contract was dependent. Not only did the claimant fail to provide in due time the necessary data but, moreover, failed to reply to the letter of 15 August, 1977. Finally, the time-table was made out after the delay of nearly three months. Over that time, the defendant was prevented from taking further steps in his dealings with subcontractors, especially with the design office and the producer. The latter also have their own production plans binding upon them. One delay involved further delays which kept accumulating and finally led to delaying the delivery of the devices as contracted for.

The claimant also did not reply to the defendant's letter of 6 December, 1977 by which the claimant was notified that the prints had not arrived. Upon receipt of the letter the claimant should have responded at once to

explain that the prints had been dispatched several weeks ago. His response would have prevented further delays and disagreements from arising.

In reviewing the state of affairs, it must be recognized that by his misbehaviour the claimant accounted for at least fifty percent of the failure to carry out the duties set forth in the contract. In consequence, the claim was to be dismissed by half. The defendant was charged to pay a half of the overall costs of proceedings, i.e. the amount of 1,113,50 roubles.

4. Award of 19 August, 1983 in the Cases No. 171/81 and No. 259/W/81

When the principal sustains damages in consequence of a buyer's insolvency, such damages shall not be charged upon the agent having no del credere capacity, if it is not proved that he knew or should have known of that insolvency.

Excerpt from reasons

In the claim of 7 July, 1981 "K", agency firm of the Federal Republic of Germany, claimed from the Polish foreign trade enterprise "T" the payment of the amount of 124,760.—DM, together with an additional claim of the costs of proceedings and 8 percent of interest since 1 November 1979. The claimant alleged that the Polish company had withheld the payment of commission due to him by virtue of the agency contract.

In the statement of defence the defendant conceded that the commission did fall due, that however he had deducted its amount from the claimant's outstanding debt resulting from the damage sustained as a result of his improper handling of the contract. The defendant charged that the agent had failed to inform him about the insolvency of those customers with whom contracts had been concluded with the assistance of the agent for the rendering of services.

On 4 November, 1982 the Polish defendant filed a counterclaim for 162,260.—DM to be paid him together with the 8-percent interest since 17 May, 1976 and the costs of proceedings. He asserted that this was the amount equal to that of the damage sustained as a result of the debtor's insolvency. The defendant added that he was holding the claimant totally liable for the damage. The latter moved for the counter-claim to be dismissed, contending that he had discharged his duties in a proper manner. During the session of the Tribunal on 5 November, 1982 it was decided to join the two cases into a single proceedings.

Having studied the documents and after hearing of each party, the Tribunal made and considered the following findings:

1) On 12 July, 1971 the parties signed an agency contract following an offer made to the claimant and subsequently approved by him. That original contract was superseded by another contract dated 1 May, 1972. In both contracts the parties had chosen Polish law as proper for the settlement of disputes which might arise between them.

The above contracts laid the basis for the agent to operate in the area of West Berlin. His duties were to seek customers and assist in the conclusion of contracts with them for the performance of services involving the use of materials such customers might undertake to supply. Also, the agent was obliged to assist the defendant in the performance of such contracts. For the above services the agent was paid commission calculated in proportion of the sums entered into the defendant's account.

2) In accordance with paragraph 9, point 10 of the contract of 1 May, 1972 it was the agent's duty to collect information on the financial and commercial standing of prospective customers and subsequently to make it known to the defendant. No provision of this kind was included in the contract of 12 July, 1971. In the opinion of the Tribunal, the latter fact had no essential meaning since under Article 760 of the Polish Civil Code the agent's duty may be inferred to furnish the principal with such information. Article 760 says that the agent is bound to undertake action necessary to safeguard the rights of the principal (cf. also Art. 65, para. 1 in connection with Art. 354, para. 1. and Art. 355, para. 1 of the Civil Code). By the very nature of the contract of agency, the agent is bound to protect his principal's interests, especially by not allowing that contracts be signed with customers whose solvency is in doubt. The agent should also observe the due diligence (Art. 355, para. 1 of the Civil Code) to ensure the proper performance of contracts by customers. Nevertheless, by neither of the above contracts the agent had provided guarantees of customer solvency (contract of *del credere* agency).

3. By his mediation, the agent helped the Polish principal to conclude two contracts with the Federal Republic's "L" Company in the course of 1971 (one contract dated 20 February, 1971 and the other one dated 3 March, 1971). He also helped the Polish principal to conclude a contract with another Federal Republic firm — the "G" Company, on 25 March, 1971.

Under the contract with the "L" firm, the Polish defendant made thirty deliveries between 29 March, 1971 and 27 November, 1971. However, failing to make payments at regular intervals, the "L" firm was beginning to be in arrears with its payments already at the end of August, 1971.

Beginning with September, 1971 no bill was paid by the firm except for two invoices. In spite of this, the defendant continued to render services for that firm. Only on 10 November, 1971 the defendant sent a telex message to the agent notifying him of "L" arrears, however without listing all unpaid invoices. A detailed list of all arrears was made up by the defendant on 20 November, 1971. On 24 November, 1971 the claimant notified the defendant that according to information provided by the "L" firm that debtor firm sent several cheques to pay for a number of invoices. In the following telex message of 25 November, 1971 the claimant notified the defendant once again the cheques were being sent to him and added that "L" was expecting to take over from the defendant goods worth 12,000. — DM payable to cheque. That telex message also informed the Polish firm that by the same transportation raw materials worth 65,000. — DM would be delivered to him. The agent also clearly recommended not to release finished products if the raw materials would not arrive. The agent advised in such case to sent back the truck driver without loading the finished products. It follows from the above that the agent was concerned that the principal be provided with some security.

The defendant disregarded the agent's advice and released the finished products on 27 November, 1971 although the raw materials had not arrived. As a result "L"'s outstanding debt rose by a further 11,700. — DM. By this token, the defendant rid himself of security to which he was entitled in accordance with Article 461, paragraph 1 and Article 490, paragraph 1 of the Polish Civil Code (i.e. the right to withhold the goods or the right to stay the performance of contract).

In spite of the defendant's statements to the contrary, there was no proof that the claimant was notified on 10 November, 1971 of the "L"'s financial difficulties. The defendant decided to withdraw evidence given by the witnesses called upon to testify to the fact while at the same time there was no documentary evidence in the files to support the defendant's plea. It should be said, however, that the above circumstances, even though they might have been confirmed by more evidence, would not have had any greater effect on the settlement of the present dispute. The arrears were accumulating over a longer period of time while the defendant party was not taking action to prevent their accumulation and to ensure the payability of the sums due.

In a telex message of 13 December, 1971 the claimant notified the defendant that "L" is going to be declared bankrupt. Then, the bankruptcy proceedings were instituted before a court in West Berlin and the defendant filed there his claim. "L" company was in arrears with the payment of 162,260. — DM due to the Polish defendant.

4) On 12 July, 1978 the defendant sent a telex message to its agent to notify him that the sum of 115,504.61 DM was being retained from the amount of commission due to the agent. In the statements made by the defendant in the proceedings, however, reference was made to deduction. But the formulation of the telex message did not seem to suggest that the defendant's action bears the character of deduction. First of all, the defendant used the term "retain" and not "deduct", what makes a great difference in both the German and the Polish language of law. Apart from this, at no point in the telex message was there any specific reference to the defendant's active debt from which the amount of the agent's commission was to be deducted. The only reference in this regard was an indication that details would be discussed on the occasion of the parties' successive meeting in Łódź. That the defendant did not regard his message as deduction in the meaning of Article 498 and following of the Civil Code, deduction being one of the ways to terminate duties, was further confirmed by the fact that he decided to file a counter-claim concerning the whole amount due him. If the defendant had been of the opinion that his deduction was made effectively, he would have confined himself to claiming the difference, i.e. the sum which was not obtained by means of the deduction. This issue, however, had no practical bearing on the settlement of the dispute for which essential was to resolve whether the claimant agent was liable for the damage incurred by the defendant.

Taking into account the factual and legal situation as described above, there is no reason to charge the claimant agent with liability for the damage sustained by the Polish defendant as a result of the debtor firm's insolvency. There is no proof to say that the agent knew of the financial difficulties encountered by the firm before 10 November, 1971 and that he failed to provide information to that effect. The agent demonstrated convincingly that he had done everything possible under the circumstances and had used all best efforts to discharge his duties, as set forth in the contract. Hence, the damage sustained by the defendant was incurred under the circumstances for which the claimant was not liable (cf. Article 471 of the Civil Code).

In the course of the proceeding no finding was made to prove the defendant's allegation that the agent's conduct and his telex message of 25 November, 1971 could be regarded as tortuous behaviour in the understanding of Article 415 of the Civil Code. All actions were taken by the agent within the framework of contractual relations between the parties, as indicated earlier. There is no evidence whatsoever to show the claimant's fault which would substantiate his liability in accordance with the principles of the law of torts.

5) The defendant signed also a contract for the performance of services

with the "G" company of the Federal Republic. The value of services rendered amounted to 12,506. — DM and this was the amount quoted in the invoice dated 24 August, 1971. In the telex message of 10 November, 1971 the claimant notified the defendant that the customer was having payment difficulties. On 20 November, 1971 the defendant sent the agent authorization to take steps in his behalf with a view to collecting the principle's dues. Over the following years some amounts of money were being remitted to the defendant, an outstanding debt of 9,256. — DM remaining. In the meantime, "G" was declared bankrupt. By the letter to the claimant of 1 April, 1980 the defendant deducted this amount from the commission due, thereby charging the claimant with liability for the sustained damage.

Yet, in the course of the proceedings no proof was found that the agent could be held guilty of any misbehaviour at the conclusion of the contract with "G" and at the following performance thereof. In particular, there was no reason to assert that the agent had known of the customer's deteriorating financial situation and that he had failed to notify his principal to that effect. As soon as the claimant learned about the "G"'s payment difficulties, he brought the fact to the attention of his principal. Therefore, even in this regard the agent could not be charged with liability for the sustained damage.

6) It is characteristic to note that at the disclosure of the two customers' insolvency the defendant did not raise any objections with respect to the agent's activities. No reference to this effect was ever made either in the telex messages or in the letter of 20 November, 1971 concerning the affairs of the "G" Company in the Federal Republic. To the contrary, cooperation with the claimant was proceeding and a new contract was signed between the parties in May, 1972 for an indefinite period of time. The cause of "L" came up in 1978, that of "G" — in 1980. It was at that time that the sums were retained or otherwise deducted from the agent's commission in amounts equal to the damage incurred in connection with the two customer's insolvency. This shows that over years the defendant did not regard the claimant agent as liable for the damage incurred. This opinion is fully justified by the files of the case.

Taking into account the fact that the claimant demonstrated that he had been duly performing his duties, as set forth in the contract, and that the damage was sustained by the defendant under the circumstances for which the agent was not liable, there was adjudicated from the defendant to the agent the whole claimed amount of 126,760.61 DM as consisting of the sums of 115,504.61 DM and 9,256. — DM, representing retained and not questioned by the defendant, falling dues on account of commission.

The interest was adjudicated since 1 November, 1979, i.e. the date on which the commission fell due.

Since the claim proved to be justified as a whole, the defendant was also charged to pay the full cost of proceedings.

7) In the light of the above, the defendant's counter-claim for 162,260. — DM in damages proved unjustified. In view of the documentary and legal evidence, the basis of the counter-claim was identical with that of the main claim. As the agent was found to have fulfilled his duties in a proper manner, therefore the counter-claim was to be dismissed.

5. Award of 16 September, 1983 in the Case No. 110/81

1. In accordance with paragraph 88, points 1 and 3 of the CMEA General Conditions of Delivery 1968/76 the calculation of contractual penalties should in detail indicate the kind and quantity of goods delivered with a delay, as well as the length of that delay. In particular, when quarterly deliveries are involved, the calculation of an aggregate sum of penalties for three quarters of the year shall be insufficient.

2. In accordance with the General Conditions of Delivery 1968/75, the seller was not obliged to notify the buyer without delay of what data are required to supplement the claim.

Excerpt from Reasons

On 6 March, 1970 the parties signed a contract for spare parts deliveries according to specifications one and two constituting integral parts of the contract. The parties to the contract were the Polish foreign trade enterprise "B" or the seller and the Soviet foreign trade association "T" or the buyer. The Polish seller delayed its deliveries in the fourth quarter of 1979. In this connection, the Soviet purchaser charged his Polish partner to pay a contractual penalty in the amount of 25,053. — roubles (cf. the letter of 2 April, 1980). The Polish defendant did not pay the penalty. Therefore the claimant filed on 27 February, 1981 a claim for the payment of the above amount inclusive of interest rates and the costs of proceedings.

In his statement of defence dated 21 October, 1981 the defendant moved for the claim to be dismissed on the grounds that the Soviet claimant failed to calculate penalties with regard to each single item. He underlined the importance of the failure by indicating that the contract contains two different specifications. He further said that this shortcoming made it impossible for him to check whether the calculation was done accurately. He pointed to paragraph 88, point 3 of the CMEA General Conditions of Delivery 1968/75 as providing for the requirement to have penalty calculation sheets made out in detail and argued that the claimant's failure to meet this requirement should cause the claim to be dismissed. In this regard the defendant enclosed his letter dated 24 October, 1980 listing the penalties for the delayed deliveries of the first, second and third quarters of 1979, based on the two specifications. The total penalty amounted to 31,175. — roubles (separate claims were filed for the penalties covering the second and third quarters of the year). At the same time, the defendant asked the Tribunal to annulate the penalties in view of production difficulties encountered by the producer.

In his statements dated 21 December, 1981 and 21 February, 1983 the claimant rejected the seller's charge of non-compliance with paragraph 88 of the CMEA General Conditions of Delivery 1968/75. During the hearing on 16 December, 1983 the claimant's representative stated that the calculation was done properly, i.e. on the percentage value of the delayed deliveries, because it was almost impossible to determine the quantity of undelivered spare parts. Besides, he said the specifications provided for percentage deliveries in the different quarters of the year. The Soviet buyer also noted that his calculation was done in conformity with the contract. He charged also the defendant with the failure to comply with the requirement to give the answer in the course of thirty days to the buyer's note of 2 April, 1980, and with bringing up his non-compliance charge only in reply to the buyer's statement of claim.

The defendant's representative upheld the charge that in the letter of 2 April, 1980 the buyer had failed to comply with the conditions set forth in paragraph 88 of the CMEA General Conditions of Delivery 1968/75. He also questioned the buyer's stance on the accuracy of his calculation. At the same time, he insisted that the total penalty account for the three quarters of 1979 being in the files could not be regarded as evidence in the case since the claimant was obliged to prove the correctness of the penalty calculation for that quarter for which he claimed penalties, i.e. the fourth quarter of 1979.

Taking into account the documents submitted by the parties and after hearing the case of each, the Tribunal arrived at the following final conclusions:

1) The CMEA Conditions of Delivery 1968/75 were applicable to the contract of 6 March, 1979.

2) The contract was found to have repeated, in its point 12 "Sanctions", paragraph 88 of the CMEA General Conditions of Delivery. Whereas its Point 13 regards the General Conditions as binding for the part not regulated by the contract, it was concluded that applicable to the same part should be Chapter 14 "Contractual Penalties" of the General Conditions 1968/75, as well as the supplementary protocol signed by the Governments of the two parties. During the hearings on 16 September, 1983 the parties agreed with this conclusion.

3) The contract did not contain provisions which would alter the CMEA General Conditions of Delivery in the part concerning the manner of penalty calculation and allow to calculate penalties on the basis of delayed delivery values. Therefore, the penalties should have been calculated in line with paragraph 88, point 3 of the CMEA General Conditions of Delivery 1968/75, i.e. in the notification of claim or in an annex enclosed there to. However, it is noted that the claimant failed to submit the annex. The claimant's interpretation that his contractual penalties may be accounted according to the percentage value of the delayed deliveries on the grounds that the contract and its two integral specifications provide for percentage deliveries over particular quarters of the year could not be accepted as right. The indication of percentage quarterly deliveries was tantamount to saying that there should be percentage deliveries of each single item. Whereas the specifications list each single item in quantities to be delivered and whereas to the invoices were enclosed detailed specifications showing what items in what quantities were been delivered, therefore the contractual penalty claim should list each single item by quantity and value as delivered with a delay.

The claimant's letter of 2 April, 1980 failed to comply with those requirements of paragraph 88, point 3 of the CMEA General Conditions of Delivery 1968/75: to inform which single items from which specification were undelivered and to give the value of each undelivered item. In effect, the notification of claim did not include a penalty calculation but only indicated an aggregate penalty value without precizing which elements formed the basis of calculation. The requirement to provide detailed calculation, arising from paragraph 88 of the CMEA General Conditions of Delivery 1968/75, had already been established by this Court (cf. case No. Kol. A 52/79 and case No. 359/80), as well as in awards of the courts of arbitration in other CMEA countries, especially by those of Berlin and Prague. The correctness of the arbitral awards had been confirmed by the amendments made to the CMEA General Conditions of Delivery, in particular

to paragraph 88 point 2 which stated now still more clearly that if the claim is made for two or more items of a contract or of an enclosure thereto, contractual penalty estimates should be made separately for each single item (see the CMEA General Conditions of Delivery 1968/75, edition of 1979).

4) The charge that the defendant failed to comply with the requirement to provide the answer as to the merits within thirty days, in line with paragraph 89 of the CMEA General Conditions of Delivery 1968/75, was non-essential in view of the fact that paragraph 89 did not set forth sanctions for failure to comply with this requirement. The defendant gave his answer in the letter of 24 October, 1980, i.e. before the date on which the claim was filed. In that letter, the defendant made a request to cancel the penalty and enclosed his own penalty calculation sheet concerning the three quarters of 1979, the aggregate sum being 31,175.—roubles. It is noted that the claimant put his own penalty value at the total of 47,207.—roubles covering the same period. Upon receipt of the defendant's penalty calculation sheet the Soviet buyer did not make any attempt to explain the difference between the two aggregate sums. The fact that the two sums differed from each by so wide a margin showed that it was necessary to avoid a total value approach and strictly to comply with the requirements of paragraph 88, point 3 of the CMEA General Conditions of Delivery 1968/75.

5) For this litigation, non-essential was also the claimant charge that the defendant only in the statement of defence against the claim pleaded non-compliance with paragraph 88 of the CMEA General Conditions of Delivery 1968/75. The CMEA General Conditions of Delivery 1968/75, as applicable to this case, do not impose upon the defendant the duty to comply with the requirement of paragraph 74 points 2 and 4. Therefore, the defendant was under no obligation to notify the claimant as soon as possible of what data were required to supplement the claim. The latter requirement was introduced only in the 1979 edition of the CMEA General Conditions of Delivery 1968/75. Therefore the defendant was entitled to plea eventual shortcomings in defence of his rights until the closure of evidence proceedings.

6. Award of 16 November, 1983 in the Case No. 133/82

When typed on the reverse of the claimant's "general conditions of sale", an arbitration clause

may be recognized as binding in spite of the absence of separate signatures thereof, if the defendant does not question its validity and, furthermore, other provisions made in the same manner were executed by the defendant.

Excerpt from Reasons

The competence of the Court of Arbitration to settle the case is established by contract No. 53-261/00645, dated 16 July, 1980 and not objected to by the defendant.

As put down in typewriting on the reverse of the contract to provide for the competence of the Court of Arbitration at the Polish Chamber of Foreign Trade and to replace the deleted point 15 standard clause of "the general conditions of sale", the arbitration clause was not provided with initials to confirm both parties' consent to make amendments. However, the Tribunal decided that the defendant did not object to the amendments and that as a result the amended arbitration clause was a "special condition", as stated in the last sentence on Page 1 of the contract. The fact of acceptance of the clause by the defendant is established by the following evidence:

- the defendant voiced no objection to the clause,
- he contacted directly the Court of Arbitration at the Polish Chamber of Foreign Trade,
- besides the arbitration clause, there was also typed on the other side of the contract a commitment concerning a.o. daily charges for the overtime holding of tanks. The defendant raised no objection to this commitment and fulfilled it.

7. Award of 29 December, 1983 in the Case No. 139/82

If in the contract the parties set the time of delivery by designating it as "I-II" quarters of a given year, therefore it must be assumed that the delivery should take place in equal parts within the time limit of each quarter.

Excerpt from Reasons

On 17 June, 1982 the Romanian foreign trade enterprise "M" filed a claim requesting the adjudication from the Polish foreign trade enterprise "B" of the payment of 8,147.—roubles, with 4-percent interest p.a. counted from the said amount for the time from the date of payment falling due to the date of payment, and also the cost of arbitration fees in the case.

The above sum was made up of several claims for contractual penalties due from the Polish supplier for delaying the delivery of goods to the Romanian purchaser.

On the grounds of contract No. 32-332/8-0480, the Polish seller was bound to deliver spare parts in the fourth quarter of 1980 and in the first-second quarters of 1981.

As stated in the claim, the Polish seller failed to deliver on time the quantity of goods worth 69,274.—roubles. As the delay was longer than 94 days, the Rumanian buyer calculated a contractual penalty of 8 percent, i.e. in the amount of 5,541.—roubles.

In the statement of defence the Polish seller submitted his own calculation wherein he admitted his failure to deliver on time the quantity of goods valued at 50,670.—roubles, what would make the claimed penalty excessive. He agreed to pay the amount of 4,053.—roubles and moved for the remainder of the claim equal to 1,488.—roubles to be dismissed.

In the letter of 31 March, 1983 "M" disagreed with the Polish seller's view, asserting that the latter's calculation was flawed in so far as it concerned the undelivered spare parts' value.

During the hearing of 15 December, 1982 the Polish supplier filed invoice duplicates Nos. 7048, 7453 and 7844 concerning those deliveries which were to take place in the second quarter of 1981, as provided for in the contract. He also filed the respective letters of advice from the "C. Hartwig" International Forwarding Enterprise of Katowice, stating dates on which the invoiced goods crossed the border.

The Tribunal considered the following:

Contract No. 32-332/8-8-0480 of 17 April, 1980, as amended on 6 September, 1980, envisaged a spare part delivery valued at 612,105.—roubles. One half of the delivery was to take place in the fourth quarter of 1980, the other half—as stated without precision in the contract, in "first-second" quarters of 1981. Advance deliveries were also allowed.

In view of the failure to set the exact date of the deliveries in 1981, consideration must be given to the settlement, what spare part quantities (in terms of value) should have been delivered in the first quarter of 1981 and what quantities—in the second quarter of 1981.

The Tribunal assumed the following opinion:

The parties' declaration of intent with respect to the dates of delivery in 1981 may be interpreted only in a manner indicating that both the first and the second quarters were the time of delivery. For if in the respective clause of the contract they clearly designated the two quarters as the time of delivery of goods, therefore they agreed that the delivery of the goods would be taking place in each of the two quarters. Any other interpretation would have been wrong. In particular, it cannot be interpreted that the delivery as a whole could have taken place in the second quarter of 1981 since this way of thinking would have denied any importance to an express contractual clause which said that the delivery would take place in the first-second quarters of 1981.

In view of the fact that the clause did not exactly say what deliveries (in terms of value or quantity) should take place in the first quarter of 1981, and what deliveries should take place in the second quarter of 1981, the parties' declaration of intent should be interpreted so that deliveries should be effected in a respective — equal — part in each quarter.

This interpretation is more in line with paragraph 11, point 1 of the CMEA General Terms of Delivery 1968/75, in the edition of 1979 and with the practice of CMEA arbitration courts. E.g. it is possible to invoice the awards made by the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw: one in the case No. 189/79 of 1 April, 1980 and the other in the case No. 84/82, of February 24, 1983; further the award No. 194 made on 15 August, 1983 by the Arbitration Commission at the Chamber of Trade and Industry of the Socialist Republic of Romania.

Similar views are expressed in jurisprudence; see e.g. KEMPER, STROHBACH and WAGNER: *Die Allgemeinen Lieferbedingungen des RWG 1968 in der Spruchpraxis sozialistischer Aussenhandsschiedsgerichte* [*The CMEA General Conditions of Delivery of 1968 in the Light of Awards of Socialist Foreign Trade Arbitration Courts*], Berlin 1975, page 151 and following.

BOOK REVIEWS * COMPTES RENDUS

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Jerzy JAKUBOWSKI, Maciej TOMASZEWSKI, Andrzej TYNEL, Andrzej W. WIŚNIEWSKI, *Zarys międzynarodowego prawa handlowego* [*Précis de droit commercial international*], Warszawa 1983, Państwowe Wydawnictwo Naukowe, pp. 312.

Il n'est pas facile, dans un monde qui se caractérise par la pluralité des systèmes juridiques, d'établir quelles seront les règles applicables à une transaction entre les partenaires originaires des différents pays. Dans ce cas, il faudra d'abord chercher les règles de conflit, désigner ensuite le système juridique national qui sera compétent pour la solution du problème et, enfin, trouver et appliquer des normes juridiques appropriées de ce système.

Cette procédure, dont les résultats sont incertains déjà au moment de la conclusion d'un contrat, ne fait qu'augmenter les risques et incertitudes dans les échanges commerciaux. Il n'est pas faux, dans cet état de choses, d'affirmer que l'antinomie entre le caractère international des opérations commerciales effectuées entre les partenaires de différents pays et le caractère national de normes qui leur sont applicables constitue un obstacle réel au développement du commerce international.

La solution de cette contradiction s'opère progressivement par voie de règles commerciales unifiées adoptées aussi bien à l'échelle universelle qu'au niveau régional. Ce processus se développe sous les auspices de plusieurs organismes internationaux et notamment la Commission des Nations Unies pour le droit commercial international (sigle anglais: UNCITRAL) créée en 1966. Les résultats sont déjà bien connus : la conclusion de plusieurs traités internationaux qui contiennent des normes juridiques unifiées régissant certains aspects des échanges internationaux, la codification d'usages com-

merciaux, la rédaction de plusieurs contrats types et de conditions générales de certaines opérations commerciales. La question qui s'impose est de savoir si les actes en question constituent un complément à la réglementation nationale ou bien s'agit-il d'une branche juridique nouvelle — le droit commercial international — qui se distingue par sa propre méthodologie, ses propres sources et un champ d'application particulier ?

Les auteurs de l'ouvrage étudié penchent, non sans quelques hésitations, pour la deuxième solution. Nous sommes donc en présence d'un premier livre polonais, et l'un des rares dans la littérature mondiale, qui présente la conception du droit commercial international et systématise ses institutions. L'intérêt du lecteur est d'autant plus grand que les quatre auteurs étudient notamment, d'une manière complète, l'oeuvre d'unification des règles commerciales entreprise par le Conseil d'Assistance Economique Mutuelle et la réglementation du commerce international propre aux pays à économie centralement planifiée.

Pour ce qui est de la conception même du droit commercial international, les auteurs estiment qu'il s'agit des normes d'origine internationale relatives aux rapports de droit civil en matière de coopération internationale économique, scientifique et technique, issues soit de la législation internationale, soit de la pratique internationale sous forme d'usages et de contrats types (p. 12). Autrement dit, cette conception de droit commercial international n'englobe ni les normes nationales

régissant les opérations commerciales, ni les normes de droit international public concernant les aspects de droit public dans la conclusion et l'exécution de ces contrats.

Conformément à cette définition, les auteurs distinguent deux sources du droit commercial international. En premier lieu, il s'agit de la législation internationale qui comprend les traités internationaux et les résolutions d'organisations internationales visant à unifier, à l'échelle mondiale ou régionale, les normes applicables au commerce international (p. 15). La deuxième source, qualifiée de droit commercial autonome (*lex mercatoria*), englobe les usages et les pratiques de commerce unifiées à l'échelle internationale (pp. 24—27).

Dans cette conception, on ne doit pas ignorer que les deux sources se distinguent quant à la force obligatoire de leurs normes. En effet, la valeur juridique des usages dépend chaque fois, et les auteurs du livre ne manquent pas de le souligner, de la volonté du législateur national. Celui-ci peut consentir à ce que les parties soumettent une transaction internationale aux usages ou aux pratiques de commerce international ou bien autoriser les tribunaux à appliquer ces usages et pratiques même si les parties n'ont pas exprimé une telle volonté. Cependant, dans les deux cas, l'application de ces usages et pratiques ne peut pas déroger, au moins en ce qui concerne le droit polonais, aux normes impératives du système juridique national (*ius cogens*). Ce caractère non homogène des sources du droit commercial international constitue la principale faiblesse de la conception présentée qui admet l'autonomie de ce droit par rapport au droit national et aux normes de droit international public.

Après avoir présenté la conception et les sources du droit commercial international, les auteurs étudient non seulement les normes unifiées, les usages et les pratiques du commerce international, mais abordent également l'ensemble des problèmes juridiques liés à la réglementation des échanges internationaux. Cette approche mérite d'être sou-

lignée et elle revêt un grand intérêt pour le lecteur.

La désignation de la loi compétente pour régir les opérations commerciales internationales est présentée largement et avec maîtrise. Recourant à des méthodes comparatives, l'ouvrage traite des règles de conflit et des méthodes de la désignation de la loi compétente dans le système juridique polonais. Les auteurs analysent également la position juridique des sujets des transactions internationales.

Avant d'étudier les différents types de contrats apparaissant dans le commerce international, un chapitre à part est consacré aux problèmes communs à ces contrats à savoir la notion de transaction internationale, la conclusion et l'interprétation des contrats commerciaux, les fondements et les limites de la responsabilité contractuelle, les circonstances exonérant de cette responsabilité, l'influence du changement des circonstances sur les obligations de commerce international ainsi que la prescription.

Parmi les différents types de contrats, le contrat de vente occupe dans ce livre une place de premier plan. Le chapitre consacré au contrat de vente présente les solutions adoptées dans la convention de Vienne de 1980 sur le contrat de vente internationale de marchandises, les dispositions des Conditions générales de livraison du Conseil d'Assistance Economique Mutuelle, 1968/1975 dans leur version de 1979), et, enfin, les règles internationales d'interprétation des principaux termes commerciaux (Incoterms).

Le livre se termine par les chapitres relatifs aux modalités de paiements, aux garanties et à l'arbitrage commercial international.

Même si l'on ne partage pas la conviction des auteurs qui proclament la naissance d'une nouvelle branche du droit — le droit commercial international, la présentation de leur conception attire pertinemment l'attention sur l'importance croissante du processus d'unification du droit régissant les opérations commerciales internationales. Cette approche, accompagnée d'une analyse de solutions nationales adoptées par les systèmes juridiques

des Etats jouant un rôle fondamental dans les opérations commerciales — et c'est le cas de l'ouvrage étudié — permet de constater que nous avons affaire à un livre de grande

valeur, indispensable à tout juriste qui s'occupe des problèmes du commerce international.

Andrzej Burzyński

Podstawy prawnoorganizacyjne stosunków PRL z zagranicą [Les fondements juridiques des relations extérieures de la République Populaire de Pologne], ouvrage collectif sous la direction de Maria Frankowska, Wrocław 1983, Ossolineum, pp. 158.

Les juristes polonais consacraient jusqu'à présent peu d'attention à l'étude du cadre juridique des relations extérieures de la Pologne et il manquait dans ce domaine une étude traitant de l'ensemble du sujet. Cette importante lacune vient d'être comblée par l'ouvrage dirigé par Mme Frankowska.

Le livre en question se compose de neuf chapitres qui ont pour objectif de présenter d'une manière complète, mais par la force des choses non exhaustive, le droit polonais régissant les relations extérieures du pays. Il s'agit, selon Mme Frankowska, d'un ensemble des normes relatives à la création d'organes étatiques qui agissent dans les relations extérieures, aux compétences et aux fonctions de ces organes, et au contrôle et à la coordination de leurs activités (p. 6).

Le sujet est abordé sur plusieurs plans. On y trouvera d'abord l'analyse du rôle de la Diète (parlement), du Conseil d'Etat (émanation de la Diète, composée de 17 députés) et du Conseil des ministres, suivie de l'étude du cadre juridique relatif à la conclusion des traités par la Pologne, à l'organisation du service diplomatique et consulaire, à l'organisation de la coopération avec l'O.N.U. et ses institutions spécialisées, un chapitre à part étant réservé à la coopération avec le Conseil d'Assistance Economique Mutuelle (C.A.E.M.). Les deux derniers chapitres sont consacrés au droit polonais régissant la coopération économique avec l'étranger et la coopération culturelle, scientifique et technique.

Cette approche semble assez intégrale et satisfaisante. On doit cependant relever l'absence d'un chapitre fonctionnel portant sur

la coordination et le contrôle des activités extérieures des organes de l'Etat. Ces problèmes ne sont pas absents dans l'ouvrage dirigé par le professeur Frankowska, car certains chapitres en font mention, mais il manque une image complète. On pourrait également envisager l'éventualité d'un chapitre particulier consacré au ministre des Affaires étrangères, dont le rôle apparaît à travers tout le livre, mais une telle conception nécessiterait inévitablement plusieurs répétitions dans les autres parties.

Les neuf auteurs se recrutent parmi les théoriciens et les praticiens polonais. Cette collaboration semble toujours souhaitable. Cependant, comme dans la plupart d'ouvrages collectifs, les contributions sont souvent d'une valeur inégale. D'une manière générale, l'essentiel de chacun des neuf chapitres est consacré à la présentation du droit polonais en vigueur, mais seulement certains auteurs l'analysent en profondeur, portent un jugement et formulent des recommandations pour l'avenir.

Dans l'avant-propos, Mme Frankowska met l'accent sur les traits généraux du droit polonais en la matière et souligne son hétérogénéité (normes du droit international et normes de diverses branches du droit national). Elle attire à juste titre l'attention sur le fait que ce droit national est, dans la plupart des cas, assez récent et date de la fin des années soixante. D'autre part, il est assez peu connu du public et subit de nombreuses modifications. Enfin, elle juge peu satisfaisant la situation dans laquelle la plupart de ces normes figurent dans

des résolutions *sui generis* du Conseil des ministres (résolutions qui n'ont pas leur fondement direct dans une loi) et ne sont pas publiées.

Dans le premier chapitre, A. Gwizdź étudie le rôle de la Diète et constate qu'en votant la Constitution de 1952, la Diète ne s'est pas attribuée de compétences particulières en matière de relations extérieures. Cependant, il n'existe pas de doute que la Diète, organe suprême du pouvoir, dispose d'une compétence générale dans ce domaine (la ratification des traités mis à part). Etudiant les activités du parlement, l'auteur aboutit à la conclusion que celui-ci consacre peu d'attention aux problèmes internationaux et que, par conséquent, la réalité ne correspond pas au modèle doctrinal et constitutionnel (p. 19).

De l'avis de M. Gwizdź, il serait souhaitable que la Diète reçoive de plus amples renseignements relatifs aux relations extérieures, y compris aux accords internationaux conclus par la Pologne. Il souligne également la nécessité des amendements constitutionnels concernant la force obligatoire des normes internationales dans l'ordre juridique polonais et la participation du parlement au processus de ratification des traités. Il recommande enfin de conférer à la Diète le droit de contrôler l'endettement extérieur du pays, une compétence qui vient de lui être attribuée en 1982.

Le deuxième chapitre, par S. Gebert, porte sur le rôle du Conseil d'Etat, qui constitue une sorte de présidence collégiale de la République. Aux termes de la Constitution, le Conseil d'Etat ratifie et dénonce les traités internationaux. M. Gebert étudie largement cette compétence ainsi que les pouvoirs de cet organe en matière d'accréditation de diplomates, de nomination de certains fonctionnaires du service diplomatique et consulaire polonais, de défense nationale, etc. Manquent dans cette partie une appréciation de l'état actuel de la législation et des recommandations pour l'avenir.

J. Kuciński se penche, dans le troisième chapitre, sur le rôle du Conseil des ministres. Il analyse d'abord les compétences

du gouvernement et ensuite les compétences de ses membres et de certains organes du Conseil des ministres. Il attire l'attention sur le fait que la Constitution ne confère pas au gouvernement de compétences particulières en matière de politique étrangère et se limite à une formule générale selon laquelle « Le Conseil des ministres assure la direction générale des relations avec les autres Etats » (art. 41 pt 9 de la Constitution). Les compétences particulières du gouvernement sont néanmoins définies par certaines résolutions *sui generis* du Conseil des ministres lui-même, actes généralement non publiés. Dans l'analyse de ces résolutions, l'auteur souligne pertinemment le rôle de premier plan joué dans les relations extérieures par le Parti Ouvrier Unifié Polonais (pp. 40—44).

Pour ce qui est de la compétence du gouvernement à conclure des traités, l'auteur estime que malgré le silence de la Constitution, la compétence du gouvernement à ce sujet est universellement reconnue par le droit international. Toutefois, cet état de choses ne doit pas, selon lui, empêcher l'adoption d'une loi dans laquelle la Diète définirait avec précision quels traités peuvent être conclus par le gouvernement. J. Kuciński insiste également sur la nécessité d'informer régulièrement le parlement des accords conclus par le gouvernement et sur l'utilité de la publication de certains d'entre-eux (pp. 48 et 64).

Dans le quatrième chapitre, Mme Frankowska aborde le problème de la compétence d'organes de l'Etat à conclure et à dénoncer les traités. Aux termes de la Constitution, le Conseil d'Etat est un organe compétent à ratifier et à dénoncer les traités (art. 30 pt 8). Cependant, dans la pratique, seulement 15% environ des traités conclus par la Pologne sont soumis à la procédure de ratification tandis que les autres sont valablement conclus par le Conseil des ministres ou par les ministres. Leur capacité à cet égard est reconnu par le droit international, mais le droit polonais devrait partager avec précision cette compétence entre divers organes. Dans ce contexte, Mme Frankowska étudie la

résolution *sui generis*, non publiée, adoptée en 1968 par le Conseil d'Etat et le Conseil des ministres relative à la conclusion et à la dénonciation des accords internationaux.

Son analyse est couronnée de brèves, mais importantes recommandations parmi lesquelles on citera la participation de la Diète au processus de ratification de traités, la solution constitutionnelle du problème de la force obligatoire des traités dans l'ordre interne polonais avec la reconnaissance explicite de la priorité des normes internationales devant la législation nationale, l'élévation au rang d'une loi de la résolution *sui generis* de 1968, la ratification par la Pologne de la convention de Vienne sur le droit des traités de 1969 (pp. 81—82).

Dans le cinquième chapitre, J. Sutor présente l'organisation du service diplomatique et consulaire polonais. La Pologne est partie aux deux conventions de Vienne de 1961 et 1963. L'auteur étudie également les normes du droit polonais en la matière. Certaines de ses recommandations, et notamment celle concernant le rétablissement de l'institution de consuls honoraires, se sont réalisées avec la récente loi consulaire polonaise de 1984. Il souligne cependant l'absence dans la législation polonaise d'une loi régissant le statut du service diplomatique (p. 94).

Dans le sixième chapitre, G. Grabowska étudie les sources du droit (international et national) relatives à la participation de la Pologne aux organisations internationales universelles et notamment les formes de la représentation de la Pologne et le rôle des organes nationaux dans ce domaine. Dans sa conclusion, l'auteur estime qu'il est pour l'instant difficile de parler d'un ensemble homogène et stable des normes nationales dans cette matière (p. 117). Elle met également l'accent sur la nécessité de renforcer les fonctions de coordination du ministre des Affaires étrangères dans la diplomatie multilatérale. Elle indique enfin que la Pologne a ratifié la convention de Vienne de 1975 sur la représentation des Etats dans leurs relations avec les organisations internationales universelles.

Le septième chapitre, par Z. Szaniawski, apporte des renseignements intéressants sur les normes du droit polonais régissant la coopération avec le C.A.E.M. L'auteur souligne que, pour la plupart des cas, ces normes font partie des résolutions *sui generis* du Conseil des ministres et ne sont pas publiées, ce qui ne facilite pas leur étude.

Dans l'analyse de ces résolutions, Z. Szaniawski se penche sur la position spéciale du Représentant permanent de la Pologne auprès du C.A.E.M. ainsi que sur la composition et les compétences des délégations polonaises aux réunions des organes du C.A.E.M. Il met l'accent sur le rôle dominant du Représentant permanent (il s'agit de l'un des vice-présidents du Conseil des ministres) qui dirige la coopération du pays avec cette organisation, le rôle des autres organes étant sensiblement réduit.

L'auteur arrive à la conclusion que l'état du droit polonais régissant la coopération avec le C.A.E.M. n'est pas satisfaisant et que les normes en question sont peu cohérentes et d'un niveau peu élevé (p. 130). Il recommande notamment d'élever au rang de loi une grande partie des actes définissant les compétences des organes nationaux en la matière et un net partage de ces compétences (p. 130).

Dans le huitième chapitre, A. Janik présente le cadre juridique de la coopération économique avec l'étranger. La majeure partie de son exposé est consacrée au rôle du ministre du Commerce extérieur et au président de la Commission du Plan. Il s'agit d'un sujet intéressant qui mériterait sans doute une monographie à part, compte tenu notamment de la réforme économique en cours en Pologne.

Pour ce qui est des services extérieurs, A. Janik regrette l'élimination des tâches économiques du ressort des consuls polonais. Les conseillers commerciaux, bénéficiant d'un statut diplomatique, ne peuvent pas, selon lui, jouer le même rôle et ne contribuent pas de manière satisfaisante au développement des échanges commerciaux de la Pologne (pp. 141—142).

Dans le dernier chapitre, J. Machowski analyse les dispositions juridiques relatives

à l'organisation de la coopération culturelle, scientifique et technique avec l'étranger. Limité à une description assez superficielle des normes en vigueur, ce chapitre manque d'appréciation et de conclusions.

En résumé, grâce à cet ouvrage, le lecteur polonais peut se faire une idée générale du droit régissant les relations extérieures

de son pays. Il s'agit d'un livre très utile et assez complet qui sert la théorie et la pratique. Certaines lacunes, mentionnées plus haut, et une lecture attentive doivent indiquer, les orientations des futures recherches.

Jerzy Kranz

Obrót prawny z zagranicą w sprawach cywilnych i karnych. Umowy międzynarodowe PRL [Rapports juridiques avec l'étranger en matières civile et pénale. Les traités de la République Populaire de Pologne], par Adam Zieliński, Warszawa 1983, Wydawnictwo Prawnicze, pp. 625.

Wybór źródeł polskiego prawa prywatnego międzynarodowego [Recueil de sources de droit polonais privé international], par Andrzej Mączyński et Józef Skąpski, Warszawa 1983, Państwowe Wydawnictwo Naukowe, pp. 419.

Konwencje Międzynarodowej Organizacji Pracy ratyfikowane przez Polskę [Conventions de l'Organisation internationale du Travail ratifiées par la Pologne], par Michał Seweryński, Warszawa 1983, Instytut Wydawniczy Związków Zawodowych, pp. 399.

Od Helsinek do Madrytu. Dokumenty Konferencji Bezpieczeństwa i Współpracy w Europie 1973—83 [From Helsinki to Madrid. Conference on Security and Co-operation in Europe Documents 1973—83], par Adam D. Rotfeld, Warszawa 1983, Polski Instytut Spraw Międzynarodowych, pp.

L'accès aux sources du droit est une chose de grande importance pour chaque juriste. Les sources du droit des gens sont parfois dispersées ce qui résulte notamment de la multitude de sujets participant à la législation internationale. Dans ce contexte, quatre recueils de traités, qui viennent de paraître en 1983 en Pologne, doivent être accueillis avec satisfaction.

La parution de ces recueils fait réfléchir sur l'état de la publication de textes internationaux en Pologne. Dans la période après 1945, il faut mentionner les trois volumes édités entre 1954 et 1960 par L. Gelberg *Prawo międzynarodowe i historia dyplomatyczna. Wybór dokumentów [Droit international et histoire diplomatique. Recueil de documents]*, ainsi que quatre volumes contenant les statuts des principales organisations internationales, un ouvrage collectif, paru entre 1961 et 1973 sous les auspices de

l'Institut polonais des affaires internationales. Une fois terminés, ces travaux n'ont pas été complétés ni mis à jour. On doit également rappeler *Wybór dokumentów do nauki prawa międzynarodowego [Recueil de documents destinés à l'enseignement de droit international]* dont la quatrième édition date de 1978 (sous la direction de K. Kocot et K. Wolfe).

Parmi les recueils édités de façon continue, une place importante revient au *Zbiór dokumentów [Recueil de documents]* qui paraît depuis 1945 et fait suite au même recueil édité depuis 1933 par le professeur J. Mąkowski. *Zbiór dokumentów*, qui reproduit en deux langues (le polonais et une langue étrangère) les textes de principaux documents diplomatiques, traités et résolutions d'organisations internationales, est cependant retardé de plus de trois ans (les derniers documents datent de 1980). La situation est encore

pire pour ce qui est du *Zbiór umów międzynarodowych PRL* [*Récueil de traités de la République Populaire de Pologne*] dont le dernier volume contient des accords internationaux datant de 1969. D'autre part, ce recueil de traités n'a pas un caractère officiel et seulement certains accords internationaux de la Pologne y sont publiés. Tous les traités ratifiés sont reproduits dans le « *Dziennik Ustaw* » (Journal des Lois) tandis que les traités dont l'entrée en vigueur ne nécessite pas la ratification sont publiés sélectivement. La doctrine polonaise du droit des gens juge cet état de choses peu satisfaisant.

Les textes édités par le professeur Zieliński et par les professeurs Mączyński et Skąpski concernent en partie la même matière. Le recueil de MM. Skąpski et Mączyński est divisé en quatre parties. Dans la première figurent les dispositions du droit polonais relatives aux affaires civiles contenant un élément étranger. La deuxième comprend les conventions multilatérales portant sur les rapports juridiques en matière civile et notamment les conventions relatives au droit des personnes, au droit familial, au droit successoral, à la traite et aux chèques, à la propriété intellectuelle, aux transports aériens et par route, à la procédure civile et à l'arbitrage commercial. La troisième partie est consacrée aux accords bilatéraux choisis, conclus par la Pologne dans ce domaine. La dernière partie porte sur le problème de nationalité et elle est divisée en dispositions du droit polonais, conventions multilatérales et conventions bilatérales de la Pologne.

Le choix de documents dans la quatrième édition de ce recueil semble assez complet et exhaustif malgré l'absence de certaines conventions relatives aux transports maritimes et des conditions générales de différents types de contrats passés par les entreprises des Etats membres du Conseil d'Assistance Economique Mutuelle. Ces lacunes semblent sans grande importance étant donnée que le recueil est surtout destiné aux étudiants des facultés de droit.

L'ensemble des textes réunis par le professeur Zieliński est, à certains égards, plus complet et il englobe les conventions inter-

nationales conclues par la Pologne en matière civile et pénale. Le précédent recueil de ce genre datait de 1966 et fut en partie périmé. L'ouvrage est divisé en deux parties : conventions bilatérales et conventions multilatérales. En vue de mieux servir les juges, les avocats et les fonctionnaires, qui sont ses principaux destinataires, ce recueil contient des textes entiers et non des extraits.

Le professeur Zieliński précise que dans son choix de textes, il s'est limité aux accords régissant les rapports juridiques avec un élément étranger et dont les normes sont appliquées sur le territoire polonais sans nécessité d'édicter des règles d'application par les autorités polonaises, donc — pour la plupart des cas — des normes auxquelles renvoie expressément le droit polonais. Par conséquent, les traités obligeant la Pologne à modifier son droit interne ainsi que les conventions consulaires et celles relatives à la nationalité sont absentes de ce recueil. Tout choix étant subjectif, il semble que celui du professeur Zieliński repose sur un critère logique.

Pour ce qui est de conventions multilatérales, le recueil reproduit dix-sept d'entre elles, mais dans la partie introductive sont énumérées tous les principaux traités multilatéraux conclus dans ce domaine par la Pologne, avec indication des journaux officiels polonais dans lesquels ils ont été publiés. Quant aux accords bilatéraux, ils y figurent tous, ce qui fait augmenter la valeur du recueil.

Le professeur Seweryński a réuni dans son ouvrage toutes les conventions de l'Organisation internationale du Travail ratifiées par la Pologne jusqu'à la fin de 1982. Ce recueil comble une importante lacune, car — mis à part un recueil du même genre tiré à 400 exemplaires en 1969 — l'accès à ces conventions, datant en partie d'avant 1939, fut difficile, ceci malgré leur publication dans le « *Dziennik Ustaw* ».

Le recueil se divise en trois parties. La première, introductive, présente la naissance de l'O.I.T. sa structure, sa législation, l'application et le contrôle d'application de ses conventions et recommandations ainsi que

l'influence du droit élaboré au sein de l'O.I.T. sur les systèmes juridiques nationaux. Dans la deuxième partie figurent les textes entiers des 74 conventions ratifiées par la Pologne. La troisième partie contient les textes de la constitution de l'O.I.T. de la déclaration de Philadelphie de 1944 ainsi que la liste de toutes les conventions de l'O.I.T.

Avec les 74 conventions ratifiées, la Pologne — qui appartient aux membres originaires de l'O.I.T. — se place à l'avant-garde des pays membres quant au nombre de ratifications. Le professeur Seweryński souligne l'influence positive des conventions de l'O.I.T. sur la législation polonaise du travail d'avant 1939. Au lendemain de la Seconde Guerre mondiale, avec le changement du régime social, la législation polonaise dépassait souvent le niveau des standards sociaux élevés prévus dans les conventions de l'O.I.T. Cependant, remarque l'auteur, avec l'écoulement du temps cette situation a changé et la législation polonaise actuelle est parfois en retard en comparaison avec les standards de l'O.I.T.

L'édition du recueil de M. Rotfeld est bilingue. Les documents reproduits et l'introduction de l'auteur sont publiés parallèlement en polonais et en anglais. Dans la première partie, l'auteur, qui a participé, en tant que membre de la délégation polonaise, aux travaux de la Conférence sur la Sécurité et la Coopération en Europe, présente la genèse de cette conférence, son déroulement, ses résolutions (leur caractère juridique et la prise de décisions) et ses développements. Selon M. Rotfeld, la C.S.C.E. et notamment l'Acte final d'Helsinki de 1975, « reflète l'équilibre des intérêts de tous les pays participant » à cette conférence tandis que

celle-ci constitue « un succès commun et une réussite politique la plus importante dans l'histoire des pays européens » (p. 49). Il estime également que « les institutions durent en règle générale plus longtemps que les conditions qui ont permis leur établissement » et que les structures issues de la conférence d'Helsinki « ont fait preuve de leur vivacité en tant qu'institutions de dialogue et de concertation » (p. 84).

Dans la deuxième partie, figurent dix documents de la conférence à savoir ceux qui expriment le consensus de tous les participants. Etant donné que le recueil est destiné aux chercheurs, hommes politiques et journalistes, ce choix n'est pas sans reproche car certains autres documents méritent sans doute d'être publiés. Parmi les textes reproduits dans cette partie figurent l'Acte final d'Helsinki, les documents finals des réunions de Belgrade (1977) et de Madrid (1983) ainsi que quelques comptes rendus d'experts.

La troisième partie contient les textes de quatorze documents officiels présentés au cours des travaux de la C.S.C.E. par la Pologne, y compris quelques documents déposés en commun avec certains autres pays socialistes.

En conclusion, les recueils de documents parus en 1983 créent de meilleures conditions pour l'étude du droit et des relations internationales. Certains d'entre-eux présentent une grande importance pour les juristes praticiens et pour l'ensemble des citoyens. Il s'agit donc d'un pas en avant et dans le bon sens. Cependant, le juriste ne doit pas se contenter de la situation actuelle ou plusieurs traités et documents internationaux attendent leur publication en Pologne.

Jerzy Kranz

Accords internationaux de la Pologne**1982—1983**

La liste publiée ci-dessous comprend les principaux accords internationaux, bilatéraux et multilatéraux, entrés en vigueur à l'égard de la Pologne (ou dénoncés par elle) en 1982 et 1983. Les arrangements administratifs (accord conclus entre les ministres) sont absents de ce registre qui ne contient que les accords conclus au nom du Conseil d'Etat ou du gouvernement polonais. Les protocoles (p. ex. protocoles annuels rentrant dans le cadre d'un accord à long terme), les plans et les programmes d'exécution joints aux accords en question ne figurent non plus sur cette liste.

Conformément à la Constitution polonaise, le Conseil d'Etat — composé de 17 députés à la Diète (parlement) — est le seul organe autorisé à ratifier et à dénoncer les traités internationaux. La ratification mise à part, le droit polonais prévoit que le consentement à être lié par un accord peut également être valablement exprimé par le Conseil des ministres, soit sous forme d'approbation (*approval*), soit sous forme de signature par un plénipotentiaire dûment autorisé ; certains accords sont conclus par un échange de notes. Enfin, les ministres ont également la compétence pour conclure des accords internationaux à condition que la matière régie par l'accord soit du ressort d'un ministre.

La Constitution polonaise ne précise pas quels sont les accords internationaux qui nécessitent la procédure de ratification. Selon la résolution conjointe du Conseil d'Etat et du Conseil des ministres, en date du 28 décembre 1968, relative à la conclusion et à la dénonciation des traités, sont soumis à la ratification les traités ayant une importance particulière dont :

— les traités de paix ainsi que les traités d'amitié, de coopération et d'assistance mutuelle,

— autres traités ayant le caractère politique,

— les traités concernant les matières régies, en droit interne, par les lois,

— les traités contenant des dispositions qui diffèrent des solutions retenues par la législation interne,

— autres traités pour lesquels la Pologne s'est engagée à suivre la procédure de ratification afin de satisfaire aux exigences de droit de l'autre partie contractante, ou si les parties sont convenues de procéder de cette manière pour des raisons particulières.

La résolution de 1968 ne spécifie pas quels traités doivent être obligatoirement soumis à la procédure d'approbation.

Dans la pratique, seulement 15 à 20 pour cent des traités conclus par la Pologne suivent la procédure de ratification. Tous les traités ratifiés sont publiés dans « Dziennik Ustaw » (Journal des Lois) destiné à la publication des lois et des règlements. Les traités non ratifiés sont publiés très sélectivement. Il n'existe pas en Pologne un recueil officiel des traités.

Les traités bilatéraux figurent sur cette liste par pays, dans l'ordre alphabétique (alphabet anglais) selon le schéma suivant : titre du traité, lieu et date de sa signature, mode d'expression par la Pologne du consentement à être lié, date de l'entrée en vigueur à l'égard de la Pologne. Les traités multilatéraux observent le même schéma. Les titres des accords conclus dans une autre langue que l'anglais ou le français sont traduits en l'une de ces langues.

Traités bilatéraux

Algeria

— Agreement concerning the legal cooperation in civil and penal cases, Algiers, 9 November 1976; ratification; 26 February 1982.

Benin

— Arrangement portant suppression de visas pour les titulaires de passeports diplomatiques et de service, le 29 mars 1982 ; échange de notes ; le 2 juillet 1982.

Bulgaria

— Agreement on mutual recognition of documents concerning education, scientific degrees and titles, Sofia, 28 October 1977; ratification; 5 December 1982.

Canada

— Agreement relating to the export into Canada of certain textiles and textile products, Ottawa, 14—16 September 1981; approval; 1 May 1982.

— Agreement on mutual fisheries relations, Ottawa, 14 May 1982; exchange of notes; 15 May 1982.

Colombia

— Agreement on cultural and scientific cooperation, Bogota, 10 March 1981; ratification; 10 August 1983.

Costa Rica

— Agreement on cultural, scientific and technological cooperation, San José, 31 October 1979; ratification; 3 December 1982.

Cyprus

— Agreement on international transport by road, Nicosia, 24 January 1981; approval; 13 January 1983.

Czechoslovakia

— Agreement concerning the activities of Centers of Information and Culture, Prague, 10 December 1982; approval; 7 June 1983.

— Agreement on exchange of goods and payments, Warsaw, 30 October 1983; signature; 30 October 1983.

Germany, Democratic Republic of

— Agreement concerning the execution of the Convention on the transfer of persons sentenced to prison with the purpose of serving this sentence in the State of their nationality, Berlin, 19 May 1978, signature 9 December 1981; approval; 20 June 1982.

Iraq

— Consular convention, Baghdad, 16 April 1980; ratification; 24 July 1982.

Italy

— Convention on the veterinary cooperation, Rome, 16 May 1978; ratification; 26 March 1982.

Japan

— Agreement on the avoidance of double taxation with respect to income taxes, Tokyo, 20 February 1980; ratification; 23 December 1982.

Korea, People's Republic of

— Consular convention, Warsaw, 3 August 1982; ratification; 30 June 1983.

Morocco

— Convention relative à l'entraide judiciaire en matière civile et pénale, Varsovie, le 21 mai 1979; ratification; le 27 novembre 1982.

Soviet Union

— Agreement on economic and technical cooperation in construction of a subway in Warsaw, Moscow, 7 June 1982; signature; 7 June 1982.

— Agreement on cooperation in construction of a nuclear power plant in Poland, Moscow, 14 April 1983; signature; 14 April 1983.

— Agreement on cooperation in construction and production of aviation equipment, Warsaw, 15 April 1983; signature; 15 April 1983.

— Agreement on cooperation in construction of a main pipe-line in the Soviet Union, Moscow, 3 May 1983; signature; 3 May 1983.

Spain

— Agreement on the avoidance of double taxation with respect to income taxes and capital gains taxes, Madrid, 15 November 1979; ratification; 6 May 1982.

Sri Lanka

— Agreement on the avoidance of double taxation and prevention of the evasion from taxation with respect to income and property taxes, Colombo, 25 April 1980; ratification; 21 October 1983.

Thailand

— Agreement on the avoidance of double taxation with respect to income taxes, Bangkok, 8 December 1978; ratification; 13 May 1983.

Yugoslavia

— Consular convention, Warsaw, 2 December 1982; ratification; 6 November 1983.

Traité multilatéraux

— Accord sur le transport international des équipements de l'industrie énergétique particulièrement lourds et dépassant les gabarits ordinaires, Olomouc (Tchécoslovaquie), le 22 juin 1981; approbation; le 11 mars 1982.

— Amendments to the Convention on Inter-Governmental Maritime Consultative Organization, London, 2 November 1977 — Res. A.371/X/; ratification; 22 May 1982.

— General Agreement on the cooperation of States-Members of the CMEA in the realization of the project «Development of science and technology of the Republic of Cuba», Prague, 19 June 1980; approval; 25 May 1982.

— Amendments to the annexes A and B of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), Geneva, 30 September 1957 amendments have entered into force respectively; 1 January 1982 and 2 June 1982.

— Accord général sur la coopération en vue d'augmenter la profondeur de traitement du pétrole par l'application d'une technologie perfectionnée en matière d'installations et d'équipements pour le traitement secondaire du pétrole, Prague, le 19 juin 1980; approbation; le 2 juin 1982.

— General Agreement on multilateral cooperation in developing, organizing, specialization

and cooperation in production of industrial robots, Budapest, 10 June 1982; approval; provisional application as from 10 June 1982.

— General Agreement on multilateral cooperation in developing and promoting wider application of micro-processes in the national economies of States-Members of the CMEA, Budapest, 10 June 1982; approval; provisional application as from 10 June 1982.

— International Convention on the measurement of volume of ships, London, 23 June 1969; acceptance; 18 July 1982.

— General Agreement on the mutual exchange between States-Members of the CMEA of unused products of technical and other assignment, Moscow, 31 March 1981; a note of the Polish Embassy in Moscow; 12 August 1982.

— Customs Convention on Containers, Geneva, 20 December 1972; ratification; 30 October 1982.

— Annex to the International Convention concerning the simplification and harmonization of customs procedures concerning control of documentary evidence of origin, Kyoto, 18 May 1973; acceptance; 26 November 1982.

— Annex to the International Convention concerning the simplification and harmonization of customs procedures concerning reimportation in the same State, Kyoto, 18 May 1973; acceptance; 26 November 1982.

— Convention on the recognition of studies, diplomas and degrees concerning higher education in the States belonging to the Europe Region, Paris, 21 December 1979; ratification; 27 November 1982.

— Sixth International Tin Agreement, Geneva, 26 June 1981; ratification; temporarily as from 9 December 1982.

— Annex to the International Convention concerning the simplification and harmonization of custom procedures concerning custom formalities prior to the lodgement of goods declaration, Kyoto, 18 May 1973; acceptance; 11 December 1982.

— Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, New York, 14 December 1973; ratification; 13 January 1983.

— Agreement on cooperation in the development and reconstruction of the Gdańsk-Warszawa - Katowice - Bratislava - Budapest - Seged - Nadlak - Nadlok - Timisoara - Drabeta - Turnu-Severin-Kraiova highway, Moscow, 27 August 1980; approval; 5 February 1983.

— Convention on the legal status, privileges and immunities of interstate economic organizations operating in certain fields of cooperation, Budapest, 5 December 1980; ratification; 14 March 1983.

— Protocol concerning intervention on the high sea in cases of sea pollution with substances other than oil, London, 2, November 1973; ratification; 30 March 1983.

— Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, Geneva, 10 October 1980; ratification; 2 December 1982.

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